

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Dayton Power)
and Light Company's Planned Sale of)
East Bend Unit 2.) Case No. 14-1084-EL-UNC

**INDUSTRIAL ENERGY USERS-OHIO'S
COMMENTS**

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August 18, 2014

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Pursuant to the Attorney Examiner's June 20, 2014 Entry, Industrial Energy Users-Ohio ("IEU-Ohio") hereby files Comments on The Dayton Power and Light Company's ("DP&L") June 13, 2014 application to sell its interest in East Bend Unit 2 ("Application") to Duke Energy Kentucky, Inc. ("Duke Kentucky"). IEU-Ohio supports the divestiture of DP&L's generating assets on lawful and reasonable terms and conditions. The Application, however, proposes to divest East Bend Unit 2 on terms and conditions that are not lawful, just, reasonable, or in the public interest.

The Application unlawfully and unreasonably seeks authority to be able to recover DP&L's costs associated with the sale from customers. Additionally, the Application does not clearly address the debt and liabilities associated with East Bend Unit 2 that will not be transferred to Duke Kentucky. Further, the Application also fails to address the impact of the transaction on current and future standard service offers ("SSO"). Because the Application proposes to transfer East Bend Unit 2 on terms and conditions that are unjust, unreasonable, and contrary to the public interest, the Public Utilities Commission of Ohio ("Commission") should either reject the unlawful and unreasonable terms and conditions outright or set this Application for an evidentiary hearing and deny DP&L's request for the Commission to waive hearing.

I. APPLICABLE STANDARD

Section 4928.17(E), Revised Code, provides that “[n]o electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.” Additionally, Rule 4901:1-37-09(D), Ohio Administrative Code (“O.A.C.”), provides:

[u]pon the filing of such application [to transfer generating assets], the commission may fix a time and place for a hearing if the application appears to be unjust, unreasonable, or not in the public interest. The commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.

Furthermore, Rule 4901:1-37-09(C), O.A.C., states that an application to sell or transfer generation assets shall, at a minimum:

- (1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.
- (2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.
- (3) Demonstrate how the proposed sale or transfer will affect the public interest.
- (4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.

As demonstrated herein, DP&L has failed to satisfy these standards.

II. ARGUMENT

A. The Application is unlawful, unjust, unreasonable, and not in the public interest because of DP&L’s request to collect all of its transactional costs associated with the sale of East Bend Unit 2

DP&L’s Application requests Commission authorization to “recover all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs,

taxes and related costs” that DP&L incurs in the sale of its interest in East Bend Unit 2.¹ DP&L’s request to recover the transactional costs associated with this generation asset divestiture runs contrary to the Commission’s prior precedent. The Commission has held that generation-related costs associated with complying with Ohio’s corporate separation law are not recoverable from an electric distribution utility’s (“EDU”) distribution customers.² Additionally, the Commission’s limited ability to regulate the competitive generation function of retail electric service does not provide the Commission with any authority to authorize the recovery of the costs requested by DP&L.³

Furthermore, in response to a Staff data request (attached to these comments as Attachment A), Staff requested DP&L to quantify all transactional costs it would seek recovery of under paragraph 14 of the Application, to which DP&L indicated that it does “not anticipate seeking recovery for any transaction costs associated with this sales process.” Legality aside, if DP&L does not intend to seek recovery of any costs pursuant to the cost-recovery request in paragraph 14 of the Application, there is absolutely no need for the Commission to grant DP&L such authority.

Because DP&L’s Application proposes an unlawful, unreasonable, unjust term and condition that is contrary to the public interest and Commission precedent, and because DP&L does not anticipate seeking recovery of any transactional costs associated with the divestiture of East Bend Unit 2, the Commission should reject

¹ Application at 5.

² *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order at 17 (Oct. 17, 2012) (hereinafter referred to as “AEP-Ohio Corporate Separation Case” or “AEP-Ohio Corporate Separation Order” as appropriate) (“Generation-related costs associated with implementing corporate separation shall not be recoverable from [AEP-Ohio] customers.”).

³ See Sections 4928.05 & 4928.141 to 4928.143, Revised Code.

DP&L's request for authority to recover any and all generation asset sale transactional costs from its customers.

B. The Application is unjust, unreasonable, and is contrary to the public interest and Commission precedent because it fails to hold its customers harmless from the debts and liabilities related to East Bend Unit 2

In its Application, DP&L states that because the sale of its East Bend Unit 2 ownership interests is a single asset transaction, the sale can be accomplished without causing outstanding bonds to be called or creating other undue financial burdens.⁴ While this is an appropriate condition for the Commission to impose as a condition of the asset divestiture, the details buried in DP&L's Application suggest the end result (assuming the Commission approves the as-filed Application) will widely miss the mark because the transfer appears to leave debt related to East Bend Unit 2 with DP&L, exposing customers to continued financial responsibility. Based on Commission precedent, the failure to protect customers from exposure to debt associated with the assets would be unjust and unreasonable and not in the public interest.

For example, while DP&L claims the transaction will have no impact on outstanding bonds, Article 5 of the Purchase and Sale Agreement between Duke Kentucky and DP&L submitted as Exhibit 1 to the Application ("Sale Agreement") suggests a different conclusion. Specifically, Article 5, Section 5.4, specifies the required consents that are necessary before the transaction may close. Schedule 5.4 specifies that a release from the Bank of New York Mellon as Trustee of the First and Refunding Mortgage dated October 1, 1935 is a required consent. Article 5, Section 5.5, specifies that DP&L holds good and valid title to all of the purchased assets except permitted liens identified in Schedule 5.5. Schedule 5.5 again identifies the First and

⁴ Application at 3.

Refunding Mortgage, dated October 1, 1935 in favor of Bank of New York Mellon as Trustee. Thus, while it appears the Sale Agreement is structured to provide Duke Kentucky with free and clear title to the acquired East Bend Unit 2, it appears DP&L is retaining an unquantified amount of indebtedness associated with its East Bend Unit 2 ownership interest.

The Application also utters not a single word about other indebtedness clearly associated with DP&L's ownership interest in East Bend Unit 2. On May 23, 2014, DP&L filed in Case No. 13-2420-EL-UNC its Amended Supplemental Application to Transfer or Sell its Generating Assets ("May 23 Application"). The May 23 Application lists on page 4 all of DP&L's outstanding first mortgage bonds totaling \$859,375,000 as of December 31, 2012. The outstanding debt includes \$35,275,000 (outstanding as of December 31, 2012) of Pollution Control Bonds issued by the County of Boone, Kentucky. East Bend Unit 2 is located in Boone County, Kentucky and is the only DP&L owned generating facility within that county.⁵ Thus, by its silence, the Application appears to be seeking Commission approval to transfer DP&L's East Bend Unit 2 ownership interest but leave a significant amount of generation asset-related debt on the books of the regulated EDU. That result is clearly not just, reasonable or in the public interest.

It is also inconsistent with Commission precedent concerning the retention of indebtedness associated with pollution control revenue bonds ("PCRB"). Through an application filed in 2012, Ohio Power Company ("AEP-Ohio") sought Commission authorization to retain PCRBs on the books of the EDU subsequent to completing the transfer of its generating assets. AEP-Ohio represented the specific PCRBs were a

⁵ A description of East Bend Unit 2 which is operated by Duke Kentucky is available at: <http://www.duke-energy.com/power-plants/coal-fired/east-bend.asp> (last accessed August 15, 2014).

low-cost source of debt and were not secured by specific electric generating facilities.⁶ The Commission allowed AEP-Ohio to retain the PCRBs subject to a requirement that AEP-Ohio ratepayers be held harmless from any costs associated with servicing the debt.⁷ Additionally, the Commission held that defeasance costs could not be recovered from ratepayers.⁸

DP&L's Application fails to even mention the retained PCRBs, let alone make the necessary hold harmless commitments that are consistent with Commission precedent. Because the treatment of the existing generation-related debt appears to be unreasonable and not in the public interest, the Commission should reject DP&L's request to collect costs related to the asset divestiture from customers or, alternatively, the Commission should set this matter for hearing as required by the Commission rules.

C. DP&L failed to demonstrate how its Application will affect the current and future SSO price and failed to demonstrate that the Application is in the public interest

The Application must “[d]emonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code”⁹ and “how the proposed sale or transfer will affect the public interest.”¹⁰ Like its three applications in Case No. 13-2420-EL-UNC, in this Application, DP&L fails to satisfy these requirements. In its Application, DP&L states its Application “will not have a material effect on the terms and conditions under which it will provide a standard service offer” and that “DP&L's ownership share of East Bend Unit 2

⁶ AEP-Ohio Corporate Separation Order at 5-6.

⁷ *Id.* at 17-18.

⁸ *Id.* at 18.

⁹ Rule 4901:1-37-09(C)(2), O.A.C.

¹⁰ Rule 4901:1-37-09(C)(3), O.A.C.

comprises 186 MW, or only about 7%, of DP&L's total capacity of about 2708 MW."¹¹ By stating that the Application will not have a material effect on the SSO, it implies that it will have some effect. The Commission's rules require DP&L to demonstrate what effect it will have, material or otherwise. Accordingly, DP&L's Application is deficient.

DP&L also claims that the sale of East Bend Unit 2 is in the public interest because the Commission previously found the separation of DP&L's generating assets from DP&L's transmission and distribution businesses was a benefit of DP&L's current electric security plan ("ESP").¹² However, nowhere in the Commission's order approving DP&L's ESP did the Commission actually find that a divestiture of East Bend Unit 2 or the terms and conditions of the divestiture proposed by DP&L in this case was in the public interest.¹³ Thus, DP&L still bears the burden of proof to demonstrate the sale of its interest in East Bend Unit 2 is just, reasonable, and in the public interest.

III. CONCLUSION

For the reasons stated herein, DP&L's Application fails to demonstrate that the terms and conditions of the transfer of East Bend Unit 2 are just, reasonable and in the public interest. Accordingly, the Commission should reject DP&L's request to recover the generation asset transfer-related costs, should ensure that DP&L's divestiture does not cause any undue financial burdens, should require DP&L to hold customers harmless for any costs of the generation-related debt, should require DP&L to demonstrate the effect on the SSO and demonstrate that the Application is in the public interest. Alternatively, the Commission should set this matter for a hearing consistent

¹¹ Application at 3.

¹² Application at 3.

¹³ See *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, *et al.*, Opinion and Order at 27-28 (Sept. 4, 2013).

with its rules on applications that appear unjust, unreasonable, or contrary to the public interest.

Respectfully submitted,

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ATTACHMENT A

11. Quantify all transaction costs associated with this sales process that DP&L anticipates seeking recovery as requested in the Application page 5, item #14.

RESPONSE:

We do not anticipate seeking recovery for any transaction costs associated with this sales process.

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 *Industrial Energy Users-Ohio's Comments* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 18th day of August 2014, via electronic transmission.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/18/2014 10:06:59 AM

in

Case No(s). 14-1084-EL-UNC

Summary: Comments of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio