

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**APPLICATION FOR REHEARING OF
CITY OF MIAMISBURG, OHIO**

Pursuant to Revised Code § 4903.10 and Ohio Administrative Code § 4901-1-35(A), the City of Miamisburg, Ohio applies for rehearing in this matter. For grounds, Miamisburg submits that the Commission’s September 17, 2014 Finding and Order (“Order”) is unlawful or unreasonable for the following reasons:

1. Although Miamisburg is entitled to intervene in these proceedings pursuant to R.C. 4903.221, the Commission did not rule on Miamisburg’s motion to intervene despite granting intervenor status to other parties;
2. The Commission acts unlawfully and unreasonably in finding that the application is not unjust and unreasonable and is in the public interest, where the Commission lacks record evidence to determine whether a transferee of DP&L’s assets will have the financial ability to satisfy the accompanying environmental liabilities.
3. Because Miamisburg’s comments opposed the approval of the application without the record evidence described in (2), above, the Commission acts unreasonably in finding that the transfer of environmental liabilities satisfies the concerns of all parties.

4. In the absence of the record evidence described in (2), above, the Commission acts unreasonably and unlawfully in approving the application without an evidentiary hearing.

The basis for this application is set forth in further detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

1. The Commission did not rule on Miamisburg's Motion to Intervene, despite granting intervenor status to several other parties.

On May 14, 2014, Miamisburg moved to intervene in this matter. No party opposed that motion. Miamisburg subsequently filed comments on DP&L's Amended Supplemental Application on June 30, 2014.

In its Order, the Commission granted motions to intervene filed by Duke, FES, Interstate Gas Supply, OMA Energy, and the OCC. Order at 3, ¶ 11. However, the Order made no mention of Miamisburg's motion to intervene and, to Miamisburg's knowledge, at no time has the Commission or the ALJ ruled on that motion.

If this was an oversight on the part of the Commission, Miamisburg requests that the Commission, on rehearing, grant its motion to intervene for the reasons set forth in that motion. If the Commission's silence was intended as a denial of the motion, Miamisburg submits that such denial is unlawful and unreasonable for the following reasons:

- a. For the reasons discussed at pages 1-2 of the motion to intervene, which pages are fully incorporated herein, Miamisburg will be adversely affected by this proceeding if DP&L is permitted to transfer assets and environmental liabilities without ensuring that the transferee has sufficient financial resources to satisfy those liabilities.
- b. Miamisburg's intervention has not prolonged or delayed these proceedings;
- c. Miamisburg's participation has contributed to the full development and equitable resolution of the factual issues of this case, as evidenced by the Commission's reference to Miamisburg's comments at page 3, ¶ 9 and page 11, ¶ 25 of its Order;

- d. Miamisburg's motion to intervene was timely filed, since neither the attorney examiner nor the Commission had established a deadline for such motions; and
- e. The Commission having granted intervenor status to other parties in this matter, there is no reason to withhold intervenor status from Miamisburg.

R.C. 4903.221. For all of the above reasons, Miamisburg requests the Commission on rehearing to grant its motion to intervene.

2. The Commission's approval of the application without sufficient information regarding the transferee's ability to satisfy environmental liabilities is unlawful and unreasonable.

- a. The Commission's Order erroneously assumes that Miamisburg's concerns about environmental liabilities were satisfied by DP&L's agreement to transfer said liabilities.**

In all three of the applications in this proceeding, DP&L requested authority to retain environmental liabilities associated with the assets to be transferred. Order at pp. 8, 11. Other parties opposed DP&L's proposal on the basis that DP&L should not be permitted to charge customers for environmental liabilities associated with assets it no longer owned. *E.g.*, OCC Comments Regarding Supp. App. at 9-15; IEU-Ohio Comments Regarding Supp. App. at 10-11. Miamisburg, on the other hand, asserted that irrespective whether DP&L's environmental liabilities are retained or transferred,¹ DP&L's application should not be approved without a hearing because the record in this proceeding was insufficient to determine the degree of risk of environmental liabilities becoming orphaned, to the detriment of Miamisburg or other host communities. Comments of City of Miamisburg on Amended Supplemental Application ("Miamisburg Comments") at 4.

¹ Miamisburg took no position whether the Commission has the legal authority to approve DP&L's retention of environmental liabilities or to defer those liabilities and associated costs to its consumers. *Id.* at 3.

Unlike other parties who are concerned about the impact of DP&L charges on their members or on the public, Miamisburg's interest in these proceedings is to ensure that DP&L or its transferee will have sufficient financial and legal resources to decommission the O.H. Hutchings Generating Station, 9200 Chautauqua Road, in Miamisburg. Miamisburg Comments at 1. As discussed in more detail at pages 4-6, below, DP&L's applications and discovery responses are devoid of information sufficient to enable the Commission to determine that DP&L, or its transferee, will have the legal or financial ability to undertake and complete all necessary and appropriate decommissioning activities at Hutchings Station. Without such information, DP&L's proposed asset disposition may result in orphaned environmental liabilities at Hutchings or elsewhere, to the harm of the host community. This is of utmost concern to Miamisburg.

So long as environmental liabilities are inadequately quantified, the risk of orphaned liabilities is present regardless whether DP&L retains or transfers its environmental liabilities. Even assuming, for sake of argument, DP&L retained "future environmental liabilities" and the authority to charge its customers for those costs, the term "future environmental liabilities" is not defined in the applications. Miamisburg Comments at 3. Thus, it is not clear whether that term would encompass the full range of necessary decommissioning activities at Hutchings, such as demolition and equipment removal. *Id.* Furthermore, although DP&L sought the *authority* to retain environmental liabilities and to defer the associated costs, it was not clear that DP&L would be prohibited from transferring those liabilities to a purchaser or transferee if DP&L found it advantageous in the future to do so. *Id.*

The Commission stated in its findings (at ¶ 25) that Miamisburg "argued against DP&L's initial request to permit it to retain environmental liabilities." The Commission misapprehends

Miamisburg's position. Regardless whether environmental liabilities are retained by DP&L or transferred with the assets, the Commission has insufficient information to assess the risk of orphaned environmental liabilities. For the same reasons, Miamisburg strongly disagrees with the Commission's suggestion (at 12, ¶ 27) that "DP&L's agreement to transfer the environmental liabilities with the generation assets resolves the issues raised in the comments and reply comments by Staff and the parties." To the contrary, so long as the record is inadequate to assess the ability of the transferee to satisfy DP&L's environmental liabilities, the Commission does not have sufficient information to determine whether DP&L's proposal is reasonable, just, and in the public interest.

b. The application and the record are devoid of information to determine whether DP&L's transferee will have sufficient financial resources to satisfy transferred environmental liabilities.

DP&L now proposes to transfer its assets to an undisclosed affiliate and to transfer all environmental liabilities with the assets. Both DP&L and the Commission reason that this development resolves the issues relating to environmental liabilities. DP&L Reply to Comments regarding Am. Supp. Application at 4; Order at 12, ¶ 27 (DP&L's agreement to transfer the environmental liabilities with the generation assets resolves the issues raised in the comments and reply comments by Staff and the parties.) However, this is not the case, because the record lacks any information regarding the likely magnitude of environmental liabilities or the ability of the affiliate to satisfy those liabilities.

DP&L claims that it has provided all the information about future environmental liabilities that it can provide at this time. Reply to Comments regarding Am. Supp. Application at 4. However, DP&L has not disclosed known plans for environmental closure of portions of Hutchings Station. DP&L has discussed with Ohio EPA cleanup activities associated with the

decommissioning of that facility. Miamisburg Comments at 2 and Exhibit A thereto. According to Ohio EPA records, *id.*, DP&L is presently developing a plan for environmental closure of certain aspects of the facility. DP&L did not dispute this in its response to Miamisburg's comments. DP&L Reply to Comments regarding Am. Supp. Application at 15. The fact that DP&L is discussing environmental closure of Hutchings is contrary to DP&L's representation in this proceeding that it has not developed a plan for cleanup or closure, DP&L's Fourth Suppl. Response to OCC Interrog. 92, and that it has not undertaken any remediation efforts with respect to assets to be transferred or sold. DP&L's Fourth Suppl. Response to OCC Interrogatory 78.

Although DP&L's reply distinguishes (at 15) between coal-fired units, natural gas units, and transmission and distribution assets at Hutchings, that distinction is immaterial. What is material is that DP&L is developing plans for environmental closure of at least portions of the Hutchings facility. That information is relevant to DP&L's future environmental liabilities. Before ruling on the application, the Commission should require a hearing to develop all evidence concerning DP&L's closure, remediation, and decommissioning plans for Hutchings, the estimated costs associated with those plans, and all other information relevant to the qualification of its environmental liabilities.

Furthermore, the record lacks any financial information about the undisclosed affiliate to which DP&L now proposes to transfer its assets. Without such information, there is no basis to determine whether the affiliate can satisfy the environmental liabilities that will accompany the assets. This may be of particular concern if, for example, DP&L transfers the assets to an empty holding company which simply mothballs the assets. Without liquid assets or an income stream,

a holding company may be inadequately capitalized to address environmental liabilities as they accrue.

3. Conclusion

For all of the above reasons, in the absence of sufficient information to assess the ability of a DP&L affiliate to satisfy future environmental liabilities that will transfer with the assets, DP&L's Amended Supplemental Application is unjust, unreasonable, and contrary to the public interest. Furthermore, in the absence of such information, the Commission lacks a basis in the record to conclude that the application is not unjust or unreasonable and is in the public interest. Order at 6, ¶17. According to the Ohio Supreme Court, "a legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶30. Thus, the Commission acts unlawfully and unreasonably in approving the application without an evidentiary hearing. Miamisburg requests that the Commission grant its motion to intervene, withdraw its approval of the application, and set this matter for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 14, 2014, a copy of the foregoing Application for Rehearing and Memorandum in Support of the City of Miamisburg were served by electronic mail on the following counsel:

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Summary: App for Rehearing of City of Miamisburg, Ohio electronically filed by Mr. Christopher A Walker on behalf of City of Miamisburg, Ohio