BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets.	))))	Case No. 13-2420-EL-UNC

COMMENTS OF THE OMA ENERGY GROUP

I. INTRODUCTION

On September 4, 2013, the Public Utilities Commission of Ohio (Commission) issued an Opinion and Order in Case Number 12-0426-EL-SSO (SSO Proceeding) which, in pertinent part, ordered the Dayton Power and Light Company (DP&L) to file an application by December 31, 2013 relating to its plan to divest its generation assets. On December 30, 2013, DP&L submitted an application for authority to transfer or sell its generation assets and to waive certain filing requirements (Application). The attorney examiner subsequently established a February 4, 2014 deadline for the filing of initial comments on the Application.

On January 30, 2014, the Ohio Manufacturers' Association Energy Group (OMAEG) filed a motion to intervene in this proceeding. OMAEG subsequently submitted initial comments on February 4, 2014. In its initial comments, OMAEG argued that the lack of information present in DP&L's Application made it difficult for OMAEG to issue substantive comments at that time.

On February 25, 2014, DP&L filed a supplemental application (Supplemental Application) to transfer or sell its generation assets. The attorney examiner subsequently

established a March 25, 2014 deadline for purposes of filing comments on the Supplemental Application. OMAEG hereby submits its comments on the Supplemental Application.

II. COMMENTS

In its Supplemental Application, DP&L seeks Commission authority to transfer its generation assets to an affiliated GenCo at fair market value on or before May 31, 2017. In order to effectuate this transfer, DP&L affirmatively states in paragraph 6 of its Supplemental Application that prior to the separation date, it will "transfer its generation assets to an unregulated affiliate via an internal restructuring involving a distribution and contribution of those assets," and that "[t]he entity will be a GenCo subsidiary of DPL, Inc. on the separation date."

In the paragraph immediately following, DP&L seems to contradict the statement in paragraph 6, stating that "[t]o insure that all potential options for separation have been considered and that the optimal solution for both DP&L and its customers is found, DP&L and its indirect parent, The AES Corporation ("AES"), have recently begun to evaluate the transfer of DP&L's generation assets to an unaffiliated third party through a potential sale. A sale to a third party could occur as early as 2014." This statement significantly undercuts the plans DP&L advances in paragraph 6. In its Second Entry on Rehearing in DP&L's SSO Proceeding (Second Entry on Rehearing), the Commission seemed to recognize the inconsistencies in DP&L's representation before the Commission, noting that DP&L "has begun to evaluate the divestiture of its generation assets to an unaffiliated third party through a potential sale that could occur as early as 2014."[1] The Commission also commented that DP&L's most recent representation

[1] See *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-426-EL-SSO, et al., Second Entry on Rehearing at ¶ 29 (March 19, 2014).

about the divestiture of its generation assets is different from the representations made in the SSO Proceeding.[2] Given the updated filing, the Commission granted applications for rehearing on this issue and revised its order in the SSO Proceeding to require DP&L to divest its generation assets by January 1, 2016.[3]

The unresolved state of affairs associated with DP&L's transfer or sale of its generation assets evidences the circumstances preventing interested parties from properly evaluating and commenting upon DP&L's Supplemental Application. Much like the circumstances surrounding its initial December 30, 2013 Application, the circumstances surrounding the transfer of generation assets in DP&L's Supplemental Application are largely unsettled. Consequently, the parties are in much the same position attempting to comment on the Supplemental Application as they were when commenting on the initial Application. Given the lack of information, interested parties cannot effectively protect their interests by analyzing the comprehensive effects of DP&L's plan or potential plans to transfer its generation assets. The parties likewise cannot offer meaningful comments on all aspects of the plan at this time, as the plan still appears to be in a state of limbo.

Although its generation divestiture plan is still largely amorphous, DP&L has requested from the Commission, in paragraph 9(b) of its Supplemental Application, the ability to retain responsibility for future environmental liabilities associated with its historic ownership of generation facilities. Despite DP&L's allusion to "future environmental liabilities," these liabilities are entirely undefined at the time of the filing of the Supplemental Application. In support of its request to retain responsibility for future environmental liabilities, DP&L argues that the Commission should allow it to retain such liabilities because they are directly related to

[2] Id.
[3] Id.

rendering service to standard service offer customers. Further, DP&L openly admits that it requests retention of these indeterminate environmental liabilities in order to allow it to seek, at some unnamed future date, recovery for prudently incurred, undefined, unlimited environmental clean-up costs associated with unnamed real property that was allegedly formerly used and useful for the production of electricity for DP&L's customers. DP&L's request is ill-timed and grasps, as precedential, at the authorization of recovery of remediation expenses associated with the clean-up of Duke Energy Ohio properties which were formerly manufactured gas plant sites.[4] DP&L's failure to initiate any type of remediation activities on its unnamed parcels of real estate, however, so greatly distinguishes its circumstances from those surrounding the Duke Energy Ohio case as to render the Commission's opinion thereon void of precedential value to DP&L's present request. Additionally, the Commission's decision in the Duke Energy Ohio case is presently on appeal to the Supreme Court of Ohio[5] and, as such, the ultimate determination on the lawfulness of utility recovery of remediation costs for previously contaminated sites, whether or not presently used and useful, is far from settled.

DP&L's request to retain responsibility for future environmental liabilities despite seeking authority to transfer its generation assets is further problematic in that the retention of generation-related liabilities and future recovery of costs associated with those liabilities would subject ratepayers to what essentially amounts to a transition charge. The establishment and assessment, by an electric utility, of transition charges outside of the market development period, violates Sections 4928.31 through 4928.40, Revised Code. As specified in Section 4928.40, Revised Code, the market development period in Ohio ended on December 31, 2005. Section

[4] See generally *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (November 13, 2013) and Entry on Rehearing (January 8, 2014).
[5] See Supreme Court of Ohio Case No. 2014-0328 (Notices of Appeal filed March 5, 2014 and March 10, 2014).

4928.38, Revised Code. specifically prohibits the electric utility's receipt of transition revenues after the market development period, and requires the electric utility to "be fully on its own in the competitive market" after such date. The statute also specifically prohibits the Commission from authorizing "the receipt of transition revenues **or any equivalent revenues** by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code."[6]

In its Second Entry on Rehearing, the Commission addressed arguments that DP&L's Service Stability Rider (SSR) is the equivalent of a transition charge.[7] Although the Commission ultimately dismissed this argument, it offered some insightful language about what constitutes a transition charge. The Commission stated,

> According to 4928.39, transition charges are cost-based charges, and cost-based charges must be related to a cost that the utility will incur. *See In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655. However, the SSR is not a cost-based charge; it was not designed for DP&L to recover specific costs.[8]

Unlike the circumstances surrounding the SSR, however, any mechanism used to recover costs stemming from responsibility for future environmental liabilities from DP&L's historic ownership of generation facilities (which responsibility DP&L seeks authority to retain in this proceeding) will be **designed** specifically **so that DP&L can recover costs associated with remediation activities** arising from its responsibility for those liabilities. It logically follows, therefore, that any such mechanism is equivalent to impermissible transition charge. Accordingly, the recovery of remediation costs associated with DP&L's generation assets, or any other environmental liabilities the electric utility retains with respect to its generation assets, is unlawful. The Commission should therefore deny DP&L's request to retain responsibility for

[6] See Section 4928.38, Revised Code (emphasis added).
[7] See Second Entry on Rehearing at ¶ 13.
[8] Id.

future environmental liabilities associated with its historic ownership of generation facilities, and deny any request to recover costs associated with such generating assets.

III. CONCLUSION

Despite the utility's attempt in its pleading to provide additional information, DP&L's Supplemental Application does not provide a sufficiently detailed and specific plan for its transfer or sale of assets such that interested parties can analyze the plan and its possible outcomes in a fully-informed manner. Accordingly, OMAEG requests that the Commission deny DP&L's Supplemental Application in its entirety as incomplete. Alternatively, OMAEG requests the opportunity to file substantive comments subsequent to DP&L revising, with certain, detailed information on its plan to sell or transfer its generation assets, its Supplemental Application.

In any event, the Commission should deny as unlawful DP&L's request to retain responsibility for future environmental liabilities associated with its historic ownership of generation facilities. Additionally, without a complete, firm, and detailed plan, and without the appropriate analysis of such and its impact on customers, DP&L's requests for waivers of certain rules and a waiver of the hearing are premature and should not be granted.

Respectfully submitted,

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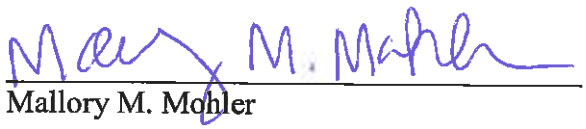
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on March 25, 2014.



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Summary: Comments Of The OMA Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group