

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**JOINT REPLY OF  
INDUSTRIAL ENERGY USERS-OHIO  
AND  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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This case involves the Public Utilities Commission of Ohio's ("Commission") determination of whether The Dayton Power and Light Company's ("DP&L") proposal to divest its generation is just, reasonable and in the public interest (as required by the Ohio Revised Code and the Commission's rules.) The Commission's rules further provide that the Commission will set the matter for a hearing if an application, on its face, does not appear to be just, reasonable, or in the public interest. Pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") hereby file this Joint Reply to the Memorandum In Opposition to the Motion for Hearing by DP&L ("Memo Contra").

As discussed herein, and in more detail in the Joint Motion for Hearing filed by IEU-Ohio and OCC on May 30, 2014 and through comments and reply comments previously filed in this proceeding by IEU-Ohio and OCC,<sup>1</sup> DP&L's Amended

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<sup>1</sup> These comments and reply comments addressed DP&L's December 30, 2013 Application, and February 25, 2014 Amended Supplemental Application, however, the lack of specificity and unlawful

Supplemental Application is unjust, unreasonable, not in the public interest, and would divest the Commission of jurisdiction over DP&L's generating assets. Accordingly, Section 4928.17, Revised Code, and Rule 4901:1-37-09(D), O.A.C., require that the matter be set for a hearing.

In its Memo Contra, DP&L argues that "a hearing would waste the Commission's time and resources because DP&L does not know the information that IEU-Ohio and OCC seek."<sup>2</sup> DP&L's admission that the Amended Supplemental Application is lacking in specific details regarding its proposed asset transfer or sale demonstrates that the Amended Supplemental Application is, on its face, not just, reasonable, or in the public interest. Accordingly, Ohio law and the Commission's rules require that the matter be set for hearing.

DP&L's argument should also be rejected because DP&L bears the burden of demonstrating that its corporate separation plan is just, reasonable, and in the public interest.<sup>3</sup> The Amended Supplemental Application, on its face, fails to meet this burden and, therefore, DP&L should be required to submit evidence at a hearing to satisfy its burden of demonstrating that its corporate separation plan is just, reasonable and in the public interest.

Further, DP&L's argument that it "does not know the information that IEU-Ohio and OCC seek"<sup>4</sup> should be rejected because it is contradicted by its application seeking

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terms and conditions relative to these two applications remains with the Amended Supplemental Application.

<sup>2</sup> DP&L Memo Contra at 5.

<sup>3</sup> Rule 4901:1-37-02(E), O.A.C. ("The electric utility has the burden of proof to demonstrate compliance with this chapter."); see also Section 4928.17, Revised Code (the Commission may not approve a corporate separation plan that is not in the public interest).

<sup>4</sup> DP&L Memo Contra at 5.

approval to sell one of its generating units (East Bend Unit 2) to Duke Energy Kentucky, Inc., in Case No. 14-1084-EL-UNC.<sup>5</sup> Despite its claim in its Memo Contra that it lacked any knowledge of a potential sale price of its generating assets, three days before DP&L filed the Memo Contra in this proceeding, DP&L's East Bend Application provides the expected sale price and other terms and conditions regarding its proposed divestiture of the East Bend Unit. DP&L further asserts in the East Bend Application that the final agreement with Duke Energy Kentucky was entered into as of May 15, 2014. At least in regard to the transfer of its interest in East Bend, DP&L's assertion that the information is unknown is contradicted by its own statements.

This is also not the first instance of DP&L's "fluid" and inconsistent position regarding the divestiture of its generating assets. DP&L has previously claimed that an asset divestiture could not be accomplished before September 15, 2016,<sup>6</sup> only to later assert that the assets could be divested possibly by the end of 2014. As the East Bend Application also demonstrates, DP&L's initial assertion that a divestiture could not occur before September 15, 2016, is not correct.

DP&L also argues that the Joint Motion for Hearing should be denied because the Commission is not required to hold a hearing inasmuch as the Commission may waive the hearing requirement in Rule 4901:1-37-09(D), O.A.C. In reliance, DP&L references the Commission's approval of the corporate separation plans of Ohio Power Company ("AEP-Ohio") and Duke Energy Ohio, Inc. ("Duke"), the latter of which was

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<sup>5</sup> *In the Matter of The Dayton Power and Light Company's Planned Sale of East Bend Unit 2*, Case No. 14-1084-EL-UNC, Application (June 13, 2014) ("East Bend Application").

<sup>6</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion & Order at 27-28 (September 4, 2013) (hereinafter referred to "DP&L ESP Order").

approved by a stipulation. Initially, DP&L's reliance on the stipulation regarding Duke's corporate separation plan is inappropriate as the stipulation states it is not precedential: "[t]his Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation."<sup>7</sup> In any event, reliance upon that stipulation and the Commission's approval of AEP-Ohio's corporate separation plan is irrelevant here because DP&L proposes numerous terms and conditions not contained in Duke's stipulation, such as DP&L's request to charge customers for all of DP&L's costs associated with transferring the generating assets and DP&L's request to saddle customers with future environmental remediation costs.

Additionally, although the Commission's rules provide that the Commission may, for good cause shown, waive any requirement in Chapter 4901:1-37, O.A.C., other than a requirement mandated by statute, DP&L cannot show good cause for such a waiver and a hearing is, in this instance, required by statute.<sup>8</sup> Initially, as discussed in the comments and reply comments filed in this proceeding by IEU-Ohio and OCC, and as discussed in the Joint Motion for Hearing, the terms and conditions proposed by DP&L in the Amended Supplemental Application are unlawful and unreasonable. Further, Section 4928.17, Revised Code, requires that the Commission find that the Amended

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<sup>7</sup> *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.* Stipulation at 2 (Oct. 24, 2011).

<sup>8</sup> Rule 4901:1-37-02(C), O.A.C.

Supplemental Application is in the public interest before it may approve the plan and Section 4903.09, Revised Code, further requires the Commission to make findings of fact based upon record evidence in all contested cases. Accordingly, a waiver of the hearing requirement contained in Rule 4901:1-27-09(D), O.A.C., is not appropriate here.

Although IEU-Ohio and OCC intend to file additional comments regarding the Amended Supplemental Application requested by the Attorney Examiner on June 30, 2014, the Commission already has sufficient information before it to find that DP&L's Amended Supplemental Application, on its face, is unjust, unreasonable, and not in the public interest. Because the Amended Supplemental Application is, on its face, not just, reasonable, or in the public interest, the Commission should set this matter for a hearing.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Joint Reply of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 23rd day of June 2014, via electronic transmission.

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