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 AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
Telephone: 614-469-8000
Telecopier: 614-469-4653
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

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Attorneys for Industrial Energy Users-Ohio

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On September 17, 2014, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order ("Transfer Order") modifying and approving the twice-amended Application of the Dayton Power and Light Company ("DP&L") seeking authority to transfer or sell its generation assets.[1] Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing. The Transfer Order is unlawful and unreasonable for the following reasons:

1. The Transfer Order unlawfully and unreasonably denied the motion for a hearing required by Rule 4901:1-37-09(D), OAC, because the Application does not demonstrate that the transfer of assets was not unjust, unreasonable, or not in the public interest and the transfer may alter the jurisdiction of the Commission over a generation asset.

2. The Transfer Order unlawfully and unreasonably waived the requirements of Rule 4901:1-37-09(D), OAC, because the Application does not demonstrate that the transfer of assets was not unjust, unreasonable, or not in the public interest, the transfer may alter the jurisdiction of the Commission over a generation asset, and DP&L failed to demonstrate "good cause" for the waiver.

[1] DP&L filed the Application on December 30, 2013. It filed a Supplemental Application on February 25, 2014 and an Amended Supplemental Application on May 23, 2014. Unless otherwise indicated by the context, "Application" refers to the application and the supplemental applications collectively.

3. The Transfer Order's authorization permitting DP&L to collect the Service Stability Rider ("SSR") after the transfer of its generation assets is unlawful because the SSR is not a charge the Commission can lawfully authorize under R.C. 4928.143(B), and the Commission failed to explain its rationale, respond to contrary positions, and support its position with appropriate evidence when it continued the SSR in violation of R.C. 4928.143.

4. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets is unlawful and unreasonable because the authorization of the SSR violates R.C. 4928.38 and the Commission failed to explain its rationale and respond to contrary positions when it authorized the continued billing and collection of the SSR in violation of R.C. 4928.38.

5. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets on the ground that the Commission "should not engage in re-litigating the SSR" is unlawful and unreasonable because the doctrines of res judicata and collateral estoppel do not prevent review of a challenge to the subject matter jurisdiction of the Commission.

6. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets is unreasonable because DP&L's generation assets will be structurally separated from the other business segments of the electric distribution utility ("EDU"), a fact inconsistent with the justification for authorizing the SSR in the ESP II Order.

7. The Transfer Order's authorization permitting DP&L to adjust its accounting so that it may book as a deferred asset the costs of transfer of the generation assets is unlawful because the Order exceeds the Commission's authority under R.C. 4928.05 and R.C. 4928.144; furthermore, the Transfer Order's authorization of accounting modifications fails to explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

8. The Transfer Order's authorization permitting DP&L to retain its interest in the Ohio Valley Electric Corporation ("OVEC") generation assets is unreasonable because DP&L has the current ability to assign its interest to an affiliate or third party.

9. The Transfer Order's authorization permitting DP&L to retain its interest in the OVEC generation assets is unlawful because the Order fails to explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and correct the errors identified herein.

Respectfully submitted,

/s/ Frank P. Darr

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In a case approving DP&L's electric security plan ("ESP"), the Commission ordered DP&L to file an application to transfer or sell its generation assets as a condition of securing an extension of the SSR.[2] Subsequently, the Commission directed DP&L to divest its generation assets by January 1, 2017.[3]

On December 30, 2013, DP&L filed the instant Application to transfer or sell its generation assets. In the Application, DP&L provided little information regarding the terms of that transfer or sale (even after two amendments) and sought additional relief that would impose considerable continuing costs on customers after DP&L transfers or sells the assets.

Without compliance with its rules requiring a hearing, the Commission approved the Application with some limited modifications in the Transfer Order. In doing so, the

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[2] *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) ("ESP II" or "ESP II Order" refers to the Opinion and Order and Entries on Rehearing as the context requires). The Commission also conditioned the extension of the SSR on the filing of a distribution rate case by July 1, 2014, an application to modernize its electric distribution infrastructure, and efforts to establish and begin to implement a plan to modernize its billing system. *Id.*

[3] *Id*., Fourth Entry on Rehearing at 5-6 (June 4, 2014).

Commission authorized DP&L to burden customers with an obligation to pay the unlawful and unreasonable SSR after DP&L divests the generation assets. It also permitted DP&L to modify unlawfully its accounting to defer additional generation-related costs associated with the transfer of the generation assets and seek recovery of those deferred costs from customers. It further authorized DP&L to retain its interest in the Ohio Valley Electric Corporation ("OVEC entitlement") without any demonstration that retention is necessary, lawful, or reasonable. Because the Transfer Order rests on procedural, legal, and factual errors, the Commission should grant rehearing, direct DP&L to file an application that complies with Commission rules and that removes the unlawful requests. Once DP&L has complied with Commission rules, the Commission may then properly determine whether the Application is not unjust, unreasonable, or not in the public interest, and parties will be afforded a proper opportunity to address the merits of a lawful application and the need for further evidentiary hearings.

II. APPLICATION

Although it has filed an initial application and two supplements, DP&L remains largely uninformative as to the terms and conditions of the sale or transfer.[4] It indicates that the divestiture may occur through a sale, but DP&L cannot provide the name of a potential buyer, the sale price, or a proposed date for a sale. If there is no sale, then there may be a transfer to an affiliate at net book value, at some point in the future.

When the issue is increasing the customers' bills, however, DP&L is more forthcoming. Its Application requests that DP&L be permitted to continue the SSR after it transfers the assets. Additionally, DP&L seeks authority to modify its accounting to

[4] The details of the initial and supplemental applications are discussed below.

permit the deferral of the costs of divesting the generation assets, which it estimates to be up to $45 million. The Application also requests authority for DP&L to retain its interest in the OVEC entitlement. (DP&L is a Sponsoring Company of OVEC and pays a portion of the fixed and variable costs of the OVEC generating stations and has a proportional right to the output of them.)

Despite the lack of details concerning the terms and conditions of a sale or transfer and the requests to continue to recover generation-related charges such as the SSR after it divests the generation assets, DP&L requests that the Commission not conduct a hearing on its Application.

At the Commission's direction, intervenors and the Commission Staff ("Staff") filed numerous comments and reply comments pointing out that the twice-amended Application was short on information and requested several unlawful terms. Because the Application was incomplete, contained requests for unlawful and unreasonable terms, and triggered a mandatory hearing requirement, IEU-Ohio and the Office of the Ohio Consumers' Counsel ("OCC") also filed a Motion for Hearing requesting the Commission to schedule the Application for an evidentiary hearing.[5]

III. THE TERMS OF THE ORDER

Although the comments demonstrated that the Application "appears unjust, unreasonable, [and] not in the public interest,"[6] the Commission concluded otherwise,

[5] Motion for Hearing and Memorandum in Support of Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel (May 30, 2014) ("Motion for Hearing")

[6] Rule 4901:1-37-09(D), OAC, provides, "Upon the filing of such application, 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.

"waived" hearing,[7] and approved the Application with some modifications on September 17, 2014. In relevant part, the Transfer Order provided that:

1. DP&L is authorized to continue to bill and collect the SSR after the generation assets are transferred.[8]
2. DP&L is authorized to modify its accounting to defer the costs of the sale of the assets and make a separate filing to recover those costs. The separate filing will be subject to a review to determine if the costs are reasonable and prudent.[9]
3. DP&L is authorized to retain its interest in OVEC. The Commission directed DP&L to make a good faith effort to attempt to secure consent to transfer the OVEC entitlement. It also directed DP&L to liquidate the OVEC entitlement in the PJM Interconnection LLC ("PJM") energy markets or through bi-lateral sales until the OVEC entitlement can be transferred.[10]

As demonstrated below, the refusal to direct that the matter proceed to hearing, the authorization permitting DP&L to bill and collect the SSR after the divestiture of the generation assets, the authorization permitting DP&L to modify its accounting to defer the costs of divesting the generation assets, and the authorization permitting DP&L to retain its interest in the OVEC entitlement are unlawful and unreasonable.

IV. THE COMMISSION SHOULD GRANT REHEARING AND REVERSE ITS ORDERS DENYING A HEARING AND DIRECT DP&L TO COMPLY WITH COMMISSION RULES TO PROVIDE THE TERMS AND CONDITIONS OF THE SALE OR TRANSFER AND REMOVE THE UNLAWFUL REQUESTS

[7] Transfer Order at 6-7.

[8] *Id.* at 10-11.

[9] *Id.* at 12-13.

[10] *Id.* at 15-16.

A. The Transfer Order unlawfully and unreasonably denied the motion for a hearing required by Rule 4901:1-37-09(D), OAC, because the Application does not demonstrate that the transfer of assets was not unjust, unreasonable, or not in the public interest and the transfer may alter the jurisdiction of the Commission over a generation asset

R.C. 4928.17(E) prohibits an EDU from selling or transferring "any generating asset it wholly or partly owns at any time without obtaining prior commission approval." Under Commission rules, the EDU must clearly set forth the terms of the transfer or sale of generation assets.[11] Further, 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,"[12] although the Commission may waive a requirement of its rules other than a requirement mandated by statute for "good cause shown."[13]

As IEU-Ohio and others repeatedly noted in their comments and Motion for Hearing and DP&L admitted, DP&L did not provide information regarding the material terms and conditions of the transfer or sale of the generation assets. In its Application, DP&L discussed action steps that it has taken to prepare to transfer its generation assets and "complex issues that DP&L will need to resolve prior to separation of

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[11] Rule 4901:1-37-09(D), OAC, provides

> An application to sell or transfer generating 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.

[12] Rule 4901:1-37-09(D), OAC.

[13] Rule 4901:1-37-02(C), OAC.

generation assets."[14] For example, DP&L claimed that it may be able to transfer its generation assets by December 31, 2014,[15] but DP&L failed to indicate under what terms it could achieve that goal. DP&L also claimed that it has yet to resolve issues related to its entitlement to purchase power from OVEC[16] and cleanup and closure costs related to the Hutchings Station and Beckjord Generation Station.[17]

The failure to comply with Commission rules went unresolved in the Supplemental Application. As in the initial filing, DP&L did not identify the transferee of the assets, stating it will transfer its generation assets to an unregulated affiliate or "to an unaffiliated third party through a potential sale."[18] It did not state the date of transfer, only offering that "a sale to a third party could occur as early as 2014."[19] It failed to state the amount of the purchase price, offering only that the price will be at "fair market value" and that it will state the fair market value "no later than 75 days before the transfer date."[20]

The Supplemental Application, however, did disclose the revenue and other enhancements DP&L was seeking. First, it requested the continuation of the SSR.[21] Second, it sought to retain responsibility for future environmental liabilities due to its historic ownership of the generation assets.[22] Third, it sought permission to recover

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[14] Application at 5 (Dec. 30, 2013).

[15] *Id.* at 1-2.

[16] *Id.* at 5.

[17] *Id.* at 6.

[18] Supplemental Application at 2 (Feb. 25, 2014).

[19] *Id.*

[20] *Id.* If the assets are transferred to a third party, the "FMV shall be the sale price of the assets." *Id.*

[21] *Id*. at 3.

[22] *Id*. at 3-5.

transfer costs.[23] Fourth, it proposed to retain its OVEC entitlement because it did not expect to be able to secure consent for the transfer of the entitlement.[24] Fifth, it sought to maintain long-term debt of $750 million or 75% of rate base, whichever is greater, in violation of its settlement agreement it entered to resolve its merger with the AES Corporation.[25]

In its third try, the Amended Supplemental Application, DP&L once again failed to satisfy the requirements of the Commission's rule to clearly state the terms and conditions of the sale or transfer. It did not identify the transferee that will receive the generation assets. Instead, DP&L stated that the assets would be transferred to an affiliate or a third party if DP&L receives "an acceptable offer."[26] It again failed to state a transfer date. Instead, DP&L stated that the transfer to an affiliate would occur on or before May 31, 2017 and that the sale to a third party could happen "as soon as this year."[27] DP&L did not state the transfer or sale price. Instead, DP&L stated that the transfer price to its affiliate would be the fair market value determined 75 days prior to its proposed transfer on or before May 31, 2017.[28]

In a small break from the opaqueness of the rest of its Application, DP&L disclosed the current debt it was proposing to retain if it divested the generation assets. According to DP&L, it held $879 million of long-term debt and hoped to reduce its long-term debt to $750 million by the end of 2016; it further hoped to have sufficient cash

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[23] *Id*. at 5.

[24] *Id*. at 5-7.

[25] *Id*. at 7-8.

[26] Amended Supplemental Application at 2 (May 23, 2014).

[27] *Id.* at 2, 6.

[28] *Id.* at 2.

flows to reduce its long-term debt by an additional $150 million to $175 million by the end of 2018.[29] In contrast with the disclosures regarding debt, DP&L's Amended Supplemental Application did not address the magnitude of the environmental liabilities it requested authority to retain following the asset divestiture or how and when it would seek recovery of the unidentified costs.[30] (It subsequently agreed to transfer the environmental liability.[31])

DP&L's Amended Supplemental Application further failed to address the costs associated with its request to retain the OVEC entitlement following its generation asset divestiture. Instead, DP&L requested authority to retain the OVEC contractual entitlement, defer unidentified costs associated with it, and address the deferred costs at a later date.[32]

Additionally, DP&L's Supplemental Application requested a "blank check" to collect all of the costs of the asset divestiture from customers.[33] DP&L's Amended Supplemental Application provided few additional details (and no legal authority concerning the recovery of these costs) other than DP&L's statement that the costs could range from $10 million if it transfers its assets to an affiliate to $45 million if it sells the assets to a third party.[34]

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[29] *Id.* at 3-5.

[30] *Id.* at 11-12.

[31] Transfer Order at 11-12. In a separate order concerning the transfer of DP&L's interest in the East Bend generating station, the Commission permitted DP&L to retain liability for pollution control bonds. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Sell its Interest in East Bend Unit 2*, Case No. 14-1084-EL-UNC, Finding and Order at 5 (Sept. 17, 2014).

[32] Amended Supplemental Application at 13-14.

[33] Supplemental Application at 5.

[34] Amended Supplemental Application at 12-13.

Because the initial and supplemental applications failed to provide the minimal amount of information required by Commission rules to understand the terms and conditions of the proposed divestiture and because the divestiture will alter the jurisdiction of the Commission over the generation assets, IEU-Ohio and OCC moved for an order setting the Application for hearing.[35]

The Transfer Order denied the Motion for Hearing on the basis that DP&L's plan to transfer the generation assets to an affiliate addresses many of the concerns raised by the commenters.[36] Based on the assumption that the "current plan" was a transfer to an affiliate, the Transfer Order goes on to state that DP&L had identified the transferee, indicated that the transfer would be at net book value, and agreed to transfer the liabilities to the transferee.[37]

The Commission's denial of the Motion for Hearing, however, ignores that DP&L has not elected how it will transfer or sell the generation assets, when it will transfer them, or to whom. Because the Application and amendments do not elect between the two alternatives or indicate the substantive terms of when the assets will be divested, for how much, or to whom, the Application and amendments do not "resolve" the issues raised by intervenors regarding the Application's failure to satisfy the requirements of the Commission's rule. Further, DP&L concedes that it does not have the information to satisfy the Commission's requirements.[38]

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[35] Motion for Hearing, *passim*.

[36] Transfer Order at 6.

[37] *Id*.

[38] Memorandum in Opposition to the Motion for Hearing by the Dayton Power and Light Company at 5 (June 16, 2014).

The problems with the Application, however, are not limited to its failure to clearly state the terms and conditions. The Application also sought terms such as the continuation of the SSR and the deferral of transfer costs that are unlawful, as discussed below. Further, the Application requested terms and conditions that an evidentiary hearing would demonstrate are unreasonable. For example, the continuing authorization of the SSR makes no sense in light of the Commission's rationale for authorizing the SSR in the ESP II Order, as discussed below. Similarly, an evidentiary hearing would demonstrate the unreasonableness of permitting DP&L to retain the OVEC entitlement when it has the present ability to assign its interest to an affiliate or a third. The Commission, however, has precluded the parties from establishing tha that DP&L's requests are unreasonable by approving these terms without an evidentiary record.

Additionally, the Application proposes a divestiture to an unregulated affiliate or sale to a third party that may alter Commission jurisdiction over the assets. Under the Commission rule, the Commission must conduct a hearing unless good cause is shown to waive it.[39] The Transfer Order provides no discussion as to whether the Commission intended to waive the mandatory requirement for a hearing or why it did so if it did waive the requirement.

Despite DP&L's failure to demonstrate that the Application complied with Commission rules and no finding that DP&L had shown good cause to waive a mandatory hearing under Commission rules, the Commission denied the Motion for

[39] Rule 4901:1-37-09(D), OAC.

Hearing. Because the denial of the Motion for Hearing was unreasonable and unlawful, rehearing should be granted and the Order denying hearing should be revised.[40]

B. The Transfer Order unlawfully and unreasonably waived the requirements of Rule 4901:1-37-09(D), OAC, because the Application does not demonstrate that the transfer of assets was not unjust, unreasonable, or not in the public interest, the transfer may alter the jurisdiction of the Commission over a generation asset, and DP&L failed to demonstrate "good cause" for the waiver

In the same finding in which the Commission denied the Motion for Hearing, it also "waived" the hearing requirement of Rule 4901:1-37-09(D), OAC. In support of its decision to waive hearing, the Commission did not make an explicit finding that DP&L had provided "good cause shown" to waive a hearing, but instead stated that DP&L had satisfied the requirements of Chapter 4901:1-37, OAC, and that the Application was not unjust, unreasonable, or not in the public interest. It based that "finding" on a statement that this "process" was consistent with the manner in which the Commission reviewed the divestiture of the generation assets of AEP-Ohio and Duke Energy Ohio, Inc. ("Duke"). Additionally, the Commission noted that it had already addressed whether DP&L should divest its generation assets in the ESP II Case.[41] The decision to "waive" hearing is not reasonable or lawful.

To the extent that there is any record in this case, it does not support a finding that DP&L complied with Commission rules. As the Commission noted in the Transfer Order, DP&L did not provide the required information regarding the expected transferee or the timing and terms of the sale because it "does not know the information sought by

[40] Because the Application still does not comply with Commission rules, the Commission should also direct DP&L to file an application that discloses the terms and conditions of the transfer or sale it has elected to pursue and remove the illegal terms discussed below.
[41] Transfer Order at 6.

IEU-Ohio and OCC."[42] Further, DP&L stated that it may elect one of two alternatives. While the Commission notes that DP&L has indicated the transferee, value of the transaction, and that the transfer will include the environmental liabilities if transferred to an affiliate, DP&L did not state that it would transfer the assets to an affiliate, and it does not identify the affiliate. Additionally, the terms of a sale to a third party are completely unknown. Thus, the Commission's finding that DP&L has demonstrated that the Application satisfies the requirements of Chapter 4901:1-37, OAC, is unsupported and unreasonable.

The Transfer Order's reliance on the "process" the Commission used in the AEP-Ohio and Duke generation divestiture cases also is unreasonable. The "process" is not a substitute for a determination whether this Application provides the information to demonstrate that the transfer or sale is not unjust, unreasonable, or not in the public interest. Such a determination is fact specific, and DP&L failed to carry its burden to show that its Application, after two amendments, provided even a minimal amount of information to demonstrate that the divestiture is not unreasonable, unjust, or not in the public interest.

The Transfer Order's reliance on Duke's corporate divestiture likewise is unlawful. The Duke corporate divestiture is based on a Stipulation that provides that it was "submitted for purposes of these [Duke ESP] proceedings only, and neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding."[43] The Commission approved the Stipulation without

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[42] *Id.* at 5.

[43] *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*

modification to this provision.[44] Reliance on the Duke Stipulation, therefore, is prohibited by the Commission's prior order.

Further, reliance upon that stipulation and the Commission's approval of AEP-Ohio's Corporate Separation Plan is irrelevant in assessing the lawfulness and reasonableness of the Application because DP&L proposes numerous terms and conditions not contained in AEP-Ohio's generation asset transfer application or Duke's Stipulation, such as DP&L's request to charge customers for all of DP&L's costs associated with transferring the generation assets and the retention of long-term debt obligations.

Likewise, the reliance in the Transfer Order to the Commission's ESP II Order directing DP&L to transfer the generation assets does not resolve the lack of information contained in DP&L's Application. The ESP II Order does not address terms and conditions of the divestiture. Despite the fact that the ESP II Order does not address the terms of the divestiture, the Transfer Order treats the directive that DP&L should divest the assets as a basis for concluding that no hearing on the Application is required. The reliance is unreasonable.

The Transfer Order's "waiver" of a hearing also fails to address the Commission requirement that a hearing be ordered if the sale or transfer will alter the jurisdiction of the Commission. In the Application approved by the Commission, DP&L may transfer or sell the generation assets to an unregulated affiliate or third party. As a result, the transfer or sale would alter the Commission's jurisdiction and trigger a requirement

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Modifications and Tariffs for Generation Service, Case Nos. 11-3549-EL-SSO, *et al.*, Stipulation at 2 (Oct. 24, 2011) ("*Duke ESP*").

[44] *Duke ESP*, Opinion and Order (Nov. 22, 2011).

under Rule 4901:1-37-09(D), OAC, for a hearing (unless DP&L provided good cause to waive the requirement). The Commission does not address the application of this rule to DP&L's request though both the Commission's rule and the Motion for Hearing require that review. Further, the Commission does not find that DP&L showed good cause to waive the rule.

DP&L's Application is incomplete and requests terms the intervenors demonstrated are unlawful. As a result, the Commission does not have a reasonable basis to conclude that the transfer is not unjust, unreasonable, or not in the public interest. Further, the Commission's rule mandates a hearing if the Commission jurisdiction over the assets may be altered by the Application. The proposal in this case appears to do just that, and DP&L has not demonstrated (and the Commission has not found) good cause to waive the hearing requirement. Accordingly, the Commission erred when it did not require a hearing as required by Rule 4901:1-37-09(D), OAC.

C. The Transfer Order's unlawful and unreasonable waiver of a hearing injures the interests of IEU-Ohio and other intervenors

The Commission's grant of a waiver of the hearing has allowed DP&L to advance and secure claims that are both unlawful and unreasonable and will result in significant financial injury to customers. In particular, the Transfer Order permits DP&L to continue an expensive and unlawful nonbypassable rider, authorizes DP&L to adjust unlawfully its accounting to defer transfer costs and seek their recovery, and authorizes DP&L to retain the OVEC entitlement for some indeterminate amount of time, all without an evidentiary record to support any of these contested findings.[45]

[45] R.C. 4903.09 requires the Commission in a contested case to set for the reasons for its decision based upon its findings of fact.

Because the Transfer Order's refusal to order a hearing is unlawful and unreasonable and injures customers, the Commission should grant rehearing.[46] Further, the Commission should direct DP&L to file the information required by its rules so that the Commission can properly review the terms and conditions of the divestiture. At the same time, the Commission should also direct DP&L to revise its Application to remove the unlawful terms discussed below. Once DP&L has complied with Commission rules, the Commission may then properly determine whether the Application is not unjust, unreasonable, or not in the public interest, and parties will be afforded a proper opportunity to address the merits of a lawful application and the need for further evidentiary hearings.

V. THE COMMISSION SHOULD GRANT REHEARING AND REVERSE ITS ORDER PERMITTING DP&L TO COLLECT THE SSR AFTER THE TRANSFER OF THE GENERATION ASSETS

In its last application for an ESP, DP&L sought the SSR, claiming it was necessary because DP&L expected to incur reduced revenue due to low wholesale capacity and energy prices and customer migration.[47] Over objections that the Commission did not have authority to authorize the SSR and in contrast to its refusal to authorize a Switching Tracker ("ST"),[48] the Commission authorized DP&L to bill and

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[46] As noted above, the Commission also should direct DP&L to provide the information regarding the terms and conditions of the divestiture and remove the illegal terms discussed below.

[47] ESP II Order at 20-22.

[48] *Id.* at 30 ("The Commission finds that the [Switching Tracker] should be denied because it violates the policies of the state of Ohio, is anticompetitive, and would discourage further development of Ohio's retail electric services market. Further, the Commission finds that the Company has not demonstrated that the ST, which would be incrementally increased when customers leave the SSO, is related to default service under Section 4928.143(B)(2)(d), Revised Code. … [Because the Commission authorized the SSR], the Commission believes that the revenues from the SSR, … are sufficient to maintain DP&L's financial integrity, without an additional ST to insulate DP&L from market risk.")

collect $110 million annually on a nonbypassable basis through the SSR.[49] In its authorization of the SSR, the Commission ignored that DP&L is required to be functionally separated currently and found that the SSR would have the effect of providing DP&L stability and certainty in the provision of retail electric service because DP&L "is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility."[50]

Although DP&L's distribution and transmission segments would be structurally separated from the generation segment after transfer of the generation assets to an affiliate or a third party, the Transfer Order nonetheless authorizes "DP&L [to] continue to collect the SSR notwithstanding DP&L's divestiture of its generation assets" because it would allow DP&L to maintain its financial integrity and is "consistent with [the Commission's] treatment with respect to both AEP and Duke."[51] The Commission further notes that it "agree[d] … that the parties should not engage in re-litigating the SSR."[52]

The Commission's authorization permitting DP&L to continue to collect the SSR after it divests the generation assets is unlawful and unreasonable. The rationale for approving the continued collection of the SSR is based on an extension of an illegal charge, an improper application of the doctrines of res judicata and collateral estoppel to a matter that goes to the subject matter jurisdiction of the Commission, and an analogy to decisions concerning the AEP-Ohio and Duke generation asset transfers that have no proper relationship to the divestiture proposed by DP&L.

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[49] *Id.*at 25.

[50] *Id.* at 22.

[51] Transfer Order at 10.

[52] *Id.*

A. The Transfer Order's authorization permitting DP&L to collect the Service Stability Rider ("SSR") after the transfer of its generation assets is unlawful because the SSR is not a charge the Commission can lawfully authorize under R.C. 4928.143(B), and the Commission failed to explain its rationale, respond to contrary positions, and support its position with appropriate evidence when it continued the SSR in violation of R.C. 4928.143

The SSR that the Commission permitted DP&L to continue to bill and collect after the generation assets are transferred was authorized in the ESP II Order as a term of the ESP under R.C. 4928.143(B)(2)(d).[53] Because the SSR cannot be lawfully authorized under that subdivision or any other of R.C. 4928.143(B),[54] the continued authorization of the rider in this Order also is not lawful.

The SSR is generation-related.[55] The charge replaces revenue shortfalls caused by low energy and capacity wholesale prices and customer migration from its generation services. DP&L suffers no lost distribution or transmission revenue from customer migration or low wholesale energy and capacity prices, and it admitted that its distribution and transmission revenue would be adequate.[56] Further, it could seek to increase its distribution and transmission rates by applying for rate increases from the appropriate legal authorities if it could demonstrate a revenue shortfall that rendered its

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[53] ESP II Order at 21.

[54] R.C. 4928.143(B(1) and (2) contain provisions addressing the recovery of costs for the provision of the standard service offer in the form of an ESP. The mandatory provision contained in (B)(1) relates to the provision of electric generation service for the SSO and is inapplicable as a basis for the SSR. The discretionary provisions of (B)(2) permit (a) automatic recovery of fuel, purchased power, and emission allowances; (b) and (c) certain specified construction-related costs discussed below; (d) terms for certain services that provide stability or certainty in the provision of retail electric service; (e) automatic increases in a component of an ESP; (f) costs of securitization; (g) transmission-related charges; (h) certain defined distribution charges; and (i) charges related economic development and energy efficiency programs. None of these provisions authorizes a nonbypassable generation-related rider to recover above-market costs of generation resources with the possible exception of the limited exceptions provided by subdivision (B)(2)(b) and (c). The Commission identified R.C. 4982.143(B)(2)(d) as the authority for authorization of the SSR. ESP II Order at 21.

[55] ESP II Order at 21-22.

[56] ESP II, Tr. Vol. I at 242.

monopoly rates for these services unreasonable.[57] Based on the record presented by DP&L, therefore, the SSR is a generation-related charge.

The SSR is also nonbypassable, and because it is a nonbypassable generation-related rider it is not a provision the Commission can lawfully authorize. The terms of an ESP are limited to those permitted by R.C. 4928.143(B). In addition to the mandatory terms that must be contained in an ESP under division (B)(1) of R.C. 4928.143, the Commission may include terms authorized by R.C. 4928.143(B)(2). "[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[58]

The only provisions of R.C. 4928.143(B)(2) that permit the Commission to authorize a nonbypassable generation-related rider are subdivisions (b) and (c). Subdivision (B)(2)(b) authorizes a charge related to construction work in progress "provided the cost is incurred or the expenditure occurs on or after January 1, 2009." Subdivision (B)(2)(c) authorizes a charge related to "an electric generating facility that is owned or operated by the electric distribution utility …[that] is newly used and useful on or after January 1, 2009."

Because the subdivisions define the particular instances in which a nonbypassable charge may be authorized, by implication other provisions such as R.C. 4928.143(B)(2)(d) do not.

> As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where … the statute involved is a definitional provision. Had the

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[57] *See, e.g.,* R.C. 4909.15 (ratemaking formula for noncompetitive services), R.C. 4909.16 (emergency relief for noncompetitive services of an EDU), & R.C. 4909.18 & 4909.19 (authorizing an application for an increase in rates). All federally approved transmission costs are recovered through a reconcilable rider. R.C. 4928.05(A)(2).

[58] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011).

> General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions. In addition, it is well-settled "that the General Assembly's own construction of its language, as provided by definitions, controls in the application of a statute."[59]

Because the SSR recovers generation-related costs, the Commission has no authority to authorize DP&L to recover the SSR on a nonbypassable basis unless the provision recovers costs identified by R.C. 4928.143(B)(2)(b) or (c). DP&L did not demonstrate that the SSR could be approved as a nonbypassable charge, nor could it, under either R.C. 4928.143(B)(2)(b) or (c). Accordingly, the SSR is unlawful and remains so after the generation assets are transferred.

Even if the Commission had authority under R.C. 4928.143(B)(2)(d) to authorize a generation-related nonbypassable rider, the record supporting the ESP II Order does not demonstrate that the SSR, either before or after the divestiture of the generation assets, will provide either physical or economic stability and certainty in the provision of retail electric service to DP&L customers. Because DP&L operates within the PJM system, the reliability of retail generation service is a function of PJM's management practices and reliability assurance responsibilities.[60] As one DP&L witness conceded, PJM would dispatch resources under its control to satisfy the needs of DP&L's customers if DP&L did not have any generating facilities or if DP&L's generating facilities did not run.[61] That fact will remain true after DP&L divests the generation assets. Likewise, the SSR is not necessary to ensure the financial stability of the EDU's transmission and distribution services since DP&L's transmission and distribution

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[59] *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm'n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

[60] ESP II, Tr. Vol. I at 172.

[61] *Id.*

businesses receive adequate revenue to ensure reliable service.[62] The record simply cannot support the unreasonable conclusion that stability or certainty of DP&L's retail electric service will lessen if it does not bill and collect the SSR.

Moreover, the Commission has not provided a legal basis for the continuation of the SSR once the assets are transferred. In the ESP II Order, the Commission concluded that the financial losses in one of the lines of business (and generation was the only one DP&L states would be at risk) might adversely impact other lines of business and thereby affect DP&L's ability to provide stable, reliable, or safe retail electric service.[63] Once DP&L divests the generation assets, however, DP&L will be a "wires" company; the generation assets that are alleged to be causing or will cause DP&L financial distress will be gone. (Any resulting financial distress will result only from the fact that DP&L has successfully sought approval to divest the assets but will retain the related debt obligations.[64]) The result will be a company with revenue from transmission and distribution that DP&L admits is adequate. Thus, even if there were some lawful basis for authorizing the SSR while DP&L owned the generation assets, that rationale would no longer exist after the divestiture. Once the assets are divested, therefore, there is no basis for the Commission to conclude that the SSR satisfies the statutory requirements of R.C. 4928.143(B)(2)(d).

The Commission rationalizes the continuing authorization of the unlawful SSR on three grounds. First, it points out that it previously authorized the SSR. Second, it

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[62] *Id.*, Tr. Vol. I at 242.

[63] ESP II Order at 21-22.

[64] Transfer Order at 16-19 (DP&L received authority to maintain long term debt of the greater of $750 million or total debt equal to 75% of rate base because the new affiliate will have limited debt carrying capacity).

states that the parties should not re-litigate the SSR. Third, it states that the order directing the transfer of the generation assets is consistent with its decisions in the AEP-Ohio and Duke ESP cases.[65] The "rationale" offered by the Commission, that the parties should not engage in re-litigating the SSR, is addressed in the next assignment of error. The other two are addressed below.

The Commission cannot rely on the ESP II Order since that Order illegally authorized the SSR, as discussed above. Compounding a wrong in the Transfer Order does not make the SSR lawful.

Likewise, pointing to the Commission's actions in the AEP-Ohio and Duke ESP cases does not rectify the illegality of the Transfer Order. The stability rider the Commission approved for AEP-Ohio is also illegal, and the lawfulness of the rider is the subject of an appeal currently before the Supreme Court of Ohio ("Court") for many of the same reasons that are presented in the appeal of the ESP II Order also now before the Court.[66] Further, the Duke ESP case, as noted above, was based on a stipulation that by Commission order is without precedential effect.[67] Thus, neither decision provides a lawful basis for the Commission to authorize the continued billing and collection of the SSR.

Additionally, the Commission's conclusory statements that it previously authorized the SSR and is relying on its Duke and AEP-Ohio ESP decisions do not address the merits of the lawfulness of the SSR in this case. The Commission "should

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[65] *Id.* at 10.

[66] *In the Matter of the Application of Columbus Southern Power Company for Authority to Establish A Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Sup. Ct. Case No. 2013-521, Second Notice of Appeal of Industrial Energy Users-Ohio (May 8, 2013).

[67] See discussion above.

explain its rationale, respond to contrary positions, and support its position with appropriate evidence."[68] The Commission's failure to address this issue, thus, is additional error.

The generation-related nonbypassable rider cannot be lawfully authorized and is unreasonable either currently or after DP&L divests the generation assets. Because the Commission has no lawful or reasonable basis to find that the SSR can be authorized under R.C. 4928.143(B)(2)(d) and fails to respond to contrary positions, the Commission should grant rehearing and reverse its order authorizing the continuation of the SSR.

B. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets is unlawful and unreasonable because the authorization of the SSR violates R.C. 4928.38 and the Commission failed to explain its rationale and respond to contrary positions when it authorized the continued billing and collection of the SSR

Under the terms of the ESP II Order authorizing the SSR, DP&L is authorized to bill and collect untimely transition revenue or its equivalent in violation of R.C. 4928.38. By continuing the authorization of the collection of the SSR, the Transfer Order makes the same fundamental error.

A transition charge recognizes that the market value of an asset is less than its book value and provides some means for a utility to recover the difference.[69] As part of the transition to customer choice in the provision of retail electric generation services, Amended Substitute Senate Bill ("SB 3") provided an opportunity for EDUs to recover

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[68] *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

[69] ESP II, Tr. Vol. II at 536.

transition revenue through a transition revenue charge.[70] A transition revenue charge could be authorized if the EDU filed a request within 90 days of the effective date of SB 3 and demonstrated that it had transition costs. Transition costs were costs: (1) that were prudently incurred; (2) that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) that were unrecoverable in a competitive market; and (4) that the utility would otherwise have been entitled an opportunity to recover.[71] An EDU was afforded one opportunity to demonstrate to the Commission that it should be authorized transition revenue, and if it was successful, the recovery of transition revenue could not extend beyond a date certain.[72]

After that date certain passed, R.C. 4928.38 bars the Commission from authorizing additional transition revenue or equivalent revenue:

> The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.[73]

Additionally, R.C. 4928.141, adopted in 2008 under Amended Substitute Senate Bill 221 ("SB 221"), confirmed that the right to seek and obtain above-market generation revenue has ended: "[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition

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[70] R.C. 4928.31 to 4928.40. *See, also,* ESP II, IEU-Ohio Ex. 3 at 18.

[71] R.C. 4928.39. Ohio law permitted recovery of regulatory assets that were identified as a part of the total allowable amount of the transition costs determined under R.C. 4928.39 until December 31, 2010. R.C. 4928.40.

[72] *Id*.

[73] R.C. 4928.38 (emphasis added).

costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." Thus, DP&L had one opportunity to collect transition revenue, and the Commission could not lawfully authorize additional transition revenue under the statutory formula described above or on any equivalent basis once that opportunity ended.

DP&L's testimony in support of the SSR demonstrated that the SSR permits it to bill and collect transition revenue or "any equivalent revenues." The differential used to calculate the SSR is based on the "lost" revenue associated with customer shopping and lower wholesale energy and capacity revenues.[74] Thus, as a means of providing DP&L with generation-related revenue it could not recover in the market, the SSR authorizes DP&L to bill and collect transition revenue or its equivalent.

DP&L's testimony confirmed that DP&L was seeking transition revenue or its equivalent. As DP&L witness Chambers stated, from an economic standpoint, the purpose of a transition charge is to compensate a utility when its assets would not be competitive when subjected to market prices.[75] He agreed that, if DP&L's return on equity deficiency is being driven by lower-than-desired generation revenue (which was DP&L's claim), and the SSR is designed to make up the difference (and it is), then the SSR is equivalent to a transition charge.[76]

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[74] DP&L Ex. 1 at 13, Ex. CLJ-1.

[75] ESP II, Tr. Vol. II at 536-37.

[76] *Id.*, Tr. Vol. II at 540-41; *id.* at 541-42 (Q: If DP&L was adequately compensated on its distribution business, adequately compensated on its transmission business, but DP&L was not adequately compensated on its generation business, and the SSR was designed to provide compensation for DP&L's generation business, would you agree that the SSR is equivalent to a transition charge? A: "Under the terms of the hypothetical, yes, I would agree. I have not seen any evidence that that, indeed, is the basis for the SSR that has been proposed by DP&L.")

By law, therefor, DP&L is prohibited from recovering transition revenue or its equivalent is barred by the terms of R.C. 4928.38. Because the SSR authorizes DP&L to recover transition revenue or its equivalent, the continued authorization in this case is illegal.

Further, DP&L's Electric Transition Plan ("ETP") settlement barred additional transition revenue recovery after December 31, 2003.[77] In violation of that settlement, the Commission has authorized DP&L to continue to recover transition revenue or its equivalent.

As with its failure to address the merits of lawfulness of the SSR under R.C. 4928.143(B), the Transfer Order also fails to address the bar to the recovery of transition revenue or its equivalent. Instead, it relies on the ESP II Order and the Commission's prior treatment of the AEP-Ohio and Duke proceedings. As noted above, neither the ESP II Order nor the other divestiture decisions justify the continued authorization of the SSR.

Further, the Transfer Order's conclusory statements that it previously authorized the SSR and is relying on its Duke and AEP-Ohio ESP decisions do not address the violation of R.C. 4928.38. The Commission "should explain its rationale, respond to contrary positions, and support its position with appropriate evidence."[78] The Commission's failure to address this issue, thus, is additional error.

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[77] *In the Matter of the Application of The Dayton Power & Light Company for Approval of itsTransition Plan pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under Section 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.,* Stipulation and Recommendation at 10 (Jun. 2, 2000). The Commission approved these terms of the Stipulation. *Id*., Opinion and Order at 29 (Sep. 21, 2000).

[78] *In re Columbus S. Power Co*., 128 Ohio St.3d at 519.

In summary, the SSR violates R.C. 4928.38 and the ETP Stipulation because it provides DP&L transition revenue or its equivalent. The Commission, thus, acted unlawfully when it continued the billing and collection of the rider. Further, the Commission erred when it failed to explain its rationale and respond to contrary positions. Accordingly, the Commission should grant rehearing and reverse its order authorizing continued billing and collection of the SSR after DP&L transfers or sells the generation assets.

C. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets on the ground that the Commission "should not engage in re-litigating the SSR" is unlawful and unreasonable because the doctrines of res judicata and collateral estoppel do not prevent review of a challenge to the subject matter jurisdiction of the Commission

The Commission states in the Transfer Order that DP&L may continue to collect the SSR after divestiture of the assets in part because "the parties should not engage in re-litigating the SSR, which [the Commission] fully addressed in the *ESP II* proceeding."[79] The legal issues raised by IEU-Ohio and others, however, go to the subject matter jurisdiction of the Commission to authorize the SSR. As such, the Commission's refusal to address the legal barriers to its authority because parties "should not engage in re-litigating the SSR" was in error.

The Commission apparently has invoked the doctrines of res judicata and collateral estoppel as a basis to continue the authorization of the SSR. The doctrines of res judicata and collateral estoppel "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed

[79] Transfer Order at 10.

upon by a court of competent jurisdiction."[80] Prior proceedings, however, do not bar a review of the lawfulness of the court or agency's action when it is without subject matter jurisdiction to issue the prior order.[81] Accordingly, the lawfulness of the Commission's assertion of subject matter jurisdiction to authorize the SSR can be raised in any relevant proceeding, regardless of whether the prior proceeding also addressed that issue.[82]

The Commission lacks subject matter jurisdiction to authorize DP&L to collect additional revenue for generation-related services on a nonbypassable basis. The definition of "retail electric service" includes any service, *i.e.*, generation, transmission, and distribution service, from the point of generation to the point of consumption.[83] The definitions in R.C. 4928.01,[84] in combination with the declarations and limitations in R.C. 4928.03 and 4928.05, make clear that the Commission may not lawfully supervise or regulate any service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio from the point of generation to the point of consumption, once that service is declared competitive, except in very narrowly defined circumstances. From these definitions and limitations, this conclusion holds irrespective

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[80] *Office of Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 16 Ohio St.3d 9, 10 (1985).

[81] *State v. Wilson*, 73 Ohio St.3d 40 (1995); *Grimes v. Grimes*, 173 Ohio App.3d 537 (4th Dist. Ct. App. 2007); *D'Agnese v. Hollern*, 2004 WL 744610 (8th Dist. Ct. App. Apr. 8, 2004).

[82] *State v. Wilson*, 73 Ohio St.3d at 46 ("The issue of a court's subject matter jurisdiction cannot be waived. A party's failure to challenge a court's subject matter jurisdiction cannot be used, in effect, to bestow jurisdiction on a court where there is none.")

[83] R.C. 4928.01(A)(27).

[84] "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following service components: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service." R.C. 4928.01(A)(27). "'Competitive retail electric service' means a component of retail electric service that is competitive as provided under division (B) of this section." R.C. 4928.01(A)(4).

of the force of federal preemption regarding sales for resale transactions and regardless of whether the service is called wholesale or retail.[85]

Since January 1, 2001, the effective date of competitive retail electric service ("CRES"), generation service has been declared a competitive service.[86] Because the General Assembly declared retail electric generation service competitive, that service (which by definition includes any generation service from the point of generation to the point of consumption) is not subject to the Commission's supervision or regulation except as may be specifically permitted by R.C. 4928.141 to 4928.143 (which relate exclusively to the establishment of an SSO for retail electric customers) and R.C. 4905.06, as it provides for public safety and reliability.[87] Additionally, R.C. 4928.05(A) precludes the Commission from regulating such a competitive service under Chapter 4909, Revised Code. Thus, the Commission is barred from using its supervisory powers or the regulatory authority in Chapters 4905, 4909, and 4928, Revised Code, except as specifically noted, to address pricing for any generation service from the point of generation to the point of consumption.

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[85] The Commission can exercise no authority except that authority that has been delegated to it by the General Assembly. To have any jurisdiction over wholesale services, the Commission would, thus, have to find some specific grant of authority by the General Assembly and this fundamental principle is true irrespective of the powers reserved to the federal government. However, the General Assembly could not lawfully delegate authority to the Commission to regulate or supervise wholesale electric transactions because the authority to regulate commerce among the states is reserved to the federal government. U.S. Const., Art. I, § 8, cl. 3.

[86] R.C. 4928.03 provides:

> Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services[86] that the consumers may obtain subject to this chapter from any supplier or suppliers.

[87] R.C.4928.05(A).

The Commission has recognized the limits on its authority to regulate an EDU in its default supplier role. In its decision regarding the closure of AEP-Ohio's Sporn 5 generating facility in which AEP-Ohio sought recovery of the stranded costs resulting from the early closure of a coal fired generation plant, the Commission held:

> *Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code.* Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.
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> …
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> [AEP-Ohio] also requests approval of a rider to collect the costs associated with the closure of Sporn Unit 5. *As discussed above, Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric generation service.*[88]

Thus, the legislative declaration that the generation function is competitive precludes the Commission from exercising jurisdiction to regulate that service from the point of production to the point of consumption and from construction to closure of a generating facility except as specifically authorized in R.C. 4928.141 to R.C. 4928.143. As discussed above, no provision of R.C. 4928.143 provides the Commission a legal basis to authorize the SSR as it did in the ESP II Order.

Because the SSR has the effect of increasing DP&L's compensation for wholesale generation-related services, the Commission also is barred from authorizing

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[88] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider,* Case No. 10-1454-EL-RDR, Finding and Order at 16-17 (Jan. 11, 2012) (emphasis added).

the charge because its jurisdiction is limited to the pricing of retail services. The General Assembly has not and could not lawfully delegate authority to the Commission to regulate or supervise wholesale electric transactions.[89] The Commission's jurisdiction is specifically limited to regulating retail transactions.[90]

In violation of that statutory limitation on the Commission's authority, the Commission in the ESP II Order increased DP&L's wholesale compensation. DP&L is anticipating low generation-related revenue because of low wholesale energy and capacity prices (as well as customer migration). In effect, then, the SSR authorization allows DP&L to increase its total compensation for wholesale generation-related services. This violation of the subject matter jurisdiction is then extended in the Transfer Order even though the alleged cause of the problem, the generation assets that DP&L currently retains, will be divested at some point.

Not only does the Commission lack authority to increase DP&L's compensation for wholesale generation-related services under Ohio law, the Federal Power Act ("FPA") preempts such orders. Under the Supremacy Clause of the United States Constitution, federal law is "the supreme Law of the Land."[91] Rooted in the Supremacy Clause is the doctrine of preemption. Under the doctrine of preemption, "the Supremacy Clause invalidates state laws that 'interfere with, or are contrary to,' federal

[89] See discussion below regarding the preemptive effect of the Federal Power Act on the Commission's subject matter jurisdiction.

[90] R.C. 4928.01(A)(6) & (7).

[91] U.S. Const. Art. VI, cl. 2 (Supremacy Clause).

law."[92] Thus, federal statutes and regulations that are properly enacted and promulgated can nullify state or local actions.[93]

Preemption of state law may be express or implied.[94] A federal law or regulation may impliedly preempt state law or regulation "where Congress has legislated comprehensively, thus occupying the entire field of regulation."[95]

With regard to the pricing of electric generation service, Congress placed the regulation of wholesale electric prices with the Federal Energy Regulatory Commission ("FERC") exclusively.[96] As a result of Congress's enactment of the FPA, "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable."[97] To ensure the lawfulness and reasonableness of wholesale electric energy rates, "the FPA implements a regulatory framework that vests FERC with authority to determine the lawfulness of wholesale energy rates or prices."[98] "It appears well accepted that Congress intended to use the FPA to give FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus

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[92] *Hillsborough County, Florida v. Automated Medical Labs, Inc*., 471 U.S. 707, 712-13 (1985).

[93] *Anderson v. Sara Lee Corp*., 508 F.3d 181, 191 (4th Cir. 2007).

[94] *Morales v. Trans World Airlines*, 504 U.S. 374 U.S. 372, 383 (1992).

[95] *La. Pub. Serv. Comm'n v. F.C.C*., 476 U.S. 355, 368 (1986).

[96] 16 U.S.C. § 824d(a).

[97] *Miss. Power and Light Co. v. Miss., ex rel. Moore*, 487 U.S. 354, 374 (1988).

[98] *PPL Energy Plus, LLC v. Nazarian*, 2013 WL 5432346 *30 (D. Md. Sept. 30, 2013) ("*PPL I*"), *aff'd*, 2014 WL 2445800 (4th Cir. 2014).

intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption."[99]

The SSR authorizes DP&L to recover a reduction in wholesale revenue DP&L anticipates as a result of low wholesale energy and capacity prices (as well as losses resulting from customer migration) so that DP&L may achieve a desired return on equity.[100] Because the SSR operates to increase DP&L's wholesale compensation, its authorization invades a field of exclusive FERC regulation and is void, *i.e.*, its authorization is beyond the lawful authority and jurisdiction of the Commission.[101] It follows that the Commission erred when it concluded that the lawfulness of the SSR could not be "relitigated" since the Commission's lack of subject matter jurisdiction may always be challenged.

Even if the Commission concludes that it has subject matter jurisdiction to authorize an above-market generation-related charge, the Commission's order in the ESP II Order would not preclude the Commission from considering the effect of the generation transfer or sale on the propriety of permitting DP&L to continue to bill and collect the SSR in this proceeding. "[T]he commission has discretion to revisit earlier regulatory decisions and modify them prospectively."[102] Since a determination that the SSR should terminate on the transfer or sale of the generation assets would operate

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[99] *Id*. at *31. *See, also*, *PPL Energy Plus, LLC v. Hanna,* 2013 WL 5603896 at *19 (D. New Jersey October 11, 2013) ("*PPL II*"), *aff'd sub nom., PPL Energy Plus, LLC v.Solomon*, Case No. 13-4330, Slip Op. (3d Cir. Sept. 11, 2014).

[100] ESP II, DP&L Ex. 1 at 13, Ex. CLJ-1.

[101] *PPL II* at *19 (order approving contract increasing the compensation of generation owner for wholesale capacity null and void).

[102] *In re Application of Columbus S. Power Co*., 129 Ohio St.3d 568, 569 (2011) (affirming the Commission's decision to modify the Economic Development Rider without reference to the bill limitations the Commission had previously ordered).

prospectively, the doctrines of res judicata and collateral estoppel do not prevent the Commission from addressing the effect of the divestiture on DP&L's continuing authorization to collect the SSR. The reasons for modifying the SSR so that it terminates when the generation assets are terminated are discussed in the next section.

D. The Transfer Order's authorization permitting DP&L to collect the SSR after the transfer of its generation assets is unreasonable because DP&L's generation assets will be structurally separated from the other business segments of the EDU, a fact inconsistent with the justification for authorizing the SSR in the ESP II Order

In the ESP II Order, the Commission premised its authorization of the SSR on the conclusion that DP&L is not structurally separated and financial shortfalls in one business segment may adversely affect the operations of the other segments. According to the Commission, "[a]lthough generation, transmission, and distribution have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service."[103] As discussed above, this finding ignores the legal requirements of R.C. 4928.03, 4928.05, and 4928.38 that prohibit the Commission from authorizing a rider such as the SSR.[104] Even if those sections did not prohibit the Commission from authorizing the SSR, however, the rationale offered by the Commission for the rider will no longer exist once DP&L transfers or sells the generation assets.

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[103] ESP II Order at 22.

[104] It also ignores the fact that DP&L is required to be functionally separated under a plan that meets the legal and policy outcomes required by R.C. 4928.02 and 4928.17(A).

Once DP&L sells or transfers the assets, DP&L will be a wires company. As a wires-only EDU, it will continue to have the opportunity to seek rates and charges through the traditional regulatory process for its noncompetitive services. Thus, by the Commission's own logic, the rationale offered by the Commission for authorizing the SSR will end once the generation assets are structurally separated. Accordingly, the authorization of the rider after the generation assets are divested is unreasonable, and the Commission should grant rehearing and reverse this part of the Transfer Order.

E. Because the Commission cannot lawfully authorize the SSR, the Commission should grant rehearing and reverse its extension of the recovery of the charge after DP&L divests the generation assets

If the Commission fails to reverse its unlawful order, the injury to DP&L's customers is patent. The Commission has authorized DP&L to bill and collect $110 million annually through December 31, 2016 regardless of whether DP&L owns the generation assets. To avoid the continued injury authorized by the Transfer Order, the Commission should grant rehearing and reverse the unlawful authorization permitting DP&L to continue billing and collecting the SSR after it has transferred the generation assets.

VI. THE COMMISSION SHOULD GRANT REHEARING AND REVERSE ITS ORDER PERMITTING DP&L TO ADJUST ITS ACCOUNTING SO THAT IT MAY BOOK AS A DEFERRED ASSET THE COSTS OF TRANSFER OF THE GENERATION ASSETS

A. The Transfer Order's authorization permitting DP&L to adjust its accounting so that it may book as a deferred asset the costs of transfer of the generation assets is unlawful because the Order exceeds the Commission's authority under R.C. 4928.05 and R.C. 4928.144; furthermore, the Transfer Order's authorization of accounting modifications fails to explain its rationale, respond to contrary positions, and support its decision with appropriate evidence

The Transfer Order authorizes accounting modifications so that DP&L may defer and then seek recovery of the costs associated with the transfer of its generation assets.[105] Because the Commission does not have a lawful basis to authorize deferral accounting of the generation-related costs, the Commission should grant rehearing and deny DP&L's request to authorize the accounting modifications.

For noncompetitive services, the Commission has authority to address an EDU's accounting procedures under R.C. 4905.13. Retail electric generation service, however, is declared competitive.[106] Under R.C. 4928.05(A), a competitive retail electric service supplied by an EDU is not subject to the Commission's accounting supervision under R.C. 4905.13.[107]

R.C. 4928.05 does recognize that the Commission may exercise authority over an EDU's competitive retail generation service as provided by R.C. 4928.141 to 4928.144, but R.C. 4928.144 limits the Commission's authority over the EDU's accounting to deferrals related to a phase-in of a rate or price established as a provision of an SSO under R.C. 4928.141 to R.C. 4928.143.

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[105] Transfer Order at 13.

[106] R.C. 4928.03.

[107] R.C. 4928.05(A)(1) provides in relevant part:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation … by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31 , division (B) of section 4905.33 , and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06 , 4935.03 , 4963.40 , and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

The Commission's limited authority does not provide a basis for the Commission to approve the accounting relief contained in the Transfer Order under either of the options available to the Commission. First, since the transfer costs would be related to competitive generation assets, the Commission cannot lawfully base its order on R.C. 4905.13.

Second, this Application is not seeking authority to phase-in a rate or price established as a provision of an SSO. As noted in DP&L's Application, this proceeding is based on the Commission's authority provided by R.C. 4928.17(E) and the related Commission rules and does not seek to phase-in any rate or price authorized in the ESP II Order.[108] Since the accounting authority DP&L is seeking is unrelated to a phase-in of any rate or price established under R.C. 4928.141 to 4928.143, the Commission is without authority under R.C. 4928.144 to adopt accounting modifications under the limited authority provided to the Commission under that section.[109]

Even if this proceeding were somehow related to a rate or price of an SSO (though it clearly is not), the cost recovery that DP&L seeks could not be approved as a term of a Market Rate Offer ("MRO") or ESP. No provision of R.C. 4928.142, defining the terms of an MRO, authorizes the recovery of generation-related transfer costs. Likewise, the transfer costs could not be recovered in an ESP. As the Commission noted in the *Sporn* case, the Commission may authorize charges for generation-related facilities only to the extent that a provision of R.C. 4928.143(B) allows.[110] Just as there

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[108] Application at 1 (Dec. 30, 2013).

[109] *In re Application of Ohio Power Co*., Slip Op. 2014-Ohio-4271 ¶ 22 (Oct. 7, 2014) ("The commission may phase in only those rates and prices that are established under R.C. 4928.141 to 4928.143).

[110] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) ("*Sporn*").

is no provision permitting the recovery of closure costs of pre-2009 generation facilities, likewise there is no provision that provides the Commission authority to authorize an EDU to bill and collect the costs of transferring a similar generation facility. Because the costs that DP&L is seeking to defer could not be recovered in prices, rates, or charges that may be authorized under either R.C 4928.142 or R.C. 4928.143,[111] there is no basis for the Commission to authorize deferral accounting under R.C. 4928.144.

Additionally, the Transfer Order does not address the intervenors' demonstration that the authorization of accounting modifications is not lawful[112] although the Commission agrees that it is permitting DP&L to defer costs related to the transfer of generation assets.[113] As discussed above, the Commission must "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[114] Having failed to address the intervenors' detailed objections to the recovery of the transfer costs, the Commission erred.

B. The Transfer Order's unlawful authorization permitting DP&L to modify its accounting injures the interests of IEU-Ohio and other intervenors

In violation of Ohio law, the Commission has authorized DP&L to modify its accounting procedures and subsequently seek to recover transfer costs from customers. As a result, the Commission has exposed customers to additional administrative costs and the potential of a charge of $10 million to $45 million when

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[111] *In re Columbus S. Power Co.*, 128 Ohio St.3d at 520 (only those terms authorized by R.C. 4928.143 may be included in an ESP).

[112] The Transfer Order notes the intervenor's comments pointing out that the Commission has no authority to authorize the recovery of the transfer costs. Transfer Order at 13.

[113] *Id.*

[114] *In re Columbus S. Power Co*., 128 Ohio St.3d at 519.

DP&L elects to either transfer or sell the generation assets.[115] Because the Commission has exceeded its lawful authority, the Commission should grant rehearing and reverse its authorization.

VII. THE COMMISSION SHOULD GRANT REHEARING AND REVERSE ITS ORDER PERMITTING DP&L TO RETAIN ITS INTEREST IN OVEC

A. The Transfer Order's authorization permitting DP&L to retain its interest in the OVEC generation assets is unreasonable because DP&L has the current ability to assign its interest to an affiliate or third party

The Commission authorized DP&L to retain its OVEC entitlement, but also directed DP&L to "make a good faith effort to divest its interest."[116] It further ordered that DP&L liquidate the "energy from its OVEC contractual entitlement … into the day-ahead or real-time PJM energy markets, or on a forward basis through a bilateral arrangement."[117] This "requirement" to liquidate the OVEC entitlement will "apply during DP&L's current ESP period and beyond, until the OVEC contractual entitlements can be transferred to the DP&L generation affiliate or otherwise divested, or until otherwise ordered by the Commission."[118] Further, the Commission directed that its Staff or an independent auditor audit DP&L's compliance with the requirement to liquidate the OVEC entitlement.[119] The Commission, however, also left open the opportunity for

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[115] Amended Supplemental Application at 12-13. For reasons that are not explained, the Commission does not note that the cost may be as high as $45 million when it summarizes the potential costs that DP&L may seek. Transfer Order at 12.

[116] Transfer Order at 15.

[117] *Id.*

[118] *Id.*

[119] *Id.*

DP&L to "deviate" from the requirement to liquidate the OVEC entitlement to energy if DP&L requests a modification.[120]

Rather than creating an elaborate regulatory structure to cover its deference to DP&L's failure to exercise its ability to assign the OVEC entitlement, the Transfer Order should direct DP&L to assign the OVEC entitlement immediately. DP&L has not indicated that the entitlement is necessary to serve current SSO customers.[121] Moreover, DP&L will be securing all SSO generation needs through a CBP under the requirements of the ESP II Order by January 1, 2016.[122] Thus, there is no reasonable basis for DP&L to retain its interest in the OVEC entitlement.

Further, DP&L has the current legal means to assign the OVEC entitlement without consent. Under the terms of the Amended and Restated Intercompany Power Agreement ("ICPA"), a Sponsoring Company may assign its ownership interest to a Permitted Assignee upon thirty-days' notice.[123] A Permitted Assignee is either an affiliate with a credit rating of BBB (Standard & Poor's) or Baa3 (Moody's) or an affiliate with a lesser credit rating that agrees in writing to satisfy all of the obligations to OVEC.[124] Additionally, the ICPA permits DP&L to transfer its ownership interest to a

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[120] *Id.* at 15-16.

[121] The fact that the Commission directed DP&L to liquidate its interest in the energy it is eligible to receive from OVEC, moreover, demonstrates that DP&L does not require the OVEC entitlement to support its current SSO requirements.

[122] Second Entry on Rehearing at 18-19 (Mar. 19, 2014).

[123] ICPA at 20-21 (Sections 9.182).

[124] The ICPA at 4 (Section 1.0118) provides:

> *"Permitted Assignee" means a person that is (a) a Sponsoring Company or its Affiliate whose long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, has a Standard & Poor's credit rating of at least BBB- and a Moody's Investors Service, Inc. credit rating of at least Baa*3 (provided that, if the proposed assignee's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such assignee's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard

third party upon notice to the Sponsoring Companies, subject to a thirty-day right of first refusal.[125] Consent is not a necessary condition for an assignment.

For the benefit of customers, the Commission can also avoid a repetition of the efforts of the other EDUs to secure above-market compensation if it reverses its unreasonable order permitting DP&L to retain the OVEC entitlement. DP&L has already previewed for the Commission that it will seek to recover the above-market cost of the OVEC entitlement from its retail distribution customers.[126] The Commission's failure to direct DP&L to divest the OVEC entitlement immediately provides the first step in this apparently inevitable request for the Commission to permit DP&L to recover its out-of-market OVEC related costs.[127] Because there is no legal basis for recovery of out-of-market costs of the OVEC entitlement from customers[128] or legal impediment to the transfer of the OVEC entitlement, the Commission should not indulge DP&L's request to

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> & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); or *(b) a Sponsoring Company or its Affiliate that does not meet the criteria in subsection (a) above, if the Sponsoring Company or its Affiliate that is assigning its rights, title and interests in, and obligations under, this Agreement agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations related to the assigned rights, title and interests to the extent such obligations are not satisfied by the assignee of such rights, title and interests*; provided that, in no event shall a person be deemed a "Permitted Assignee" if counsel for the Corporation reasonably determines that the assignment of the rights, title or interests in, or obligations under, this Agreement to such person could cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer. (Emphasis added.)

[125] ICPA at 21-23 (Section 9.183(a) through (e)).

[126] Supplemental Application at 6-7.

[127] Duke, AEP-Ohio, and the FirstEnergy EDUs have proposals for recovery of out-of-market generation costs through a nonbypassable rider currently before the Commission.

[128] In the briefing in the AEP-Ohio ESP case currently before the Commission, the intervenor and Staff initial and reply briefs detail the extensive legal barriers to and policy problems with the authorization of recovery of the out-of-market costs incurred by an EDU that retains its OVEC entitlement. *See, e.g., In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, *et al*., Initial Brief of Industrial Energy Users-Ohio at 3-36 (July 23, 2014).

retain it. Accordingly, the Commission should grant rehearing and reverse its Order authorizing DP&L to retain the OVEC entitlement.

B. The Transfer Order's authorization permitting DP&L to retain its interest in the OVEC generation assets is unlawful because the Order fails to explain its rationale, respond to contrary positions, and support its decision with appropriate evidence

The only explanation by the Commission for permitting DP&L to retain the OVEC entitlement is that its orders regarding OVEC "will ensure that the divestiture of DP&L's generation assets is substantially completed, while granting DP&L and the Commission flexibility for DP&L to divest its interest in OVEC at a later date."[129] The Commission does not provide any explanation as to why DP&L cannot divest the OVEC entitlement immediately under the terms of the ICPA discussed above. It also fails to explain why "flexibility" is needed when DP&L rests its whole case for retaining the OVEC entitlement on an excuse that it cannot secure a consent it does not need. As discussed above, the Commission must "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[130] When it approved DP&L's request to retain the OVEC entitlement, it failed to do so. The Commission, therefore, should grant rehearing and explain its reasons. When it addresses the merits, it also should direct DP&L to divest immediately its interest in the OVEC entitlement.

VIII. CONCLUSION

Because the Application remains incomplete, seeks unlawful and unreasonable terms, and proposes to alter the Commission's jurisdiction over generation assets, the

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[129] *Id*. at 16.

[130] *In re Columbus S. Power Co*., 128 Ohio St.3d at 519.

Commission erred by failing to order a hearing. The Commission then compounded the procedural error by authorizing terms exposing customers to tens of millions of dollars in generation-related charges. At a minimum, the Commission should grant rehearing and remove the unlawful terms from its Order authorizing continued billing and collection of the SSR, accounting modifications, and retention of the OVEC entitlement. Further, the Commission should direct DP&L to file the information required by Commission rules so that the Commission can properly review the terms and conditions of the divestiture. Once DP&L has complied with Commission rules, the Commission may then properly determine whether the Application is not unjust, unreasonable, or not in the public interest, and parties will be afforded a proper opportunity to address the merits of a lawful application and the need for further evidentiary hearings.

Respectfully submitted,

/s/ Frank P. Darr
Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

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 *Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 17th day of October 2014 *via* electronic transmission.

/s/ Frank P. Darr
Frank P. Darr

Judi L. Sobecki
The Dayton Power & Light Company
1065 Woodman Drive
Dayton, Ohio 45432
judi.sobecki@dplinc.com

Charles J. Faruki
Jeffrey S. Sharkey
Faruki Ireland & Cox P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
cfaruki@ficlaw.com
jsharkey@ficlaw.com

ON BEHALF OF THE DAYTON POWER AND LIGHT COMPANY

Bruce J. Weston
Edmund Berger
Maureen R. Grady
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
edmund.berger@occ.ohio.gov
maureen.grady@occ.ohio.gov

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Kimberly W. Bojko
Jonathan A. Allison
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Allison@carpenterlipps.com

OH BEHALF OF OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Rocco D'Ascenzo
Duke Energy Ohio, Inc.
139 East Fourth Street – 1303 Main
Cincinnati, Ohio 45202
Rocco.d'ascenzo@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com

ON BEHALF OF OHIO ENERGY GROUP

Mark A. Whitt
Andrew J. Campbell
Gregory L. Williams
Whitt Sturtevant LLP
88 East Broad Street
Columbus, Ohio 43215
whit@whitt-sturtevant.com
Campbell@whitt-sturtevant.com
Williams@whitt-sturtevant.com

Vincent Parisi
Lawrence Friedeman
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, Ohio 43016
vparisi@igsenergy.com
lfriedeman@igsenergy.com
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F. Lang
N. Trevor Alexander
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
jlang@calfee.com
talexander@calfee.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

M. Howard Petricoff
Gretchen L. Petrucci
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43216-1008
mhpetricoff@vorys.com
glpetrucci@vorys.com

ON BEHALF OF THE RETAIL ENERGY SUPPLY ASSOCIATION

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45840
cmooney@ohiopartners.org

ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Anne M. Vogel
American Electric Power Service Corporation
155 W. Nationwide Blvd., Suite 500
Columbus, Ohio 43215
amvogel@aep.com

ON BEHALF OF AEP GENERATION RESOURCES INC.

Christopher A. Walker (Reg. No. 0040696)
Van Kley & Walker, LLC
137 N. Main St., Suite 316
Dayton, Ohio 45402
cwalker@vankleywalker.com

ON BEHALF OF THE CITY OF MIAMISBURG

Joseph M. Clark (Counsel of Record)
Direct Energy
21 East State Street, 19th Floor
Columbus, Ohio 43215
joseph.clark@directenergy.com

ON BEHALF OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

Amy B. Spiller
Deputy General Counsel
Jeanne Kingery (Counsel of Record)
Associate General Counsel
Duke Energy Commercial Asset
Management, Inc.
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com

ON BEHALF OF DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

Thomas W. McNamee
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
thomas.mcnamee@puc.state.oh.us

ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Bryce A. McKenney
Gregory Price
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
bryce.mckenney@puc.state.oh.us
greg.price@puc.state.oh.us

ATTORNEY EXAMINERS

Summary: Application for Rehearing and Memorandum in Support electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio