BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of<br>The Dayton Power and Light Company<br>for Authority to Transfer or Sell Its<br>Generation Assets. | :<br>:<br>:<br>: | Case No. 13-2420-EL-UNC |

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**SUPPLEMENTAL REPLY COMMENTS OF**
**THE DAYTON POWER AND LIGHT COMPANY**

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## I. INTRODUCTION AND SUMMARY

DP&L's Supplemental Application describes DP&L's plans to transfer its generation assets, as the Commission ordered DP&L to do. Staff and various Commenters have filed Comments in this case, in which they assert that DP&L's Application does not supply sufficient information, and that various proposals by DP&L should be rejected.

As demonstrated below, the Commission should reject the criticism of DP&L's Supplemental Application. DP&L's Supplemental Application provides all of the information that could reasonably be supplied as of the date of the application. (Some items, such as the fair market value of the assets at the time of transfer, will necessarily need to be determined at a later date.) DP&L also demonstrates below that the criticisms of DP&L's Supplemental Application are unfounded, and the Commission should approve that Application.

## II. BACKGROUND

The hearing in DP&L's ESP case (Case No. 12-426-EL-SSO) occurred in March 2013, one year ago. As DP&L's President Phil Herrington explained, DP&L planned at that time to transfer its generation assets to an affiliate:

> "Q. Section 4928.02(H) states that it is the policy of the state to:
>
> 'Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.'
>
> Does DP&L's ESP advance that policy, and if so how?
>
> A. Yes. DP&L's ESP filing advances this policy because DP&L will abide by its filed Corporate Separation Plan as

> amended and DP&L's filing describes its plan to request a transfer DP&L's generation assets into a separate affiliate."

DP&L Ex. 8, pp. 5-6 (Herrington) (emphasis added).[1]

The evidence at the hearing showed that DP&L could not transfer its generation assets to an affiliate before 2017 for two reasons: (1) DP&L has restrictions in its bond indentures that preclude it from transferring its generation assets before September 1, 2016; and (2) due to adverse market conditions, DP&L would not have sufficient cash flow to refinance the bonds before 2017. DP&L Ex. 16A, pp. 2-4 (Jackson). Accord: Tr. 260-62, 2897, 2911 (Jackson); Tr. 1148-50 (Herrington); Tr. 800-05 (Rice).

After the hearing in DP&L's ESP case, there were material changes in market conditions. For example, at the time of the ESP hearing, DP&L projected that prices during the 2016/2017 PJM delivery year would be $174.25/MW-day. FES Ex. 1, p. 53808. DP&L projected that it would earn capacity revenues in 2016 of $146 million and in 2017 of $168 million. Id. However, after the hearing, publicly available market-price data show that the PJM capacity price for the 2016/2017 delivery year cleared on May 24, 2013 at a price of $59.37 (i.e., one-third of DP&L's projected price).[2]

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[1] Accord: Tr. 1141 ("Q. Now, recognizing that the details of any transfer may not have been figured out, I'm assuming from your answer that DP&L has, in fact, made a decision that when it transfers generation -- its generation, that that transfer will be to an affiliate; is that a fair characterization of the answer? A. That is our plan at this time.") (Herrington); Tr. 258-59 ("Q. And was there a reason that you did not make an assumption about sales of generation plants when you prepared that exhibit? A. Yes. There was nothing to include. We did not -- don't have anything currently that we are looking at that would suggest that we're going to make a sale of our generation assets.") (Jackson).

[2] http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx. The Commission may take administrative notice of published reports of market prices. In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Increase its Rates for Electric Service to all Jurisdictional Customers, et al., Nos. 83-1528-EL-AIR and 83-1529-GA-AIR, 1984 Ohio PUC LEXIS 9, at *32 (Nov. 20, 1984); In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its

(footnote cont'd...)

In light of changes in market conditions, among other factors, DP&L decided to explore the possible sale of its generation assets to a third party. That transfer would be accomplished by transferring the assets at fair market value to an affiliate of DP&L, which would then sell the assets to a third party. DP&L described those plans to the Commission in its Supplemental Application, ¶¶ 5-7 in this case.

It is important for the Commission to understand that DP&L does not know at this time whether a third party would be willing to purchase the assets at a price acceptable to DP&L. As the Commission knows, events in the generation market are unpredictable, and a third party may not be willing to purchase DP&L's generation assets at a price that would allow DP&L to maintain its financial integrity. DP&L will not sell its generation assets to a third party if doing so would jeopardize its financial integrity.

## III. TERMS OF THE PROPOSED SALE OR TRANSFER

Staff (p. 1), FES (pp. 6-7), and IEU (p. 4) argue that DP&L's Supplemental Application is deficient because it fails to identify the price at which DP&L will transfer its generation assets. However, that information is not currently available. Specifically, as DP&L's Supplemental Application, ¶ 4 states, DP&L intends to transfer its assets at fair market value ("FMV"). If the generation assets are to be transferred to a third party, then the FMV will be an amount that results from the sale process; there is no agreement in place to sell the assets, and DP&L does not know whether it will be able to sell its generation assets, and if so, what the price will be. DP&L thus cannot state the FMV at this time. As stated in DP&L's Supplemental

(...cont'd)
Filed Schedules Fixing Rates and Charges for Electric Service, No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912, at *192-93 (Aug. 16, 1990)

Application, ¶ 5, DP&L will make a filing in this docket that will identify the FMV 75 days before the transfer.

On the other hand, if DP&L's generation assets are to be transferred to and retained by an affiliate, then that transfer will not happen for years.[3] DP&L would transfer its generation assets to an affiliate at FMV. The FMV should be established close in time to the actual transfer of the assets, to ensure that the amount at which the assets are transferred accurately reflects their fair value. Again, as stated in DP&L's Supplemental Application, ¶ 5, DP&L will make a filing in this docket 75 days before the transfer to identify the FMV.

FES (p. 6) and IEU (p. 4) argue that DP&L's Application is deficient because it fails to identify to whom it will transfer its assets. Not true. DP&L's Supplemental Application, ¶¶ 6-7, states that DP&L will transfer the assets either to an affiliate or to a third-party buyer. DP&L cannot identify the third-party buyer at this time because there is no party that has agreed to purchase the assets; if DP&L enters into an agreement with a third-party buyer, then it will identify that buyer.

Staff (p. 2) also states that DP&L's Supplemental Application fails to identify the amount of debt that would be transferred with the assets; that issue is addressed infra in section VIII. Staff also states that DP&L does not address the effect that the transfer will have on DP&L; that issue is addressed infra in section V. Staff also states that DP&L's Application does not address whether DP&L should be prohibited from paying dividends; that issue is addressed infra in section VIII.

[3] In the Commission's September 6, 2013 Entry Nunc Pro Tunc, the Commission set May 31, 2017 as the deadline for DP&L to transfer its generation assets. In the Commission's March 19, 2014 Second Entry on Rehearing, p. 10, the Commission accelerated that deadline to January 1, 2016. DP&L reserves its right to seek rehearing on the Commission's decision to accelerate that deadline to January 1, 2016.

## IV. THE SSR

In DP&L's Supplemental Application, ¶ 9(a), DP&L asks the Commission to find that the Service Stability Rider ("SSR") shall continue regardless of whether DP&L is able to transfer the generation assets this year or at a later time, and regardless of whether DP&L transfers its generation assets to a third party or to an affiliate. IEU (pp. 7-8), OEG (pp. 1-4), and OCC (pp. 5-9) argue that the Commission should reject DP&L's request that the SSR continue if DP&L transfers its generation assets before the SSR terminates. FES (pp. 2-3) argues that the Commission should wait to rule on DP&L's request until more details about the asset transfer are known. (Staff does not object to DP&L's proposal in its Comments.)

As the Commission knows, numerous parties (including the Commenters) have argued that DP&L should transfer its generation assets, and should do so as quickly as possible. They claim that the development of competitive markets in Ohio is dependent upon DP&L transferring its generation assets.

However, the Commenters fail to appreciate that DP&L's ability to sell the generating assets to a third party before the Commission-imposed deadline to transfer the assets depends upon a continuation of the SSR. Specifically, DP&L currently has approximately \$876.9M in debt.[4] Given the current market conditions, a third party is unlikely to be willing to buy those assets at a price that will allow DP&L to pay off a significant portion of those debts. If the assets are to be sold to a third party, then DP&L (as a transmission and distribution utility) will need the SSR to assist it to pay the remaining debt. Based upon current market conditions and expectations, the only way that DP&L may be able to sell its generation assets to a third

[4] As of February 28, 2014.

party before the Commission-imposed deadline is to continue the SSR until it is scheduled to end.

Indeed, the Commission authorized AEP to continue to collect its stability rider after its generation assets were transferred. Specifically, in AEP's ESP case, the Commission authorized AEP to continue to recover its stability charge until May 31, 2015, but approved AEP's plan to transfer its generation assets by January 1, 2014.[5] The Commission should similarly allow DP&L to recover its SSR even if it transfers its generation assets before the SSR expires.[6]

## V. **EFFECT ON SSO**

Staff (p. 2) asserts that DP&L does not identify the effect that the transfer will have upon it. Not so. As explained in Supplemental Application, ¶ 12, 100% of DP&L's SSO will be supplied through competitive bidding before the deadline for DP&L to transfer its assets to an affiliate.[7]

## **ENVIRONMENTAL LIABILITIES**

There are a variety of proposals currently pending before Congress and the EPA that would implement new environmental regulations. At this time, it is impossible to predict

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[5] August 8, 2012 Opinion and Order, pp. 36, 57 (Case No. 11-346-EL-SSO).

[6] The Commission authorized similar recovery for Duke. October 24, 2011 Stipulation and Recommendation § VII.A. (Case No. 11-3549-EL-SSO) (Duke to collect electric service stability charge for years 2012, 2013 and 2014), § VIII.A. (Duke to transfer generation assets "on or before December 31, 2014"). That Stipulation was approved by the Commission in the November 22, 2011 Opinion and Order (Case No. 11-3549-EL-SSO).

[7] The Commission's September 6, 2013 Entry Nunc Pro Tunc established a deadline for DP&L to divest its generation assets of May 31, 2017, and established that 100% competitive bidding would begin on January 1, 2017. The Commission's March 19, 2014 Second Entry on Rehearing, pp. 17-19, established a January 1, 2016 deadline for DP&L to transfer its generation assets, and that 100% competitive bidding would start on January 1, 2016. DP&L reserves its right to seek rehearing as to the Commission's Second Entry on Rehearing.

whether new regulations will be enacted. However, some of the regulations being proposed would require DP&L to incur costs to remediate its generation facilities for conduct that occurred at those facilities while DP&L owned the assets and they were being used to provide service to Ohio customers.

DP&L's Supplemental Application, ¶ 9(b), seeks Commission authorization to allow DP&L to retain responsibility for future environmental liabilities associated with DP&L's historic ownership of its generation facilities, and to allow DP&L to defer those costs. As of the date of this filing, DP&L has not incurred such environmental liabilities but anticipates that it may incur such liabilities and associated expenses in the future. Staff (p. 3), AEP (pp. 3-4), OMA (pp. 4-6), OPAE (pp. 1-3), OEG (pp. 4-6), RESA (pp. 3-4), IEU (pp. 9-12), and OCC (pp. 9-15) argue that DP&L's requests to recover its environmental liabilities associated with providing service to retail customers should be denied. The Commission should reject those arguments, and should allow DP&L to retain and defer those expenses in the future, for the reasons explained below.

Staff (p. 3), OEG (pp. 4-5), IEU (p. 11), OCC (p.10) and AEP (p. 3) argue that DP&L should be required to transfer its environmental liabilities because the Commission ordered Duke and Ohio Power to do so. One factual inaccuracy in Supplemental Comments should be corrected. Staff's Supplemental Comments (p. 3) states that the Commission should "reiterate the same conditions it placed upon Duke-Ohio and Ohio Power for the transfer of their generation assets, namely that all liabilities transfer along with the asset" but that statement is mistaken, because (1) the Stipulation and Recommendation filed October 24, 2011 in the Duke

Energy Ohio case[8] contains no such condition (see p. 25-27 regarding generation assets), and (2) the November 22, 2011 Opinion & Order in those cases contains no such condition. Therefore no such condition should be imposed upon DP&L. .[9] As demonstrated below, DP&L's request to retain its environmental liabilities is consistent with controlling law, and should be approved.

OEG (p. 4) argues "there is no valid reason for DP&L's customers to retain cost responsibility for the host of future environmental requirements that could be imposed on generation assets that the Company no longer owns." OCC (pp. 11-12) makes a similar argument. To be clear, DP&L is not asking to retain environmental costs that would be incurred by a transferee to operate the generation assets in the future (e.g., costs to comply with new clean-air standards). Instead, DP&L is asking to retain future liabilities that it may incur related to DP&L's historic operation of those assets for Ohio customers (e.g., remediation costs). Ohio customers received generation from DP&L's generation assets, and if future liabilities are incurred associated with that historic operation, then it is reasonable for Ohio customers to pay those costs.

IEU (pp. 9-10), OEG (pp. 4-5), OCC (pp. 9-11), OMA (pp. 4-5) and OPAE (p.2) argue that Ohio law bars DP&L from recovering environmental costs associated with its historic ownership of the generation facilities. To the contrary, the fact that environmental clean-up costs associated with generation facilities are recoverable by a utility is demonstrated by amendments to the Ohio Revised Code that authorize a utility to apply for a financing order that would permit

[8] Case Nos. 11-3549-EL-SSO, 11-3550-EL-ATA, and 11-3551-EL-UNC.
[9] DP&L would also note that AEP voluntarily agreed to transfer those liabilities in its Application. March 30, 2012 Ohio Power Company's Application for Approval of Full Legal Corporate Separation, p. 4 (Case No. 12-1126-EL-UNC ("AEP Generation will assume all liabilities associated with the generating assets being transferred"). DP&L should not be bound by decisions made voluntarily by other utilities.

the utility to recover "phase-in costs." Ohio Rev. Code § 4928.231(A)(1). The term "phase-in costs" is defined as follows:

> "'Phase-in costs' means costs, inclusive of carrying charges incurred before, on, or after the effective date of this section, authorized by the commission before, on, or after the effective date of this section to be securitized or deferred as regulatory assets in proceedings under section 4909.18 of the Revised Code, sections 4928.141 to 4928.143, or 4928.144 of the Revised Code, or section 4928.14 of the Revised Code as it existed prior to July 31, 2008, pursuant to a final order for which appeals have been exhausted. <u>'Phase-in costs' excludes</u> the following:
>
> * * *
>
> (2) Costs incurred after the effective date of this section related to the ongoing operation of an electric generating facility, <u>but not environmental clean-up or remediation costs incurred by an electric distribution utility because of its ownership or operation of an electric generating facility prior to the effective date of this section, which such clean-up or remediation costs are imposed or incurred pursuant to federal or state law rules, or regulations and for which the commission approves recovery in accordance with section 4909.18 of the Revised Code, sections 4928.141 to 4928.143, or 4928.144 of the Revised Code, or section 4928.14 of the Revised Code as it existed prior to July 31, 2008.</u>"

Ohio Rev. Code § 4928.23(J) (emphasis added).

In this case, DP&L is not seeking a financing order to recover "phase-in costs," pursuant to § 4928.231(A)(1). However, § 4928.23(J)(2) demonstrates that a utility may recover "environmental clean-up or remediation costs incurred by an electric distribution utility because of its ownership or operation of an electric generating facility" pursuant to a Commission Order under "section 4909.18 of the Revised Code, sections 4928.141 to 4928.143, or 4928.144 of the Revised Code, or section 4928.14 of the Revised Code as it existed prior to July 31, 2008." The sections cited in Ohio Rev. Code § 4928.23(J)(2) <u>must</u> permit a utility to recover environmental remediation costs associated with a generation facility; otherwise, § 4928.23(J)(2) would be superfluous. State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ., 131 Ohio St. 3d 478, 483-84, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19 ("No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.") (alteration in original) (internal quotation marks and citation omitted); State ex rel. Myers v. Bd. of Educ. of Rural Sch. Dist. of Spencer Twp., 95 Ohio St. 367, 373, 116 N.E. 516 (1917).

In other words, sections 4928.231 and 4928.23(J)(2) authorize a utility to recover environmental remediation costs associated with a generation facility that it owns or operates, through a financing order if the Commission had authorized the utility to recover those pursuant to Sections 4909.18, 4928. 143 or 4928.144. The reference in Section 4928.23(J)(2) to Sections 4909.18, 4928. 143 or 4928.144 would be superfluous if the Commission did not have jurisdiction to authorize a utility to recover environmental remediation costs of a generation facility under those sections. The Commission should thus authorize DP&L to retain its environmental liabilities so that it can recover environmental remediation costs under those sections in the future.

In addition, the Commission recently held the environmental liabilities at a site that was no longer "used and useful" were nonetheless recoverable in a Duke gas case, 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., 2013 Ohio PUC LEXIS 259 (Nov. 13, 2013). In that case, Duke filed an application for an increase in rates, and the parties entered into a Stipulation that resolved all of the issues in the case except whether Duke could recover environmental expenses associated with two facilities. 2013 Ohio PUC LEXIS, at *28. It was undisputed that at the time of the filing of Duke's application the facilities at issue had been taken out of service. Id. at *52. Duke was required to incur costs to remediate those facilities pursuant to state and federal law. Id. at *107-09.

Staff and various parties to the case argued that the assets could not satisfy the "used and useful" criterion in Ohio Rev. Code § 4909.15(A)(4), since the assets at issue were no longer in service (id. at *110-12), the costs were incurred outside of a test year (id. at *133), and the expenses were not a cost of rendering utility service (id. at *134-35). The Commission rejected those arguments. Id. at *128-29, *140-46. In particular, the Commission stated:

> "Upon our review of the record in these cases, we find that Duke has supported its claim that the remediation costs incurred on the East and West End sites were a cost of providing utility service. Duke has substantiated, on the record, that the remediation costs were a necessary cost of doing business as a public utility in response to a federal law, CERCLA, that imposes liability on Duke and its predecessors for the remediation of the MGP sites. Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business."

Id. at *141-42 (emphasis added).

The same reasoning applies here. The costs that DP&L may incur in the future to remediate its generation facilities constitute costs of providing utility service, which are recoverable from customers pursuant to Ohio Rev. Code § 4909.15(A)(4). The Commission should thus permit DP&L to retain those liabilities, and to seek to recover them in a future proceeding if those costs are incurred.

OCC (p. 11) and OMA (pp. 4-5) argue that DP&L's environmental liabilities constitute transition costs and are not recoverable pursuant to Ohio Rev. Code § 4928.38.

However, those Commenters do not explain how the Commission could have authorized DP&L to recover those costs in DP&L's 1999 ETP case (99-1687), when we still do not know today whether those costs will be incurred, and if so, their amount. Indeed, one of the criteria for a transition cost to be recovered was that it be "verifiable." Ohio Rev. Code § 4928.39(B). The potential environmental liabilities at issue could not have been "verified" in 1999, since they still are unknown today. Those costs thus would not constitute transition costs in DP&L's ETP case, as that term was defined in § 4928.39(B).

## VI. OVEC

As to DP&L's interest in Ohio Valley Electric Cooperative ("OVEC"), DP&L's Supplemental Application, ¶ 9.(d), states that DP&L does not expect to be able to transfer its interests in OVEC because the OVEC Sponsoring Companies have refused to grant such consent to other utilities. DP&L does not propose that any of the retail rate issues relating to OVEC be resolved in this proceeding, but rather, will seek rate recovery in a separate proceeding. DP&L does ask that the Commission grant accounting authority pursuant to Ohio Rev. Code § 4905.13, to permit DP&L to defer the costs associated with OVEC that are not recovered through DP&L's fuel rider.

Staff (p. 4), OCC (p. 19), and IEU (p. 16) state that DP&L should seek authority from the OVEC Sponsoring Companies for permission for DP&L to transfer its interests in OVEC. DP&L has no reason to believe or expect that the OVEC Sponsoring Companies, which would not grant permission to AEP just last year, would suddenly change course and consent to DP&L's transfer of its interests. Requiring DP&L to go through the timely process of seeking consent, with every reason to expect it will not be given, would only result in additional delay and a need to amend DP&L's plan once again. DP&L should not be required to perform a futile act.

IEU (pp. 16-18) argues that the Amended and Restated Inter-company Power Agreement ("ICPA") authorizes DP&L to transfer its generation assets without consent of the Sponsoring Companies. Not so. Section 9.182 of the ICPA (which IEU quotes) states that the transfer must be "in form and substance acceptable to [OVEC]." (Excerpts attached to IEU's Comments). That section thus requires the consent of the Sponsoring Companies.

Section 9.183 (which IEU cites) grants DP&L certain rights to sell its OVEC interests to a third party, subject to certain rights of first refusal of the Sponsoring Companies; IEU does not claim that any of those conditions can be satisfied. More importantly, given OVEC's operating costs and the current generation market, DP&L is not aware of any third party that would be willing to purchase DP&L's interest in OVEC.

Staff (p. 5) and Direct Energy (p. 2) argue that the Commission should treat DP&L's interest in OVEC in the same manner that the Commission treated AEP's interest in OVEC in Case No. 12-1126-EL-UNC. In the Commission's December 4, 2013 Finding and Order, the Commission (pp. 8-9) Ordered AEP to sell generation from OVEC into PJM under certain conditions, and authorized AEP to address rate-related issues in its next ESP. DP&L has no objections to those comments.

RESA (p. 4) argues that any recovery of costs associated with OVEC should be bypassable. The Commission should address that rate-related issue in the future proceeding, when DP&L seeks rate treatment associated with its OVEC expenses. To the extent that the Commission is inclined to decide that issue now, it should rule that the expenses should be recovered through a nonbypassable rider since DP&L's commitments to OVEC date back many decades. As DP&L's OVEC commitments significantly preceded deregulation in Ohio, it is reasonable that all customers should bear expenses associated with OVEC.

## VII. DEBT RATIO

In DP&L's Supplemental Application, ¶ 9(e), DP&L asks the Commission to allow it to maintain temporarily a long-term debt of $750 million or total debt equal to 75 percent of rate base, whichever is greater, after the transfer of DP&L's generation assets. DP&L asks to be permitted to maintain that debt level until at least 2018, and sought a waiver of the requirement in the Commission's November 22, 2011 Finding and Order in Case No. 11-3002-EL-MER that DP&L maintain a capital structure that includes an equity ratio of at least 50 percent.

IEU (p. 19) argues that the Commission should not "permit DP&L to transfer its generation assets while leaving DP&L responsible for servicing the associated debt." FES (p. 4) similarly states that "[t]here is no way for the Commission to determine if the generation assets are being transferred at fair market value if the Commission does not know what debt is being assigned with the assets." Those arguments demonstrate a fundamental misunderstanding of the contemplated transactions.

DP&L's debt is not associated with any particular asset. All of DP&L's assets secure substantially all[10] of DP&L's first mortgage bonds. Further, IEU and FES assume that some amount of DP&L's debt should transfer with the generation assets, but that is not so. The

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[10] There is only approximately $18.6 million of debt secured by assets connected with Wright Patterson Air Force Base.

generation assets will be transferred for FMV in poor market conditions. The unregulated affiliate will not be able to support any transfer of debt. DP&L expects to use cash generated from its operations to pay down debt..

Staff (p. 6) states that if DP&L's concern relates to the terms of new financing, then DP&L and DPL Inc. could enter into an intercompany note through which the debt is maintained by DP&L but serviced by DPL. This cannot be done. DPL Inc. is well below investment grade. The parent's lack of creditworthiness impedes its ability to support utility-level debt.

Staff (p. 6) also asserts that DP&L should be required to maintain a positive retained earnings. The Commission has ordered DP&L to transfer its generation assets by a date certain; however an unregulated affiliate will not be able to support any transfer of debt. In light of this reality, negative retained earnings may be unavoidable, absent a deferral of the separation date.

Staff (p. 7) also asserts that DP&L should be prohibited from paying dividends until it maintains a debt/equity ratio of approximately 50/50 percent. That comment is unreasonable, and would constitute an unlawful taking, because it would effectively deprive DP&L's shareholders of the benefit of their investments. It is well-settled that utility investors are entitled to an opportunity to earn a reasonable return on their investment, and denying DP&L the right to pay dividends would constitute a taking.[11]

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[11] Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio, 63 Ohio St. 3d 555, 562-63, 589 N.E.2d 1292 (1992) (per curiam) (quoting Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944)).

OCC (pp. 20-21) asserts that DP&L's request for relief from the Commission's November 22, 2011 Finding and Order in the merger case (Case No. 11-3002-EL-MER) constitutes an application for rehearing that was filed after the thirty-day deadline. Not so. It is well-settled that the Commission may reconsider its prior orders, provided that the Commission explains its reason for doing so.[12] DP&L's request is reasonable for the reasons stated above.

OCC (p. 21) and FES (p. 3) also assert that DP&L has not explained the reason that it seeks relief on this issue. As explained above, DP&L seeks relief because the anticipated FMV of the generation assets is expected to be adversely impacted by the poor market conditions. OCC and FES are well aware of those poor market conditions, and the effects that those conditions have on the FMV of the generation assets.

## VIII. EXPENSES TO SELL OR TRANSFER GENERATION ASSETS

In its Supplemental Application, ¶ 9(c), DP&L asks that it be permitted to recover all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes and related costs that it incurs to comply with the Commission's Order that DP&L separate its generation assets. DP&L cannot identify the amounts of these costs at this point in time, since the process is ongoing. OCC (pp. 15-17), OEG (p. 6) and RESA (pp. 4-5) argue that DP&L should not be permitted to recover those costs because they are generation related.

The Commission should reject the Commenters' argument that the costs are generation related and are not recoverable. Those costs are costs that DP&L (not an affiliate of DP&L and not a third-party buyer) must incur pursuant to Ohio law (Ohio Rev. Code § 4928.17)

[12] Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio, 114 Ohio St. 3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 14 ("The commission may change or modify earlier orders as long as it justifies any changes.").

and a Commission Order (September 6, 2013 Entry Nunc Pro Tunc, p. 2). Those costs should thus be borne by DP&L (the party that must incur them as a matter of law) and are recoverable under Ohio Rev. Code § 4928.143(B)(2)(h), which authorizes a utility's ESP to include "[p]rovisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking."

DP&L does not object to the Staff's review of costs for reasonableness before recovery of them is authorized, but DP&L believes (contrary to Staff's position) that the request for recovery should be filed in this docket.

## IX. <u>WAIVER OF HEARING</u>

DP&L's Supplemental Application, ¶¶ 16-17, asks the Commission to waive a hearing in this matter. That request is consistent with the Commission's Orders in AEP's and Duke's generation asset transfer cases, in which no hearing was required. <u>In the Matter of the Application of Ohio Power Company for Approval of an Amendment to Its Corporate Separation Plan</u>, Case No. 12-1126-EL-UNC, Finding and Order, p. 11 (October 17, 2012) ("[T]he Commission finds good cause exist to waive any requirement to hold a hearing on the corporate separation application. Given the fact that we have already approved the divestiture of OP's generating assets as a component of the modified ESP 2 cases, subject to approval of the amended corporate separation plan, and that such decision was reached following an extensive hearing, which included testimony in support of the divestiture of the generation assets, we find that the requirements of Rule 4901:1-37-09(D), O.A.C., do not apply to this proceeding."); <u>In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security</u>

Plan, Accounting Modifications, and Tariffs for Generation Service, Case No. 11-3549-EL-SSO, et al., Opinion and Order, p. 46 (Nov. 22, 2011).

Several parties assert that it is premature to rule on DP&L's request to waive a hearing. IEU (pp. 20-24), OEG (pp. 7-9), and OPAE (p. 1) assert that DP&L's request to waive a hearing should be denied.

There is no need or reason for the Commission to conduct a hearing at this time, since DP&L's Supplemental Application provides all of the information that DP&L can provide at this time. The purpose of a hearing is to allow the Commission to take evidence so that it can resolve disputes of fact. None of the Intervenors that requested a hearing have explained why -- at this time -- a hearing would be beneficial.

It is true that there are certain issues associated with DP&L's Supplemental Application that will need to be resolved in the near future (FMV of the assets, recovery of OVEC costs, recovery of environmental costs, recovery of costs of transferring the assets). DP&L believes that those issues can all be resolved in the future through a comment process.

## X. CONCLUSION

The Commission should approve DP&L's Supplemental Application to transfer its generation assets.

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**CERTIFICATE OF SERVICE**

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