

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan	)	

In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 16-396-EL-ATA
Approval of Revised Tariffs	)	

In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority	)	
Pursuant to Ohio Rev. Code § 4905.13	)	

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**MOTION BY INDUSTRIAL ENERGY USERS-OHIO FOR AN ORDER DENYING THE  
REQUEST FOR WAIVER OF THE REQUIREMENT THAT TRANSMISSION COSTS  
BE RECOVERED THROUGH A BYPASSABLE RIDER AND RELATED ORDERS  
AND  
MEMORANDUM IN SUPPORT**

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Industrial Energy Users-Ohio (“IEU-Ohio”) moves for an order denying the request of The Dayton Power and Light Company (“DP&L”) for a waiver of Rule 4901:1-36-04(B) of the Ohio Administrative Code (“OAC”) that requires transmission costs be recovered through a bypassable rider.

IEU-Ohio further moves for an order directing DP&L to file transmission tariff sheets that conform to federal law, the applicable Open Access Transmission Tariff (“OATT”), and Rule 4901:1-36-04(B), OAC. In particular, the order should direct DP&L to amend its transmission tariff sheets to remove those restrictions that prevent retail customers from securing transmission service directly or indirectly from PJM Interconnection, LLC (“PJM”).

The reasons supporting this Motion are set out in the accompanying memorandum.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION**

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**I. INTRODUCTION**

On February 22, 2016, DP&L filed an application (“Application”) to establish a standard service offer (“SSO”) in the form of an electric security plan (“ESP”). As part of the proposed ESP, DP&L seeks continued authorization of a nonbypassable transmission rider, the Transmission Cost Recovery Rider-Nonbypassable (“TCRR-N”) and terms that permit only DP&L to bill for transmission services secured on behalf of retail customers by competitive retail electric service (“CRES”) providers based on the billing determinants contained in its transmission rider. DP&L also proposes that the charges billed and collected from demand-metered customers be based on either monthly on-peak demand, monthly off-peak demand, or a demand ratchet calculated on the customer’s demand over the previous eleven months.<sup>1</sup> In support of its request for continued authorization of the TCRR-N, DP&L seeks a waiver of Rule 4901:1-36-04(B),

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<sup>1</sup> Application, Proposed Tariff Schedules, Tariff Sheets T3 and T8 (Feb. 22, 2016).

OAC, which requires that a transmission rider be avoidable by all customers that choose alternative generation suppliers.<sup>2</sup> In support of its request for a waiver, DP&L states only that the Public Utilities Commission of Ohio (“Commission”) has previously authorized a nonbypassable transmission rider.<sup>3</sup>

The Commission should deny the requested waiver for two reasons.

First, the Commission is preempted by the Federal Power Act (“FPA”) from authorizing a transmission rider that conflicts with the PJM OATT. Under the FPA, the Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction of terms and conditions of retail transmission services applicable to retail customers in Ohio. Because FERC’s jurisdiction over the retail transmission tariff is exclusive, the Commission, without FERC approval, cannot lawfully authorize retail transmission tariff sheets that vary from the PJM OATT. The PJM OATT provides that customers may secure transmission service directly from PJM or indirectly through a CRES provider. The OATT also provides a billing determinant based on the customer’s zonal annual peak demand. DP&L’s Application, however, seeks authorization of tariff provisions that would prevent retail customers from contracting with PJM under the PJM OATT and impose billing determinants that vary from the PJM billing determinants for Network Integration Transmission Service (“NITS”) and other listed services. Accordingly, the Commission cannot lawfully grant the requested waiver.

Second, DP&L has not presented lawful and reasonable basis for granting a waiver of the requirement that a transmission rider be bypassable. A waiver can be granted only on a showing of good cause. Under this standard, DP&L must show a

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<sup>2</sup> Application at 18.

<sup>3</sup> *Id.*

substantial reason for a waiver, but it has alleged only that the waiver should be granted because the Commission previously approved the current nonbypassable rider. Given that the proposed rider is unlawful under federal law, reliance on past practice is not a demonstration of a reasoned basis for a waiver. Moreover, the transmission rider in its proposed form will cause harm to all customers by shifting cost responsibility and frustrating the price signals that could lead to reduced transmission expenditures. Accordingly, DP&L has failed to state a ground that will support a waiver.

Because the requested waiver is both unlawful and unsupported, the Commission should deny DP&L's request for waiver and order DP&L to file proposed transmission tariff sheets that conform with the applicable PJM OATT and Rule 4901:1-36-04(B), OAC.

**II. DP&L'S REQUEST FOR WAIVER SHOULD BE DENIED BECAUSE AUTHORIZATION OF THE TCRR-N WOULD UNLAWFULLY DEPRIVE CUSTOMERS OF THE OPPORTUNITY TO SEEK TO SECURE TRANSMISSION SERVICE UNDER THE PJM OATT ON TERMS AND CONDITIONS APPROVED BY FERC**

**A. FERC has exclusive jurisdiction to set the transmission rates of retail customers taking generation services in states that have adopted retail choice**

In Order No. 888,<sup>4</sup> FERC "clarifie[d] Federal/state jurisdiction over transmission in interstate commerce and local distribution"<sup>5</sup> and adopted rules requiring utilities to adopt an OATT. FERC also concluded that its jurisdiction under Section 201(b) of the FPA extends to the provision of transmission service when the sale of retail electric

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<sup>4</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Stats. & Regs., Regs. Preambles, Jan. 1991—June 1996, ¶ 31,036, p. 31,632, 61 Fed. Reg. 21540 (1996) ("Order No. 888"). References are to the version of Order No. 888 available at <http://www.ferc.gov/legal/maj-ord-reg/land-docs/order888.asp>.

<sup>5</sup> Order No. 888 at 4.

service is unbundled: "the unbundled transmission service involves only the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission."<sup>6</sup> Accordingly, FERC concluded, "[FERC's] assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail wheeling program, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission and public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205."<sup>7</sup>

FERC further required that retail customers will take transmission service pursuant to an OATT.<sup>8</sup> As guidance, the Order included as an appendix a Pro Forma Open Access Transmission Tariff ("Pro Forma OATT") containing non-price minimum terms and conditions of non-discriminatory transmission.<sup>9</sup> As set out in the Pro Forma OATT, unbundled transmission service is available to Eligible Customers.<sup>10</sup> Eligible Customers include "any retail customer taking unbundled Transmission Service pursuant to a state retail access program."<sup>11</sup>

Although FERC has exclusive jurisdiction over retail transmission service in states that had unbundled retail electric service, FERC provided the opportunity for state commissions to seek authorization of a retail tariff, but required that the separate retail tariff be approved by FERC and comply with the policies and rate outcomes

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<sup>6</sup> *Id.* at 431.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 440.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*, Appendix D, Open Access Tariff Original Sheet No. 37 (availability of service agreements).

<sup>11</sup> *Id.*, Appendix D, Open Access Tariff Original Sheet No. 10 (definition of Eligible Customer).



contained in Order No. 888. It noted that “if the unbundled retail wheeling occurs as part of a state retail access program, it may be appropriate to have a separate retail transmission tariff to accommodate the design and special needs of such programs. In such situations, the Commission will defer to state requests for variations from the FERC wholesale tariff to meet these local concerns, *so long as the separate retail tariff is consistent with the Commission's open access policies and comparability principles reflected in the tariff prescribed by this Final Rule. In addition, rates must be consistent with our Transmission Pricing Policy Statement, and the guidance herein concerning ancillary services.*”<sup>12</sup> FERC required that parties file an application for approval of a separate tariff.<sup>13</sup>

Based on demonstrations that its policies are not frustrated, FERC has permitted modifications “consistent with or superior to” the Pro Forma Tariff to accommodate the implementation of retail wheeling.<sup>14</sup> The Commission, however, has rejected attempts to maintain noncompliant provisions on a going forward basis, stating, “all transactions with new retail customers, or revisions to the arrangements with existing customers, must take place at the rates, and pursuant to the terms and conditions, of [Transmission Owner's] open access tariff on file with [FERC].”<sup>15</sup>

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Entergy*, 91 FERC ¶ 61,155 at 61591 (May 18, 2000) (approving modifications of the Entergy OATT to implement retail pilot program in Texas). In response to applications for modifications, FERC has approved the use of a designated agent, allocation methodologies for the apportionment of responsibility for ancillary services, the submission by an alternative supplier of one application for all its retail customers, and the waiver of a deposit requirement. *Allegheny Power Serv. Corp.*, 81 FERC ¶ 61,271 at 62342 (Nov. 26, 1997) (summarizing changes permitted in OATT to implement retail wheeling programs). To accommodate a pilot retail wheeling program, FERC permitted a variation from the demand based charge required by the OATT, but required a demonstration that a utility properly converted the charges applicable to customers operating without demand meters to a retail rate. *Id.*

<sup>15</sup> *NY State Elec. and Gas Corp.*, 77 FERC ¶ 61,044 at 61154 (Oct. 18, 1996).

FERC's assertion of jurisdiction over retail transmission service was affirmed by the United States Supreme Court in *New York v. FERC*.<sup>16</sup> Based on Section 201's grant of jurisdiction over the "transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce," the Court concluded, "This statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities—transmitting and selling. It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid."<sup>17</sup>

Following its decision to require public utilities to provide open access to retail transmission services in those states that had unbundled retail electric service in Order No. 888, FERC sought to encourage the creation of regional transmission organizations ("RTO") that would advance several policies: "Appropriate regional transmission institutions could: (1) improve efficiencies in transmission grid management; (2) improve grid reliability; (3) remove remaining opportunities for discriminatory transmission practices; (4) improve market performance; and (5) facilitate lighter handed regulation."<sup>18</sup> As a principal governing RTOs, FERC sought to assure that customers would have uniform access to transmission facilities in the region:

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<sup>16</sup> 535 U.S. 1 (2002).

<sup>17</sup> *Id.* at 19-20.

<sup>18</sup> Regional Transmission Organizations, FERC Stats & Regs. ¶31,089 (Jan. 6, 2000) (Order 2000 at 3) (references are to a copy of the order available at <http://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf>).

With the RTO the sole provider of transmission service, transmission customers have a nondiscriminatory and uniform access to regional transmission facilities. This type of access cannot be assured if customers are required to deal with several transmission owners with differing tariff terms and conditions. As noted in the NOPR, the RTO must be the provider of transmission service in the strong sense of the term. Mere monitoring and dispute resolution are insufficient to meet the requirements of this standard.<sup>19</sup>

Under rules adopted in Order No. 2000, the RTO is required to be the sole provider of transmission service over facilities under its control and administer its own transmission tariff.<sup>20</sup>

PJM is an RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia and has a FERC-approved OATT (the "PJM OATT"). Under the PJM OATT, PJM is the Transmission Provider, through its Office of Interconnection.<sup>21</sup> The parties under the tariff are the Transmission Provider and the Transmission Customer.<sup>22</sup> The Transmission Customer is any Eligible Customer that executes a Service Agreement or requests in writing that the Transmission Provider file with FERC a proposed unexecuted Service Agreement to receive transmission service.<sup>23</sup> An Eligible Customer includes any retail customer taking unbundled transmission service pursuant to a state

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<sup>19</sup> *Id.* at 330.

<sup>20</sup> 18 C.F.R. § 35.34(k)(1).

<sup>21</sup> PJM OATT, § 1.46.

<sup>22</sup> *Id.*, § 1.32.

<sup>23</sup> *Id.*, § 1.45.

requirement that the Transmission Provider or a Transmission Owner offer the transmission service.<sup>24</sup>

PJM is responsible for providing NITS to Network Customers.<sup>25</sup> "Network Integration Transmission Service allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Network Load in a manner comparable to that in which each Transmission Owner utilizes the Transmission System to serve its Native Load Customers."<sup>26</sup> Under the PJM OATT, PJM and Transmission Owners are compensated for the provision of services and facilities needed by PJM to provide NITS, Administration, and Ancillary Services to Network Customers.

Network Customers are those customers that are Eligible Customers that seek NITS for designated Network Loads. The Eligible Customer may be a generation owner or a purchaser of generation.<sup>27</sup> An Eligible Customer also includes a retail customer that takes electric service on an unbundled basis under a state required retail access program.<sup>28</sup> To secure transmission service, an Eligible Customer must make an application<sup>29</sup> and "arrang[e] for the delivery of its energy from the delivery point or interconnection."<sup>30</sup>

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<sup>24</sup> *Id.*, § 1.11(ii).

<sup>25</sup> *Id.*, Part III, Preamble.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, § 30.7.

<sup>28</sup> *Id.*, § 1.11.

<sup>29</sup> *Id.*, §§ 29.1 & 29.2.

<sup>30</sup> *Id.*, § 29.4.

A Network Customer is required to pay PJM Settlement as the agent for the Transmission Provider for Ancillary Services, PJM Administrative Service, Transmission Enhancement Charges, and a Monthly Demand Charge.<sup>31</sup>

The Monthly Demand Charge is the sum of all monthly zone and non-zone demand charges assignable to the Network Customer for the Zone Network Loads, including losses.<sup>32</sup> The retail customer's Zone Network Load is determined at the time of the annual peak of the Zone in which the load is located (*i.e.*, a 1CP basis).<sup>33</sup>

The PJM OATT is a tariff on file with FERC. As such, the terms and conditions of the tariff may not be altered except as permitted by FERC.<sup>34</sup> Based on its exclusive jurisdiction, FERC has determined that unbundled retail transmission is “Commission-jurisdictional,”<sup>35</sup> has required “consistent application of the tariff rate” contained in the OATT, and has required that charges to retail wheeling customers be based on the demand use of retail customers.<sup>36</sup>

**B. Ohio law requires an electric distribution utility (“EDU”) to provide unbundled retail electric services.**

Because Ohio has directed that retail electric service is unbundled and generation service is a competitive retail electric service, the provisions of the PJM OATT for transmission service are available to Ohio’s retail transmission customers.

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<sup>31</sup> *Id.* §§ 34 & 34.1.

<sup>32</sup> *Id.*, § 34.1.

<sup>33</sup> *Id.*

<sup>34</sup> 16 U.S.C. § 824d(d).

<sup>35</sup> *PECO Energy Co.*, 91 FERC ¶ 61,030 at 61106 (Apr. 12, 2000) (rejecting a filing to add terms to its retail supplier tariff related to retail load forecasting and scheduling).

<sup>36</sup> *Montaup Elec. Co.*, 80 FERC ¶61,288 at 62025 (Sept. 12, 1997). For those customers that are not demand metered, the Commission has authorized the use of an energy billing determinant in lieu of a demand determinant. *Id.*

As part of the restructuring of the regulation of retail electric service, Ohio has declared that retail electric generation service is a competitive retail electric service, that retail customers may secure the service from any supplier or suppliers, and that prices for retail competitive electric services be separately priced and itemized on the customer's bill.<sup>37</sup> As part of the transition from the provision of retail electric service from the traditional price regulation approach to the unbundled approach, each EDU was required to seek Commission approval of a rate unbundling plan that specified the unbundled components for electric transmission, generation, and distribution service.<sup>38</sup>

The unbundled transmission component was required to be equal to the tariff rates determined by FERC that were in effect on the date of the approval of the transition plan.<sup>39</sup> Once the Commission approved the transition plan, the EDU was required to file the unbundled rate components and these schedules remained in effect during the Market Development Period. Although the Market Development Period for an EDU was required to end no later than December 31, 2005,<sup>40</sup> Commission rules continue to provide for separate identification of each charge of a CRES provider if the EDU bills the customer on a consolidated basis for competitive and noncompetitive services.<sup>41</sup>

Additionally, transmission owners located in Ohio on or after the starting date of competitive retail electric service were required to be a member of a federally approved independent transmission operator and transfer control of the transmission owner's

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<sup>37</sup> R.C. 4928.03, 4928.07, & 4928.31

<sup>38</sup> R.C. 4928.31(A)(1).

<sup>39</sup> R.C. 4928.34(A)(1).

<sup>40</sup> R.C. 4928.40.

<sup>41</sup> Rule 4901:1-10-22, OAC.

transmission facilities to the transmission operator.<sup>42</sup> An electric utility was also required to provide an independent transmission plan as part of its transition plan or, if the utility did not do so, to be a member of, and transfer control of transmission facilities it owned or controlled to, one or more qualifying transmission entities by December 31, 2003.<sup>43</sup> The transmission entity is required to be approved by FERC, separate control of the transmission facilities from control of generation facilities, implement to the extent reasonably possible policies and procedures designed to minimize pancaked transmission rates and improve service reliability within the state, be designed to achieve the objectives of an open and competitive electric generation market place, eliminate barriers to market entry and preclude control of bottleneck facilities in the provision of retail electric service, maintain a governance structure to ensure the entity is independent of the users of the transmission facilities, be capable of maintaining real-time reliability of the electric transmission system, ensure comparable and nondiscriminatory transmission access and necessary services, minimize system congestion, and address real and potential transmission constraints.<sup>44</sup>

R.C. 4928.05(A)(2) authorizes the Commission to provide for the recovery through a reconcilable rider in an EDU's rates, all transmission and transmission-related costs, imposed on or charged to the utility by the FERC or an RTO, independent system operator, or similar organization approved by FERC.<sup>45</sup> The Commission has also implemented rules governing the authorization of a transmission rider and required that

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<sup>42</sup> R.C. 4928.12(A).

<sup>43</sup> R.C. 4928.35(G).

<sup>44</sup> R.C. 4928.12(B).

<sup>45</sup> R.C. 4928.05(A)(2).

the transmission rider be bypassable. Rule 4901:1-36-04(B), OAC, provides, “The transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers.”

**C. The Commission is without authority to authorize transmission terms and conditions that are nonbypassable and that vary from the terms and conditions available under the PJM OATT**

In DP&L’s application for an SSO in 2012, DP&L sought authorization for a nonbypassable transmission rider, the TCRR-N.<sup>46</sup> Over the objection of IEU-Ohio, the Commission authorized the nonbypassable rider.<sup>47</sup> In this Application, DP&L seeks to continue the unlawful terms and conditions of the TCRR-N that prevent retail customers from securing transmission service directly or indirectly from PJM at terms and conditions contained in the PJM OATT.

Under the proposed nonbypassable rider, DP&L will bill and collect for NITS and other listed transmission services billed to it by PJM. For retail customers that are demand metered, DP&L will calculate the monthly charge for transmission services based on “billing demand.”<sup>48</sup> “Billing Demand shall be determined as defined on the applicable Electric Distribution Service Tariff Sheet Nos. D17 through D25.”<sup>49</sup> For demand metered customers, billing demand will be based on the greatest of 75% of off-peak demand during the billing month, 100% of on-peak demand during the billing

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<sup>46</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 12 (Sept. 4, 2013).

<sup>47</sup> *Id.* at 36.

<sup>48</sup> Dayton Power and Light Company, Tenth Revised Tariff Sheet No. T8, Page 3, viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Transmission.pdf>.

<sup>49</sup> *Id.*



month, or the higher of on or off-peak demand during certain months over the prior eleven month period.<sup>50</sup>

A customer cannot avoid the terms and conditions established by DP&L by contracting with a CRES provider. Under the DP&L tariff, a CRES provider is responsible for securing transmission service from PJM for the load the CRES provider serves, but the retail customer served by the CRES provider will be directly billed by DP&L for NITS and other transmission and ancillary services based on the billing determinants imposed by the TCRR-N.<sup>51</sup>

The authorization of the extension of the TCRR-N and related tariff sheet provisions conflict with federal requirements under the exclusive authority of FERC.

First, the proposed tariff sheets effectively preclude all customers from contracting with PJM or a CRES provider for retail transmission service under the PJM OATT. Under the TCRR-N, retail customers must pay DP&L for transmission services. The nonbypassable nature of the rider thus exposes them to double billing if they were to contract directly with PJM for transmission services. Further, DP&L precludes the customer from securing transmission service indirectly through a CRES provider since DP&L retains billing authority for load served by CRES providers and bills retail customers under its nonbypassable tariff for transmission services.

Second, the retail transmission rider produces a billing outcome that varies from the PJM OATT. The PJM OATT provides that the billing determinant for an Eligible

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<sup>50</sup> *Id.*, Thirteenth Revised Sheet No. D19 (Secondary), Thirteenth Revised Sheet No. D20 (Primary), Eleventh Revised Tariff Sheet No. D21 (Primary Substation), and Tenth Revised Tariff Sheet No. D22 (High Voltage), viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Transmission.pdf>.

<sup>51</sup> *Id.*, Third Revised Sheet No. T3, page 2. Currently, DP&L also has a bypassable transmission tariff that is set at 0. *Id.*, Fourteenth Revised Tariff Sheet No. T9.

Customer is the 1CP of the customer, but the TCRR-N demand billing determinant for a demand-metered customer is based on a monthly off-peak or on-peak demand billing determinant or a demand ratchet. Because a customer's monthly peak demand or the minimum billing demand will have little, if any, relationship to the 1CP, the TCRR-N and related provisions conflict with the billing determinants of the PJM OATT and will cause significant shifts in revenue responsibility among customers relative to the revenue responsibility produced by the PJM OATT.

Third, DP&L has not alleged that it has sought and received FERC approval for a retail transmission tariff that varies from the PJM OATT. Moreover, it would be unlikely that DP&L could secure the necessary FERC approval because the pricing and other terms presented by DP&L in this Application conflict with the PJM OATT. Because of the obvious conflict with the PJM OATT, the proposed tariff sheets are not “consistent with or superior to” the PJM OATT.

In summary, FERC has exclusive jurisdiction to authorize retail transmission tariffs. Under that authority, FERC has authorized the PJM OATT. The PJM OATT is controlling and authorizes eligible customers to secure transmission service directly or indirectly from PJM under terms and conditions contained in the PJM OATT. DP&L has not sought relief from FERC for a retail transmission tariff that varies from the PJM OATT. Because the retail transmission tariff is within the exclusive jurisdiction of FERC and no relief has been sought, the Commission is not authorized to act on DP&L’s request to alter the terms and conditions that DP&L retail customers may elect under the PJM OATT. DP&L’s request for a waiver so that it can extend a retail transmission

tariff that conflicts with the PJM OATT and produces revenue outcomes that conflict with those produced by the PJM OATT, therefore, must be rejected.

**III. DP&L'S REQUEST FOR A WAIVER OF RULE 4901:1-36-04, OAC, SHOULD BE DENIED BECAUSE DP&L HAS NOT AND CANNOT DEMONSTRATE GOOD CAUSE FOR A WAIVER OF THE RULE.**

The Commission may waive the application of a rule related to the transmission rider if the rule is not mandated by statute only for good cause.<sup>52</sup> Because the Commission has not defined what constitutes “good cause,” the term should be defined by the ordinary and natural definition of the term.<sup>53</sup> Under the ordinary and natural definition of the phrase, “good cause” means a “[s]ubstantial reason, one that affords legal excuse.”<sup>54</sup> Although DP&L seeks a waiver of Rule 4901:1-36-04, OAC, it offers no substantial reason for granting the waiver.

The Application states only that the Commission has previously authorized the TCRR-N and that DP&L intends to continue the TCRR-N during its next ESP.<sup>55</sup> That statement falls short of any explanation as to a cause, good or otherwise, for granting a waiver of the Commission’s requirement that the transmission rider be bypassable, particularly because the current rider is unlawful, as discussed above.

Moreover, the grant of a waiver and subsequent authorization of the DP&L nonbypassable rider and related provisions will continue transmission provisions that are inferior to the PJM OATT. As noted above, granting DP&L’s request will improperly

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<sup>52</sup> Rule 4901:1-36-02(B), OAC.

<sup>53</sup> *State v. Brown*, 38 Ohio St.3d 305, 308 (1988).

<sup>54</sup> *Id.* (internal quotation marks removed). In a similar vein, the Commission has found good cause for conducting a hearing on a showing by the Staff of a substantial justification for doing so. See *In re Matter of the 2010 Electric Long-Term Forecast Report of Duke Energy Ohio, Inc.*, Case No. 10-503-EL-FOR, Entry at 1-2 (July 15, 2010).

<sup>55</sup> Application at 18.

shift costs. In addition to the rate impacts effected by the TCRR-N and related provisions, the transmission provisions sought by DP&L also eliminate or obscure the ability of IEU-Ohio members and other customers to apply their demand response capabilities. Under the TCRR-N, customers with the ability to lower their demands at times of the system peak have no incentive to do so since they will be billed based on their monthly “billing demand.” Because DP&L’s proposed transmission tariff provisions disregard the opportunities customers may have to apply their demand response capabilities, the TCRR-N and related provisions will deprive IEU-Ohio members and all customers of the reliability and associated reduced transmission investment benefits that can be achieved if bills for unbundled transmission service were determined by the FERC-approved 1CP billing determinant.

Because DP&L has not alleged a substantial reason to grant the waiver and a waiver would continue the harms already embedded in the current rider, DP&L has not and cannot demonstrate that good cause supports a waiver of the requirement that the transmission rider be bypassable.

**IV. THE COMMISSION SHOULD DENY DP&L’S REQUEST FOR WAIVER OF RULE 4901:1-36-04(B), OAC, AND DIRECT DP&L TO AMEND TARIFF SHEETS T3 AND T8 SO THAT THEY COMPLY WITH FEDERAL AND STATE LAW**

As discussed above, the request for a waiver seeks an outcome that is unlawful and unsupported. Accordingly, the Commission should deny DP&L’s request for a waiver of the requirement that the transmission rider be bypassable, as required by Rule 4901:1-36-04(B), OAC.

Additionally, the Commission should order DP&L to amend its transmission tariff sheets, particularly Sheet Numbers T3 and T8, to remove restrictions that prevent retail

customers from securing transmission service directly or indirectly from PJM. The tariff sheets should conform to the requirement that the transmission rider be avoidable by all customers taking service from CRES providers. Moreover, the Commission should direct DP&L to delete those provisions of its transmission tariff sheets that require DP&L to bill and collect for transmission service for those services secured for the retail customer load served by a CRES provider.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion by Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 11<sup>th</sup> day of March 2016, *via* electronic transmission.

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Summary: Motion by Industrial Energy Users-Ohio for an Order Denying the Request for Waiver of the Requirement that Transmission Costs be Recovered Through a Bypassable Rider and Related Orders and Memorandum in Support electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio