BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of East Bend Transaction	))))	Case No. 14-1084-EL-UNC

COMMENTS ON DP&L'S APPLICATION BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Edmund "Tad" Berger, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (Berger) (614) 466-1292
Telephone: (Grady) (614) 466-9567
Edmund.berger@occ.ohio.gov
Maureen.grady@occ.ohio.gov

August 18, 2014

TABLE OF CONTENTS

Page

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of East Bend Transaction.	)))	Case No. 14-1084-EL-UNC

COMMENTS ON DP&L'S APPLICATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

This is a case where the Dayton Power & Light Company ("DP&L" or "Utility") is seeking to charge its customers all of the transaction costs that it may incur in the single asset sale of its generation ownership interest in East Bend Unit 2 to Duke Energy Kentucky ("DEK"). DP&L states that these costs may include "all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes, and related costs that it incurs in the sale of its interest in East Bend Unit 2."[1] DP&L provides no estimate of these costs, nor does it propose a particular ratemaking mechanism to charge customers.

DP&L previously raised (and OCC earlier addressed) the issue regarding DP&L's transaction costs in Case No. 13-2420-EL-UNC, where DP&L requested blanket authority to charge customers for transaction costs associated with divesting all of its generation assets – either to an affiliate or a third party.[2] Thus, this issue is already being

---

[1] DP&L Application, p. 5.

[2] *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 at 5.

addressed in that proceeding, where OCC has submitted Comments to DP&L's Supplemental Application and Amended Supplemental Application.[3]

As discussed in Case No. 13-2420-EL-UNC and reiterated below, DP&L should not be permitted to collect transaction costs from its Ohio customers related to the sale of generation assets to DEK, an entity unaffiliated with DP&L. These are costs that do not relate to providing Standard Service Offer ("SSO") service to DP&L's customers. Nor are these costs necessary to provide any service that DP&L is offering to Ohio consumers. DP&L is to be "on its own" in the competitive generation market. Therefore, charging customers for these costs would be an illegal subsidy of competitive generation service from DP&L to its generation affiliate, resulting in a financial windfall to its parent company— DPL Inc. Moreover, DP&L's request for single issue ratemaking of these costs is otherwise contrary to Ohio law and ratemaking policy. This request should be rejected.

To the extent that DP&L's proposal to charge transaction costs to customers is entertained, the PUCO should hold a hearing as required by its rules where jurisdiction is proposed to be altered over a utility's generation assets. The PUCO should not grant DP&L's request that the public or evidentiary hearing process be waived.[4]

II. STANDARD OF REVIEW AND BURDEN OF PROOF

OCC's comments at Case No. 13-2420-EL-UNC delineated the standard of review applicable to this proceeding as established by R.C. 4928.17(E). Under that

---

[3] *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, OCC Comments to Supplemental Application at 15-17; OCC Comments to Amended Supplemental Application at 19-20.

[4] DP&L Application at 4.

standard, the PUCO must approve any proposed sale or transfer of generating assets before a utility can proceed with its sale or transfer. The PUCO's own rules provide that a hearing may be required "if the application appears to be unjust, unreasonable, or not in the public interest."[5] Furthermore, the PUCO "shall" schedule a hearing if the application "proposes to alter the jurisdiction of the commission over a generation asset."[6] After a hearing, or, if no hearing is required, the PUCO "shall issue an order approving the application" if the sale or transfer is "just, reasonable, and in the public interest."[7]

Additionally, a sale or transfer of generation assets is an integral part of a utility's corporate separation plan under R.C. 4928.17. Consequently, the PUCO must evaluate how the proposed sale or transfer affects the utility's corporate separation plan.

Furthermore, as an integral part of a corporate separation plan, the PUCO's review of a plan for sale or transfer of generating assets must allow parties to file objections to the plan, and afford parties a hearing on issues the PUCO determines reasonably require a hearing.[8] Consistent with the procedures set forth in R.C. 4928.17(B), the PUCO should reject a generation asset transfer plan that is "substantially inadequate."

The PUCO's rules establish that the utility has the burden of proof to demonstrate that a proposed sale or transfer of generation assets is "just, reasonable, and in the public

---

[5] Ohio Admin. Code 4901:1-37-09(D).

[6] Id.

[7] Ohio Admin. Code 4901:1-37-09(E) (emphasis added).

[8] See R.C. 4928.17 (B).

interest."[9] The PUCO must consider DP&L's application using these standards and decide whether the utility has met its high burden of proof.

III. COMMENTS

A. DP&L's Proposal To Charge Customers For Transaction Costs Associated With The Sale Of East Bend Unit 2 Would Violate Ohio Law And Ratemaking Policy. To The Extent The PUCO Intends To Consider DP&L's Request, A Hearing Should Be Held To Determine Whether DP&L's Request Is Just, Reasonable, And In The Public Interest.

While OCC does not oppose DP&L's proposed sale of East Bend Unit 2, customers should not be required to finance the transaction. The PUCO has previously found that customers should not be responsible for costs associated with implementing corporate separation. Specifically, in an Ohio Power Company corporate separation proceeding, the PUCO held that "[g]eneration-related costs associated with implementing corporate separation shall not be recoverable from customers."[10] There is no basis for treating costs related to DP&L selling its generation assets to Duke Energy Kentucky differently than generation-related costs associated with implementing a corporate separation plan.

It is not clear what mechanism DP&L would propose to collect from customers the transaction costs incurred from the sale of generation assets to DEK. Nevertheless, DP&L's request for customers to pay for these costs is inconsistent with the law's mandate that a utility's provision of competitive retail electric service be separated from

---

[9] Ohio Admin. Code 4901:1-37-02(E).

[10] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan,* Case No. 11-5333-EL-UNC, Finding and Order of January 23, 2012, p. 19.

its provision of transmission and distribution ("T&D") service.[11] And R.C. 4928.38 required utilities to be "on their own" in the competitive generation market since 2005, effectively mandating that no aspect of a utility's provision of competitive retail electric service be subsidized by the utility's T&D business. If DP&L were permitted to charge customers for transaction costs associated with the sale of its generation assets, DP&L's regulated monopoly distribution customers would be forced to subsidize costs related to competitive generation. This would violate R.C. 4928.02(H) which prohibits "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."

The Supreme Court of Ohio has found that rate plans must comply with the requirements of R.C. 4928.02.[12] DP&L's proposal to subsidize transaction costs does not comply with the requirements of the law. First of all, it is clear that such transaction costs cannot and should not be included in any base distribution rates. This is because the transaction costs related to the sale of generation assets are not costs attributable to distribution service. R.C. 4909.15 allows the PUCO to fix rates for distribution service based on, inter alia, "the cost to the utility of rendering the public service for the test period." DP&L's transaction costs from selling a generation asset are not costs to DP&L of rendering distribution service to distribution customers.

---

[11] R.C. 4928.17(A)(1) and 4928.17(C).

[12] *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St. 3d 305; 2007-Ohio-4164; 871 N.E.2d 1176.

Any allowance to charge customers for these costs would violate Ohio ratemaking policy, which only allows for the collection from customers of recurring expenses associated with providing current distribution services through a base distribution rate proceeding.[13] Transaction costs associated with the sale of generating assets are one-time costs associated with generation assets and could not appropriately be claimed in a base distribution rate proceeding if DP&L were to seek to collect them in that forum.

It is also unreasonable and unjust for such transaction costs to be collected from customers through a rider mechanism. In Case No. 13-2420-EL-UNC, DP&L emphasized that the PUCO ordered it to separate its generating assets in its recent electric security plan ("ESP") proceeding. But DP&L is under a statutory mandate[14] to do so and was only given temporary authority to postpone its divestiture during a transitional period. Moreover, the mere fact that the PUCO orders a utility to take particular actions does not mean that the utility is entitled to charge regulated monopoly customers the costs it incurs to comply with a mandate associated with competitive generation facilities. Rather, any proposed charge to customers must meet the requirements of Ohio's ratemaking law (R.C. 4909.18) and must be valid for inclusion in such ratemaking request. DP&L's request for authority to charge customers for the transaction costs related to East Bend Unit 2 meets neither mandate.

Setting rates by solely looking at costs associated with a single mandate is inconsistent with sound ratemaking policy. While the General Assembly has authorized the PUCO to include "provisions regarding single issue ratemaking" for a utility's

---

[13] R.C. 4909.15(A)(4).

[14] R.C. 4928.17.

distribution service, as part of an electric security plan,[15] it has not otherwise authorized single issue ratemaking in any other context. The presumption should be that collecting single issue non-distribution charges outside of an ESP is inconsistent with ratemaking law and policy.

Since 2005, DP&L has been "on its own" in the competitive generation market under the legal provisions implemented in Senate Bill 3. Since then, it is plain that the state legislature intended for DP&L to divest its generating assets to an affiliate or third party. Now DP&L is finally doing so but that does not mean that it can charge customers for transaction costs. These costs are not related to the provision of transmission and distribution service. It would violate the law and otherwise be unreasonable to charge such amounts to the utility's regulated service customers.

B. DP&L's Request For Waiver Of A Hearing Should Be Rejected If The PUCO Entertains DP&L's Proposal To Charge Customers For Transaction Costs Associated With Its Sale Of East Bend Unit 2.

DP&L requests that the PUCO waive the hearing required under the PUCO's rules when a party proposes "to alter the jurisdiction of the commission over a generation asset."[16] DP&L requests this waiver, claiming that "a comment process, together with a Staff evaluation of the request to transfer generation assets, is sufficient to allow this Commission to evaluate the proposed transfer expeditiously."[17] DP&L also argues, as it did in Case No. 13-2420-EL-UNC, that "the Commission has already conducted an extensive evidentiary hearing in DP&L's recent ESP case regarding whether DP&L

---

[15] R.C. 4928.143(B)(2)(h).

[16] DP&L Application at 4, *citing* Ohio Admin. Code 4901:1-37-09(D).

[17] DP&L Application at 4.

should be ordered to transfer its generation assets, and issued an Order in that proceeding that required DP&L to transfer its generation assets."[18]

DP&L continues to cloud the scope of the PUCO's order in the ESP proceeding, as well as the nature of the proceeding leading up to the decision. That proceeding did not evaluate any specific plan for sale or transfer of generation assets. The PUCO only addressed in the ESP proceeding whether, and by what date, DP&L should be required to divest its generation assets to finally comply with the mandates of Senate Bills 3 and 221. And with respect to the date of divestiture, DP&L is misguided because it continues to reference the incorrect date of May 1, 2017.[19] The PUCO's Entry on Rehearing initially modified the divestiture date to January 1, 2016,[20] and subsequently via its Fourth Entry on Rehearing to January 1, 2017.[21] It is wholly inappropriate for DP&L to argue that concerns with the current application for evaluation of East Bend Unit 2 were somehow addressed in the ESP proceeding when no such a proposal was before the PUCO.

The PUCO's regulations require a hearing when a proposal is put forth to "alter the jurisdiction of the commission over a generation asset."[22] DP&L has now, ***for the first time***, put forth a specific proposal to alter the PUCO's jurisdiction over a specific generation asset. The PUCO's rules require a hearing. The PUCO should hold a hearing on any issues associated with such change in jurisdiction over East Bend Unit 2.

---

[18] DP&L Application at 4.

[19] DP&L Application at 5.

[20] DP&L ESP II, Second Entry on Rehearing at 31.

[21] DP&L ESP II, Fourth Entry on Rehearing at 6.

[22] Ohio Admin. Code 4901:1-37-09(D).

DP&L's reliance on the PUCO's waiver of hearings in AEP Ohio's and Duke's corporate separation plan proceedings is misplaced.[23] Those waiver requests were approved after substantive applications were submitted and subjected to scrutiny by PUCO Staff and intervenors.[24] And, in the case of Duke's transfer application, DP&L's reliance on such a PUCO-approved Stipulation is contrary to the express terms of that Stipulation, which prohibits any party to the stipulation from offering or relying upon the Stipulation "in any proceeding[ ] except as necessary to enforce the terms of this Stipulation."[25]

While, at this time, OCC's only objection to DP&L's application is the Utility's proposal to charge customers for transaction costs associated with the sale of these particular generation assets, the PUCO should adhere to the regulatory requirements it has established for review of applications in which jurisdiction is proposed to be altered. And, if the PUCO does not outright reject DP&L's claim for transaction costs associated with the sale of East Bend Unit 2, a hearing should be specifically held to address the specifics of such transaction costs and the reasonableness and lawfulness of DP&L's proposal to charge them to customers.

---

[23] DP&L Application at 10, *citing In the Matter of the Application of Ohio Power Company for Approval of an Amendment to Its Corporate Separation Plan,* Case No. 12-1126-EL-UNC, Opinion and Order, p. 11 (Oct. 17, 2012) and *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 Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 11-3549-EL-SSO, et al., Opinion and Order, p. 46 (November 22, 2011).

[24] *See infra* at 3-4.

[25] *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 Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 11-3549-EL-SSO, Stipulation Filed October 24, 2011, pp. 41-42, approved by Opinion and Order, p. 46 (November 22, 2011).

IV. CONCLUSION

DP&L's proposal to charge its customers the transaction costs associated with its sale of East Bend Unit 2 to Duke Energy Kentucky should be rejected. To the extent that the PUCO does not reject such request outright, the PUCO should adopt an appropriate schedule for a hearing, after ample opportunity for discovery. DP&L's request that a hearing be waived should be rejected.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Edmund "Tad" Berger
Edmund "Tad" Berger, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (Berger) (614) 466-1292
Telephone: (Grady) (614) 466-9567
Edmund.berger@occ.ohio.gov
Maureen.grady@occ.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Comments* was served on the persons stated below via electronic transmission to the persons listed below, this 18th day of August 2014.

/s/ Edmund "Tad" Berger
Edmund "Tad" Berger
Assistant Consumers' Counsel

SERVICE LIST

Thomas.mcnamee@puc.state.oh.us
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
Judi.sobecki@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com

Attorney Examiners:
Bryce.mckenney@puc.state.oh.us
Gregory.price@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/18/2014 4:42:55 PM

in

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

Summary: Comments Comments on DP&L's Application by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Berger, Tad Mr.