BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	:	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	:	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	:	Case No. 12-672-EL-RDR

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR REHEARING AS TO THE COMMISSION'S SECOND ENTRY ON REHEARING

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I. INTRODUCTION

On March 19, 2014, the Commission entered a Second Entry on Rehearing in this matter. Industrial Energy Users-Ohio ("IEU"), The Office of the Ohio Consumers' Counsel ("OCC"), and The Ohio Energy Group ("OEG") have each filed Applications for Rehearing as to the Commission's Second Entry on Rehearing. As demonstrated below, the Commission should reject the arguments in those Intervenors' Applications for Rehearing.

II. THE COMMISSION SHOULD NOT GRANT REHEARING AS TO THE SSR AND SSR-E

A. THE TERMINATION DATE OF THE SSR SHOULD NOT BE ACCELERATED AND THE SSR-E SHOULD NOT BE ELIMINATED

IEU (pp. 11-16), OCC (pp. 3-9) and OEG (pp. 2-5) argue that the Commission should terminate the SSR on the deadline for DP&L to transfer its generation assets, and should eliminate the SSR-E. The Commission should reject that argument for the following separate and independent reasons:

1. The Commission should restore the original generation separation deadline: As DP&L demonstrated in its Application for Rehearing as to the Commission's Second Entry on Rehearing, the Commission should restore the original May 31, 2017 deadline for DP&L to transfer its generation assets.

Specifically, the hearing in this case occurred in March 2013, one year ago. As explained by DP&L's President Phil Herrington, 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 retain 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 <u>DP&L's filing describes its plan to request a transfer DP&L's generation assets into a separate affiliate</u>."

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 terms and conditions in certain Pollution Control Bonds and First Mortgage Bonds that significantly impede its ability to transfer 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). <u>Accord</u>: Tr. 260-62, 2897, 2911 (Jackson); Tr. 1148-50 (Herrington); Tr. 800-05 (Rice).

Those points remain true and accurate today – absent a sale of the generation assets to a third-party purchaser, DP&L needs the full period of time until May 31, 2017 to

[1] <u>Accord</u>: 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 were looking at that would suggest that we're going to make a sale of our generation assets.") (Jackson).

transfer its generation assets to an affiliate as a result of the structural limitations associated with its bond financings (where such limitations are related to DP&L's First & Refunding Mortgage) and financial hurdles resulting from adverse market conditions.

After the hearing in DP&L's ESP case, there were material adverse changes in market conditions. Specifically, 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]

Changes in other commodities markets have also worked to compress DP&L's margin, thereby placing further financial strain on the Company beyond that which was expected at the time of the hearing.

In light of these volatile market conditions, DP&L decided to explore the possibility of selling 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 February 25, 2014

[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. 83-1428-EL-AIR and 83-1529-GA-AIR, 1984 Ohio PUC LEXIS 9, *32 (Nov. 20, 1984); In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service, No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912, *192-193 (Aug. 16, 1990).

Supplemental Application of The Dayton Power and Light Company to Transfer or Sell Its Generation Assets, ¶¶ 5-7. (Case No. 13-2420-EL-UNC).

As DP&L explained in its Application, it is important to understand three points regarding the potential transfer of DP&L's generation assets to an affiliate.

First, 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.

Second, the reason that DP&L might be able to transfer the assets as part of a third party sale process as early as 2014, but it cannot transfer to an affiliate before 2017, is that a third party might be willing to purchase those assets at a price that would help DP&L to offset costs of releasing the generation assets from the Company's mortgage and otherwise restructuring/refinancing its debt.

Third, and most importantly, the statements that DP&L's witnesses made to the Commission at the hearing were true and accurate then, and remain true and accurate now. Specifically, as DP&L explained at the hearing, it cannot transfer its generation assets to an affiliate before 2017, due to limitations in certain bond financings (where such limitations are related to DP&L's First & Refunding Mortgage) and adverse market conditions. That statement was true then, and remains true now. The reason that DP&L recently stated (in its Supplemental Application in Case No. 13-2420-EL-UNC) that it may sell its generation assets in 2014 was that changed market conditions have caused DP&L to explore selling its generation assets to a third party; that exploration was not part of DP&L's strategic plan at the time of the ESP hearing.

The Commission should thus restore the May 31, 2017 deadline for DP&L to transfer its generation assets, and should reject the Intervenors' argument that the Commission should terminate the SSR at an earlier date and should eliminate the SSR-E.

2. <u>The Commission should not accelerate termination of the SSR or eliminate the SSR-E</u>: Even if the Commission were to deny DP&L's request that it restore the original generation separate deadline, the Commission should not accelerate termination of the SSR or eliminate the SSR-E because DP&L needs those riders to maintain its financial integrity.

Specifically, the evidence at the hearing established that due to significant changes in market conditions, DP&L faces serious threats to its financial integrity and consequently to its ability to provide safe and reliable service. DP&L Ex. 1A, CLJ-1 (Jackson); Tr. 2822-23 (Malinak). DP&L's declining return on equity (and the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service) is being driven principally by three factors: (1) increased switching; (2) declining wholesale prices; and (3) declining capacity prices. DP&L Ex. 1A, p. 13 & CLJ-1 (Jackson); Tr. 135-36 (Jackson). Without the SSR, DP&L would earn unreasonably low ROEs. DP&L Ex. 4A, WJC-5 (Chambers). Dr. Chambers' testimony demonstrated that with the SSR, DP&L would have an opportunity to earn a reasonable ROE during the ESP term. DP&L Ex. 4A, WJC-2 (Chambers).

Further, the evidence demonstrates that DP&L needs the SSR and SSR-E so that it can provide safe and reliable service. Specifically, as Mr. Jackson testified:

> "Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic

> incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.
>
> A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, it is the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity."

DP&L Ex. 16A, p. 8 (Jackson Rebuttal) (emphasis added). Accord: DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal) (the SSR "is important to the company's ability to provide stable, safe, and reliable electric service"); DP&L Ex. 4A, p. 53 (Chambers) (the SSR "is an important factor in maintaining the Company's financial integrity and thus permits it to provide quality service to its customers. Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers.").

Staff agreed with DP&L on many issues related to the SSR. For example, Staff witness Dr. Choueiki testified that Staff agreed that an SSR should be established:

> "Q. Does the Staff agree with the establishment of an SSR?
>
> A. Yes. Staff also notes that the Commission has granted similar charges to other utilities based on R.C. 4928.143(B)(2)(d)."

Staff Ex. 10A, p. 11 (Choueiki) (footnote omitted).

Dr. Choueiki explained the basis for that agreement at the hearing:

> "Q. Now, in this case you state that the staff agrees with the establishment of an SSR. Do you see that in your testimony?
>
> A. Yes.
>
> Q. Is this agreement based on what the Commission has done with other utilities?

A. . . . [M]y observation is the Commission under that specific statute has granted another EDU -- another EDU an SSR, stability rider, so that's the policy issue addressed here.

* * *

Now, to continue with this line of thought, under this we've looked at the financial information the company has provided us with. . . . [T]o the extent the Commission finds that the company -- the financial integrity of the company is compromised, then the SSR would be a recommendation . . . ."

Tr. 1840-41 (Choueiki).

Dr. Choueiki further agreed that it was "very important" that DP&L be able to maintain its financial integrity:

"Q. <u>Now that I understand your definition, let me ask you, is the financial integrity of a utility important, and if so, why?</u>

A. <u>For the Commission it's very important</u>. I mean, the Commission -- in my mind, the Commission can decide what it wants on the financial integrity in this case, but in my mind if the Commission -- the Commission would want to make sure that the company is charging a reasonable rate to customers but also reasonable to the company. So the company doesn't go bankrupt."

Tr. 1879-80 (emphasis added).

The Intervenors argue that DP&L's financial integrity issues will disappear if it transfers its generation assets to an affiliate, but that argument ignores the economic reality of the situation. Regardless of whether the generation assets are sold to a third party or are retained by a DP&L affiliate, DP&L would still face significant threats to its financial integrity without the SSR and SSR-E.

Specifically, if a sale to a third party does not occur, then DP&L plans to transfer its assets to an affiliate at fair market value by the Commission-imposed deadline. As DP&L demonstrated at the hearing, DP&L will face substantial threats to its financial integrity without the SSR and SSR-E. Transferring the generation assets to an affiliate will not eliminate those threats to DP&L's financial integrity because DP&L will need to maintain its $876.9 million in debt,[3] and will need the SSR and SSR-E to pay those debts. DP&L will need to maintain that debt because (a) an affiliate would not be able to support that debt, given current poor market conditions, Tr. 132, 136, 260-61 (Jackson); and (b) DP&L cannot transfer existing DP&L debt to a generation affiliate without the approval of the bondholders or bond insures as the case may be. Such approval is very unlikely to be provided given the cash flows of the generation portfolio would not be able to support that debt. DP&L will thus continue to need the SSR and SSR-E.

Further, DP&L's bonds restrict DP&L's ability to transfer its generation assets before September 2016. DP&L Ex. 16A, pp. 2-4 (Jackson). DP&L would incur substantial costs to transfer its generation assets before that date. Id. The Commission's order accelerating DP&L's deadline to transfer its generation assets to January 1, 2016 thus would not eliminate DP&L's need for the SSR and SSR-E; instead, the order would increase DP&L's need for those charges, so that DP&L would need additional revenue for costs that DP&L would incur to transfer its generation assets before the bond restrictions expire.

On the other hand, if DP&L's generation assets were to be sold to a third party, then 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 its $876.9 million in debt. If the assets are to be sold to a third

[3] As of February 28, 2014.

party in advance of the deadline to transfer the assets, then DP&L (as a transmission and distribution utility) will still need the SSR to assist it to pay off additional amounts of its 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 maintain the SSR and the SSR-E. In addition, as described above, DP&L would incur substantial bond-related costs if the generation assets are sold to a third party before the restrictions in the bonds expire,[4] and DP&L will need the SSR and SSR-E to assist it with those costs. (The reason that the assets may be able to be sold to a third party before the Commission-imposed deadline is that DP&L could use cash received from that third party to pay those bond-related costs. However, paying those costs would reduce DP&L's net cash flows, and DP&L will need the SSR and SSR-E to help offset that reduction in cash flow.)

Finally, continuing the SSR and SSR-E after the deadline for DP&L to transfer its generation assets is consistent with Commission precedent. 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 and SSR-E even if DP&L is required to transfer its generation assets by the new January 1, 2016 deadline established by the Commission.[6]

[4] DP&L Ex. 16A, pp. 2-4 (Jackson Rebuttal).
[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).

B. THE SSR AND SSR-E ARE NOT TRANSITION CHARGES

IEU (pp. 13-16) and OCC (pp. 11-12) argue that the SSR and SSR-E are transition charges. The Commission should reject that argument for the following separate and independent reasons:

1. The Commission denied rehearing on this issue: The Commission should reject Intervenors' arguments in their entirety because the Commission denied the parties' application for rehearing related to whether the SSR is a transition charge in its Second Entry on Rehearing, pp. 5-6. A rehearing application as to an entry on rehearing should be limited to issues as to which the Commission grants rehearing.

2. The SSR and SSR-E are not cost-based charges: As an initial matter, the Commission correctly concluded that the SSR and SSR-E are not transition charges because they do not recover any specific costs. Second Entry on Rehearing, p. 6. Specifically, Ohio Rev. Code § 4928.39 states repeatedly that a transition charge recovers "costs." The SSR does not authorize the recovery of any specific costs; rather, it is a charge that was designed to allow DP&L to maintain a reasonable ROE so that it could provide safe and reliable service. Indeed, there was overwhelming evidence – including concessions by numerous Intervenor witnesses – that the SSR was designed to allow DP&L to earn a targeted ROE and was not designed to recover any specific costs. DP&L Exhibit 14A, pp. 16-18 (Malinak Rebuttal); Tr. 209 (Jackson); Tr. 552 ("the SSR is not a cost-based from that standpoint . . . it is a general amount of money that contributes significantly to the ongoing financial integrity of the company") (Chambers); Tr. 823 (Parke); Tr. 1304-05, 1433 (Seger-Lawson); Tr. 2871 (Malinak); Tr. 1707 (Hess); Tr. 2035 (Rose); Tr. 2518 (Duann); Tr. 1808-09 (Turkenton). The SSR thus is not a transition cost as the term is defined in § 4928.39.

Without record support, OCC claims (pp. 11-12) that the SSR and SSR-E are designed to allow DP&L to recover specific costs. However, OCC never identifies any specific costs that the SSR and SSR-E would recover. Moreover, as demonstrated above, OCC's own witnesses admitted that the purpose of the SSR was to allow DP&L to recover a targeted ROE. Tr. 2035 (Rose); Tr. 2518 (Duann). The SSR thus is not designed to recover any specific cost, and is not a transition charge.

IEU claims (p. 14) that statements that DP&L made in its April 7, 2014 Reply Comments in Case No. 13-2420-EL-UNC show that the SSR is a transition charge. Not so. In those Reply Comments, DP&L explained that even if DP&L's generation assets were to be sold to a third party, the purchase price is not likely to be sufficient to allow DP&L to pay off a significant portion of its debts. Reply Comments, pp. 5-6. In that situation, DP&L (as a transmission and distribution company) would continue to need the SSR to pay the remaining debt (<u>i.e.</u>, to maintain its financial integrity). <u>Id</u>. Those statements do not establish that the SSR is a transition charge; they show that the SSR is a charge authorized under § 4928.143(B)(2)(d) to maintain DP&L's financial integrity. Indeed, IEU's witness concedes that the SSR was designed to allow DP&L to maintain a stated ROE (Tr. 1707 (Hess)), and it thus is not designed to allow DP&L to recover any specific costs.

3. <u>Section 4928.143(B)(2)(d) is the later-enacted statute</u>: Even if the SSR were a transition charge under Ohio Rev. Code § 4928.39 (enacted in 1999), the SSR would still be a lawful statutory charge under Ohio Rev. Code § 4928.143(B)(2)(d) (enacted in 2008). If there is a conflict between the two statutes (there is none), then § 4928.143(B)(2)(d) would control since it was the later-enacted statute. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of

enactment prevails."); Summerville v. City of Forest Park, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute . . . prevails"); Stutzman v. Madison County Bd. of Elections, 93 Ohio St. 3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").

C. THE SSR-E AMOUNT SHOULD BE $36.6 MILLION

OCC (p. 10) and IEU (pp. 16-18) argue that the amount of the SSR-E should be reduced from $45.8 million to $36.6 million in light of the Commission's decision to shorten the SSR-E period from five months to four months. DP&L agrees that the Commission's decision to shorten the SSR-E recovery period would have a corresponding effect on the total amount to be recovered, and that the SSR-E should thus be limited to $36.6 million.

III. THE COMMISSION SHOULD NOT GRANT REHEARING AS TO THE MORE FAVORABLE IN THE AGGREGATE TEST

IEU (pp. 8-11) seeks rehearing as to issues related to the "more favorable in the aggregate" test in Ohio Rev. Code § 4928.143(C)(1). The Commission should reject IEU's arguments for the following separate and independent reasons:

1. The Commission did not grant rehearing in its Second Entry on Rehearing: As an initial matter, the Commission should reject IEU's arguments in their entirety because the Commission denied the parties' applications for rehearing related to that test in its Second Entry on Rehearing, p. 27. A rehearing application as to an entry on rehearing should be limited to issues as to which the Commission grants rehearing.

2. The Commission has identified the non-quantifiable benefits of DP&L's ESP: IEU argues (p. 9) that the Commission has failed to identify the non-quantifiable benefits

of DP&L's ESP. That is not so. The Commission listed and described those benefits in both its Opinion and Order (pp. 50-51) and in its Second Entry on Rehearing (pp. 28-29).

3. The Commission cannot qualify a non-quantifiable benefit: IEU also argues (p. 10) that the Commission improperly applied a "subjective test" to determine whether the non-quantifiable benefits of DP&L's ESP exceed any quantifiable benefits of an MRO. The Commission should reject that argument because the Commission is required to consider non-quantifiable attributes of DP&L's ESP, and by definition, those attributes cannot be quantified.

Specifically, the General Assembly could have drafted Ohio Rev. Code § 4928.143(C)(1) so that an ESP would pass the test only if the ESP was "more favorable on a quantifiable basis" than an MRO. However, that is not what the General Assembly did. The General Assembly used the phrase "more favorable in the aggregate," demonstrating that the Commission must consider qualitative as well as quantitative costs and benefits.

Indeed, the Supreme Court of Ohio has stated:

> "[W]hile it is true that the commission must approve an electric security plan if it is 'more favorable in the aggregate' than an expected market-rate offer, that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions.' Thus, *the commission must consider more than price* in determining whether an electric security plan should be modified."

In re Application of Columbus S. Power Co., 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27 (emphasis added; emphasis deleted) (citations omitted). Based on the Court's recent precedent, it was thus necessary and appropriate for the Commission to consider qualitative benefits.

Further, it is, by definition, impossible to quantify a qualitative benefit. There is simply no way to prove the value in dollars and cents of a qualitative benefit with any degree of mathematical precision. The General Assembly charged the Commission with deciding whether an ESP is "more favorable in the aggregate" than an MRO, and the Commission is thus required to consider qualitative benefits. The Commission identified the qualitative benefits of DP&L's ESP, and explained why it believed that those benefits exceeded the quantitative price benefit of an MRO. The Commission's decision is thus consistent with the law, and it should deny IEU's Application for Rehearing.

IV. CONCLUSION

The Commission should deny IEU's, OCC's, and OEG's Applications for Rehearing as to the Commission's Second Entry on Rehearing.

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