

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-426-EL-SSO
for Approval of Its Market Rate Offer.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-427-EL-ATA
for Approval of Revised Tariffs.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-428-EL-AAM
for Approval of Certain Accounting)	
Authority.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-429-EL-WVR
for Waiver of Certain Commission)	
Rules.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-672-EL-RDR
to Establish Tariff Riders.)	

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE
APPLICATION FOR REHEARING OF THE DAYTON POWER AND LIGHT
COMPANY AS TO THE SECOND ENTRY ON REHEARING**

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I. BACKGROUND

Amended Substitute Senate Bill 3 ("SB 3") declared that retail electric generation service is a competitive electric service, directed structural separation of the competitive and noncompetitive business segments of an electric distribution utility ("EDU"), and provided EDUs a limited period to collect transition revenue as part of its transition

plan.¹ In the transition plan the Dayton Power and Light Company (“DP&L”) filed and the Public Utilities Commission of Ohio (“Commission”) approved in 2000, DP&L successfully sought and collected transition revenue and received authority to separate its competitive and noncompetitive assets.² Long after the completion of the transition period, DP&L in this case sought to deprive customers of the benefits of competition available through low energy and capacity prices by requesting additional nonbypassable transition charges. Further, DP&L sought to delay the transfer of its generation assets. In the Opinion and Order and Entry Nunc Pro Tunc, the Commission granted DP&L’s requests in substantial part when it authorized DP&L to secure additional transition revenue in the form of the Service Stability Rider (“SSR”) until December 31, 2016 and to delay the transfer of the generation assets until May 31, 2017.³ Additionally, the Commission provided DP&L the opportunity to continue to collect transition revenue through the Service Stability Rider-Extension (“SSR-E”) from January 1, 2017 to May 1, 2017.⁴

After the hearing concluded, DP&L provided the Commission additional information indicating that its prior representations regarding the need for a delay in the transfer of the generation assets are no longer valid. In a pleading filed with the Commission on February 25, 2014, DP&L stated that it may be able to transfer

¹ R.C. 4928.03; R.C. 4928.17(A); R.C. 4928.38 & 4928.40.

² See IEU-Ohio Ex. 3 *passim*.

³ Opinion and Order at 17-28 (Sept. 4, 2013) (“ESP II Order”); Entry Nunc Pro Tunc at 2 (“Sept. 6 Entry”).

⁴ September 6 Entry at 2. The Commission subsequently directed that the SSR-E will terminate no later than April 30, 2017 in the Second Entry on Rehearing. Second Entry on Rehearing at 16 (Mar. 19, 2014) (“Second Entry on Rehearing”).

generation assets as early as 2014.⁵ Based on DP&L's disclosure, the Commission granted rehearing and advanced the date by which DP&L must transfer its generation assets to January 1, 2016.⁶ The Commission further noted "that any approval of an amount for recovery through the SSR-E will take into consideration the timing and disposition of DP&L's generation assets."⁷

In its Second Application for Rehearing, DP&L presents an assignment of error seeking a Commission order reversing its decision to advance the date by which DP&L must transfer its generation assets.⁸ In support of its assignment of error, DP&L claims that there was a "miscommunication" with the Commission.⁹ To support this allegation, DP&L states that changes in market conditions since the hearing have led it to consider an earlier transfer of the assets to a third party.¹⁰ It continues that it does not know if a third party will be willing to purchase the assets at a price acceptable to DP&L, that DP&L might sell the assets if the sale would help DP&L offset costs of releasing a mortgage and restructuring debt, and that DP&L's prior statements were accurate then and now.¹¹ DP&L then concludes that the reasons for delaying the date by which the

⁵ *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, Supplemental Application of the Dayton Power and Light Company to Transfer or Sell its Generation Assets at 2 (Feb. 25, 2014) ("*Generation Transfer Case*").

⁶ Second Entry on Rehearing at 16.

⁷ *Id.* at 18.

⁸ Application for Rehearing of the Dayton Power and Light Company as to the Second Entry on Rehearing at 1-2 (Apr. 18, 2014) ("DP&L Second Application for Rehearing").

⁹ Memorandum in Support of Application for Rehearing of the Dayton Power and Light Company as to the Second Entry on Rehearing at 1 (Apr. 18, 2014) ("DP&L Memorandum in Support").

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6.

assets must be transferred require rehearing and an order reinstating May 31, 2017 as the date by which the generation assets must be transferred.¹²

Rehearing should be granted only if DP&L can demonstrate that the Commission's order is unlawful or unreasonable.¹³ Because DP&L is under a legal requirement to structurally separate,¹⁴ DP&L cannot demonstrate that the Commission's order is unlawful. Likewise, DP&L has not demonstrated that the Commission's order advancing the date by which generation assets must be transferred is unreasonable because DP&L's allegation that the Commission's decision to advance the date was based on a miscommunication is not supported. DP&L's Second Application for Rehearing, however, again confirms that the SSR and SSR-E are unlawful transition charges. Accordingly, the Commission should deny DP&L's assignment of error and terminate authorization of the unlawful SSR and SSR-E.

II. THE COMMISSION CORRECTLY UNDERSTOOD THAT DP&L MAY TRANSFER GENERATION ASSETS SOONER THAN DP&L PREVIOUSLY REPRESENTED

DP&L does not point to anything that demonstrates that the Commission's order is unlawful. Under R.C. 4928.17(A)(1), DP&L must operate under a corporate separation plan that provides for the provision of competitive retail electric service through a fully separated affiliate. Thus, there can be no claim that the Commission is without legal authority to direct DP&L to transfer its generation assets to a third party to bring its corporate separation plan into compliance with the requirements of R.C. 4928.17.

¹² *Id.* at 7-8.

¹³ R.C. 4905.10(B).

¹⁴ R.C. 4928.17(A).

Rather than arguing that the Commission's order was unlawful, DP&L rests its assignment of error on a claimed "miscommunication" between it and the Commission. When the Commission advanced the date by which generation assets should be divested, however, it was acting in accordance with DP&L's new-found interest in transferring generation assets sooner rather than later and its apparent ability to do so.

The Commission's decision to advance the divestiture date relied on representations that DP&L made in pleadings in its *Generation Transfer Case*. As the Commission explained in the Second Entry on Rehearing:

The Commission relied upon the testimony of DP&L witness Jackson that DP&L could not divest its generation assets before September 1, 2016. ... Accordingly, the Commission ruled that DP&L must file a generation asset divestiture plan that divests its generation assets by May 31, 2017. ... Subsequently, DP&L filed a supplemental application in [the *Generation Transfer Case*] representing that it 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 2014.¹⁵

The Commission then ordered that the generation assets be transferred to a third party by January 1, 2016.¹⁶

Since the Commission issued the Second Entry on Rehearing, DP&L has confirmed that it was considering the transfer of generation assets as early as 2014. In the *Generation Transfer Case*, DP&L filed Reply Comments on April 7, 2014 and confirmed that it was exploring the possible sale of the assets at fair market value, but did not know whether it will find a buyer to complete the transaction.¹⁷

¹⁵ Second Entry on Rehearing at 17 (citations omitted).

¹⁶ *Id.* at 17-18.

¹⁷ *Generation Transfer Case*, Supplemental Reply Comments of the Dayton Power and Light Company at 3 (Apr. 7, 2014).

In its Second Application for Rehearing, DP&L again stated that it decided to explore the possibility of selling its generation assets to a third party because market conditions were “volatile.”¹⁸ The market issues leading to this new exploration for a buyer were the low prices for generation capacity that resulted from the Base Residual Auction for the 2017-2018 Planning Year and higher commodity prices.¹⁹ “In light of these volatile market conditions, DP&L decided to explore the possibility of selling its generation assets to a third party.”²⁰

Based on the statements DP&L has made, there was no “miscommunication” warranting rehearing. DP&L is considering a more immediate sale of the assets because capacity prices for the 2017-2018 Planning Year and other costs are not what DP&L anticipated.²¹ Accordingly, DP&L has not demonstrated that a “miscommunication” led the Commission to an unreasonable result.

III. DP&L’S SECOND APPLICATION FOR REHEARING PROVIDES ADDITIONAL SUPPORT THAT THE SSR AND SSR-E ARE UNLAWFUL TRANSITION CHARGES

In its Second Application for Rehearing, DP&L also states that it cannot accelerate the transfer of the generation assets before 2017 “without additional financial resources.”²² In the *Generation Transfer Case*, DP&L explained what the “additional

¹⁸ DP&L Memorandum in Support at 6.

¹⁹ *Id.*

²⁰ *Id.* DP&L’s parent has also stated in filings to the Securities and Exchange Commission (“SEC”) that “[i]t is DP&L’s intention to refinance the first mortgage bonds under similar terms that would also allow for the potential legal separation of its generation assets.” Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2013, AES Corporation at 62 (viewed at http://investor.aes.com/phoenix.zhtml?c=76149&p=irol-sec&secCat01Enhanced.2_rs=21&secCat01Enhanced.2_rc=10&control_selectgroup=Show%20All#9291005).

²¹ DP&L Memorandum in Support at 6.

²² *Id.* at 4.

financial resources” are. Anticipating that the Commission may terminate its authorization of the SSR when DP&L transfers the generation assets, DP&L asked the Commission to permit it to continue the SSR after the generation assets are transferred.²³ In support of this request, DP&L alleged:

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 party before the Commission-imposed deadline is to continue the SSR until it is scheduled to end.²⁴

Based on what it expects to secure in the sale of the generation assets, DP&L anticipates that its debt cost is “unrecoverable in a competitive market.”²⁵ Thus, the SSR is a transition charge, as demonstrated by DP&L. The Commission, however, cannot lawfully authorize transition revenue claims under either Ohio law or the terms of DP&L’s transition plan settlement.²⁶

IV. CONCLUSION

Because DP&L has not demonstrated that the Commission’s order advancing the date by which generation assets must be transferred is either unlawful or unreasonable,

²³ *Generation Transfer Case*, Supplemental Application of the Dayton Power and Light Company to Transfer or Sell its Generation Assets at 3 (Feb. 25, 2014).

²⁴ *Id.*, Supplemental Reply Comments of The Dayton Power and Light Company at 5-6 (Apr. 7, 2014). The Commission has taken administrative notice of the application and supplemental application in Case No. 13-2420-EL-UNC. Second Entry on Rehearing at 17 n.1.

²⁵ R.C. 4928.39(C). In prior testimony, DP&L indicated that one method by which the Commission could determine the amount of costs that were stranded by the introduction of competition was based on the sale price of the generation assets. Under this approach, the net proceeds of a sale to the existing owner after payment of capital gains tax are netted against the existing owner’s net invested capital to yield the after-tax stranded cost. IEU-Ohio Ex. 3 at Attachment K at 10-12. DP&L’s claim for additional SSR revenue after it transfers the generation assets resembles a claim based on the sale price of the assets DP&L previously advanced as an alternative basis for determining stranded cost.

²⁶ R.C. 4928.38; IEU-Ohio Ex. 3 at 16-26; Second Application for Rehearing of Industrial Energy Users-Ohio at 11-16 (Apr. 17, 2014) (“IEU-Ohio Second Application for Rehearing”).

the Commission should not grant DP&L's Second Application for Rehearing seeking to reverse that order.

In seeking to extend the date by which it must transfer the generation assets, however, DP&L has again confirmed that the SSR and the SSR-E (if the Commission authorizes an increase in the charge) are unlawful transition charges. Based on the requirements of Ohio law and the repeated demonstrations that the SSR and SSR-E provide DP&L an unlawful opportunity to bill and collect transition revenue, the Commission should terminate the SSR and SSR-E immediately.²⁷

Respectfully submitted,

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²⁷ IEU-Ohio Second Application for Rehearing at 11-16.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ***Industrial Energy Users-Ohio's Memorandum Contra the Application for Rehearing of The Dayton Power and Light Company as to the Second Entry on Rehearing*** was served upon the following parties of record this 28th day of April 2014, via electronic transmission.

/s/ Frank P. Darr

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Summary: Memorandum Contra the Application for Rehearing of the Dayton Power and Light Company as to the Second Entry on Rehearing electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio