BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 16-0395-EL-SSO
In the Matter of Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 16-0396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13.	))))	Case No. 16-0397-EL-AAM
In the Matter of Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.	)))	Case No. 12-426-EL-SSO
In the Matter of Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
In the Matter of Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case No. 12-428-EL-AAM
In the Matter of Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

OHIO PARTNERS FOR AFFORDABLE ENERGY AND THE EDGEMONT NEIGHBORHOOD COALITION'S MEMORANDUM CONTRA

I. Introduction

Ohio Partners for Affordable Energy, an intervenor in all the above-captioned dockets, and the Edgemont Neighborhood Coalition, an intervenor in the 2012 dockets, (together "Low-Income Advocates") respectfully submit to the Public Utilities Commission of Ohio ("Commission") this Memorandum Contra the Motion of The Dayton Power and Light Company ("DP&L") to implement the Service Stability Rider Extension ("SSR- E") on January 1, 2017. DP&L claims that the Commission found in Case No. 12-426-EL-SSO, et al., that DP&L should have the opportunity to implement the SSR-E and recover $45.8 million in the first four months of 2017 if its financial integrity remains compromised after its Service Stability Rider ("SSR") expires on December 31, 2016. DP&L claims that it has met the conditions set forth by the Commission to implement the SSR-E. Motion at 3. DP&L asks the Commission to allow DP&L to implement the SSR-E. Motion at 6.

II. An SSR-E proceeding is necessary for implementation of the SSR-E.

The Commission set forth conditions to ensure that the SSR charges were based on current and reliable information so that the SSR-E would continue to have the effect of stabilizing or providing certainty regarding retail electric service without granting DP&L significantly excessive earnings. Case No. 12-426-EL-SSO, et al., Opinion and Order (September 4, 2013) at 27. The Commission found that an SSR-E proceeding would provide more clear and reliable data for the later months of DP&L's Electric Security Plan ("ESP"). Id DP&L claims that it has complied or substantially complied with the Commission's conditions so that the SSR-E may be implemented, apparently on the basis of its Motion alone. Motion at 6.

Even in the passages from the Commission's Opinion and Order in Case No. 12-426-EL-SSO, et al., cited by DP&L, the Commission clearly contemplated an SSR-E proceeding to determine if DP&L has complied, or substantially complied,

with the Commission's conditions. The Commission stated that the SSR-E proceeding "will provide more clear and reliable data for the later months of the ESP, which should alleviate concerns raised by intervenors and Staff." Opinion and Order, Case No. 12-426-EL-SSO, et al. (September 4, 2013) at 27.

DP&L's motion states that it has complied or substantially complied with the Commission's conditions and includes an attachment of the Testimony of its witnesses Craig L. Jackson and Sharon Schroder in Case No. 16-395-EL-SSO, et al., who testify that DP&L has complied or substantially complied with the Commission's conditions. This is not evidence upon which the Commission may base any findings. DP&L has the burden of proving that it has complied or substantially complied with the conditions and cannot meet that burden by simply filing pleadings. If the motion merely constitutes DP&L's desire to commence an SSR-E proceeding, the Commission may commence such a proceeding, but the motion itself provides no basis upon which the Commission can find that its conditions have been met. The Commission may make such findings only after an evidentiary hearing.

III. The SSR charge is an unlawful and unreasonable transition charge.

While there is a need for an SSR-E proceeding if there is to be an SSR-E, the Commission must now address the basis upon which the Commission allowed the SSR. Many intervenors, including the Low-Income Advocates, objected to the establishment of the SSR as a generation-related transition charge. The intervenors argued that DP&L was permitted to collect transition revenues in its electric transition plan ("ETP") proceeding, but the period for the collection of transition revenues had ended. Case No. 12-426-EL-SSO, Opinion and Order at 19-21. The Commission found that the SSR was not a transition charge using the following language at 22:

> Moreover, our holding today is consistent with our decision in the *AEP ESP II Case*, in which we determined that AEP-Ohio's proposed RSR did not allow for the collection of inappropriate transition revenues or stranded costs. *AEP ESP II Case*, Opinion and Order (August 8, 2012), at 32.

The Commission's finding in the AEP-Ohio case, consistent in the Commission's own words, with its finding approving DP&L's SSR, has now been overturned by the Ohio Supreme Court. *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608.

The Supreme Court found that the fact that AEP-Ohio had not explicitly sought transition revenues did not foreclose a finding that AEP-Ohio was receiving the equivalent of transition revenues under the guise of the RSR. The Court noted that the General Assembly in enacting R.C. 4928.38 barred the receipt of transition revenues *or any equivalent revenues* by an electric utility after 2010. (Id., Emphasis in the Original at 8). By inserting the phrase "any equivalent revenues," the General Assembly demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market but also any revenue that amounts to transition revenue by another name. Moreover, the Court, after looking at the nature of the revenue recovered under AEP-Ohio's RSR, found that the record supported a finding that AEP-Ohio was receiving the equivalent of transition revenues through the RSR. Id. While the Court allowed some charges to be included in AEP-Ohio's RSR that were not considered transition revenues, the Court reversed the Commission's allowance of transition revenues (or equivalent revenues) in the AEP-Ohio RSR.

Like DP&L with its SSR, AEP-Ohio had proposed the RSR as a means to ensure that it was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period. Id. at 9. The Court found that the RSR recovered the equivalent of transition revenue and that the Commission erred when it found otherwise. Id.

The fact that the Commission cited its now over-turned AEP-Ohio order in approving DP&L's SSR leads to the conclusion that the DP&L SSR is also unlawfully allowing DP&L to collect the equivalent of transition revenues. As in the AEP-Ohio case, the Supreme Court has already found the SSR to be unlawful. In addition, the Supreme Court has before it the issue of DP&L's recovery of the equivalent of transition revenues in the appeal of the Commission's SSR finding for DP&L. The Low-Income Advocates filed an amici curiae brief at the Supreme Court in Case No.14-1505 arguing that the Commission's Opinion and Order in Case No. 12-426-EL-SSO, et al, violates R.C. 4928.38 and 4928.39 by awarding DP&L transition revenues. Ohio Supreme Court, Case No. 2014-1505, Brief Amici Curiae (December 1, 2014). These statutes, enacted in 1999, allowed Ohio public utilities to collect transition revenues as the utilities transitioned from being regulated providers of both generation and distribution service to being solely regulated distribution utilities. After 1999, generation was to be purchased in the competitive generation market. R.C. 4928.38 gave the utilities the opportunity to collect transition revenues to allow for their above-market generation costs, which would not be collected in the competitive generation market. Under R.C. 4928.39, transition costs are the above-market generation costs that the utility would have recovered under regulation of generation but could not recover in the competitive generation market. Under R.C. 4928.38, the utility may not receive any transition

revenues or any equivalent revenues after the end of its market development period, which for DP&L ended on December 31, 2005. In Ohio, retail electric generation is a competitive service, and the prices for the service are market based. The owners of electric generation are wholly on their own in the competitive generation market.

Given the precision of the law, the Commission could not use the words "transition charge" in approving the SSR. In its Second Entry on Rehearing, the Commission claimed that the SSR was not a transition charge because, pursuant to R.C. 4928.39, transition charges are cost-based and the SSR was not cost-based. According to the Commission, the SSR was based on what DP&L needed to maintain its "financial integrity". Id. The Commission attempted to side-step the law by changing the words used to describe the SSR from "transition charge" to "financial integrity" charge. Id.

However, the Commission's justifications for the SSR, such as future generation price decreases, increased customer shopping for generation, and the transition to auctions for procuring Standard Service Offer ("SSO") generation supply, are all related exclusively to DP&L's unregulated competitive generation business. DP&L claimed that its "financial integrity" would be threatened by the declining market price of generation and increased shopping for generation by its customers over the next several years. The claims were all based on the expected lower profits of the competitive generation business. Under Ohio law, the profits of DP&L's competitive generation business are not a matter of the Commission's concern.

The SSR compensates DP&L for costs it cannot collect in the competitive generation market, and thus the SSR serves the same purpose as transition revenues. The SSR permits DP&L to collect revenues from captive distribution

customers to compensate DP&L for declining generation revenues due to competition. The SSR represents the very same transition revenues that under R.C. 4928.39 may no longer be collected from ratepayers after December 31, 2005. The SSR is designed to compensate DP&L for the challenges of the competitive retail generation business and was justified solely by DP&L's generation business losses. In Ohio, retail generation is subject to competition and market prices. The Commission is precluded by law from authorizing utilities to collect any above-market generation transition charges *or equivalent revenues* after 2005. R.C. 4928.38 and 4928.39. The Commission does not have statutory authority to protect DP&L's sole shareholder, the Virginia-based holding company AES, from the decline in the profits of DP&L's competitive generation business.

The Commission is a creature of statue and may only exercise the authority given to it by the General Assembly. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio State 2d 153, 164, 166. Even if the Commission recognized its lack of authority by avoiding the words "transition revenues" when it approved the SSR, the SSR allows DP&L to collect revenues from captive distribution customers to compensate DP&L for its losses in the competitive generation market. This is unlawful. R.C. 4928.38 and 4928.39. In the AEP-Ohio case, the Ohio Supreme Court recognized the "guise" used by the Commission to award AEP-Ohio the equivalent of transition revenues in violation of Ohio law. The Court reversed the Commission's finding. The Commission's order allowing the SSR for DP&L is unlawful. The SSR is an unlawful charge. The Supreme Court precedent from the AEP-Ohio case applies to the SSR in the appeal in Supreme Court Case No. 14-1505.

IV. The Supreme Court will consider whether the SSR relates to default service.

Intervenors also argued before the Commission in Case No. 12-426-EL-SSO, et al., that the SSR did not meet the criteria of R.C. 4928.143(B)(2)(d) as a charge related to default service. Opinion and Order, Case No. 12-426-EL-SSO, et al. (September 4, 2013) at 18. However, the Commission found that the SSR was related to default service. Id. at 21.

The Commission found that R.C. 4928.143(B)(2)(d) authorizes a financial integrity charge to the extent that such a charge is necessary to ensure stability and certainty for the provision of SSO service. Id. at 21. The SSR was approved to provide DP&L stable revenue to maintain its financial integrity, in order to meet its obligation to provide a "standard service offer", i.e., generation service. The Commission claimed that the SSR was allowed under R.C. 4928.143(B)(2)(d) because it is a charge related to "default service" and will have the effect of "stabilizing" and "providing certainty regarding retail electric service". Case No. 12-426-EL-SSO, et al., Second Entry on Rehearing at 7; Opinion and Order at 21-22.

By describing the SSR using these words from R.C. 4928.143(B)(2)(d), the Commission meant to evade its lack of authority to subsidize competitive generation. According to the Commission, DP&L needed "stable" revenues to maintain its "financial integrity" to "meet its obligation to provide a standard service offer".

But R.C. 4928.143(B)(2)(d) refers specifically to default service. Default service is not the same thing as the Standard Service Offer. The Commission failed to recognize that the Standard Service Offer is a competitive product under Ohio law. In R.C. 4928.141, the General Assembly defined "standard service offer" as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service". The "standard service offer" is explicitly defined in the law as "all *competitive* retail electric

services". [Emphasis added.] R.C. 4928.141. No subsidy passing through the regulated distribution utility can be used to maintain corporate profits as a result of revenue declines resulting from instituting a competitive standard service offer.

In the Low-Income Advocates' amici curiae brief before the Ohio Supreme Court in the appeal of the DP&L decision, Supreme Court Case No. 14-1505, the Low-Income Advocates argued that the Commission justified the SSR in terms of "default service", which occurs when a competitive generation supplier fails to provide generation service to a customer so that the customer defaults to the competitive standard service offer until the customer chooses another competitive generation supplier. R.C. 4928.14. Unlike the "standard service offer", which is a competitive service, "default service" is defined to include both competitive and non-competitive cost components. As a provider of default service, the distribution utility simply passes through to the customer the cost of the competitive generation component of the default service. The distribution utility provides the default service, but the distribution utility does not provide the competitive generation service component of the default service.

The Commission used the words of R.C. 4928.143(B)(2)(d) to justify approval of the SSR to subsidize DP&L's competitive generation business. This is unlawful. The statute states that the ESP may include charges for "default service" as would have the effect of "stabilizing or providing certainty regarding retail electric service". If DP&L were to receive a subsidy for its role in providing "default service", it would have to justify the subsidy in terms of the cost of providing "default service', including non-competitive components as well as the competitive components of retail electric service. DP&L made no such showing. Generation is readily available in the region; the availability of stable generation

is a certainty. DP&L proposed the SSR to offset the losses of DP&L's competitive generation business; the SSR is not related to default service.

In granting the SSR, the Commission invoked "default service", "financial integrity", "certainty" and "stability" to fit the SSR under R.C. 4928.143(B)(2)(d) and to evade its lack of authority to approve the SSR to subsidize DP&L's competitive generation business. No statute gives the Commission authority to subsidize DP&L's competitive generation business. Ohio statutes forbid such a subsidy. The Commission's attempt to interpret the words of R.C. 4928.143(B)(2)(d) to justify approving the SSR to subsidize DP&L's competitive generation business is unlawful.

In the AEP-Ohio case, the Court noted the argument of the Ohio Consumers' Counsel ("OCC") that the Commission erred when it failed to apply the statutory definition of "default service" as set forth in R.C. 4928.14. *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608 at 17. The Court noted that the Commission had decided for the first time in its First Rehearing Entry on January 30, 2013, that AEP-Ohio's RSR was authorized under R.C. 4928.143(B)(2)(d) as a charge that relates to default service. Id. When OCC filed its second application for rehearing in the AEP-Ohio case, according to the Court, OCC did not allege that the Commission erred when it failed to apply the statutory definition of "default service." The Court found that OCC may not argue for the first time before the Court that the Commission's Entry on Rehearing violated R.C. 4928.14 and must first raise the issue with the Commission, giving the Commission an opportunity to correct the alleged error. Only because OCC did not give the Commission the opportunity to address this argument first, the Court found that it lacked jurisdiction to consider the argument. Id. This procedural deficiency will not re-occur in OCC's appeal of the DP&L SSR in Ohio Supreme Court Case No. 14-1505, because OCC raised the issue in DP&L before the Commission. OCC

Second Notice of Appeal, Supreme Court Case No. 14-1505; Case No. 12-426-EL-SSO (September 22, 2014) at 3; Opinion and Order at 18; Second Entry on Rehearing, at 7. The Ohio Supreme Court should reverse the Commission's order approving the SSR as related to default service because the SSR is simply an unlawful subsidy for DP&L's competitive generation business.

V. Conclusion

DP&L's motion to implement the SSR-E should be denied. It is obvious that the Commission intended that an SSR-E proceeding would be held so that the latest information to support an SSR-E could be heard. There is no provision in Ohio law or in the Commission's Opinion and Order in Case No. 12-426-EL-SSO, et al., that would allow the Commission to grant DP&L the authority to implement the SSR-E in the absence of an evidentiary proceeding.

In addition, the Ohio Supreme Court has issued a decision in the AEP-Ohio ESP II case that, following the precedent, over-turns the Commission's approval of the SSR in DP&L's Case No. 12-426-EL-SSO, et al. Given the Court's precedent, the SSR is already found to be unlawful as is argued in the appeal in Ohio Supreme Court Case No. 14-1505. The SSR is an unlawful transition charge and is not related to default service. There should be no SSR, and approval of the SSR-E is unlawful.

Respectfully submitted,

/s/Colleen Mooney
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
Telephone: (614) 488-5739
cmooney@ohiopartners.org
(electronically subscribed)

/s/Ellis Jacobs
Ellis Jacobs
Edgemont Neighborhood Coalition
Advocates for Basic Legal Equality, Inc.
130 W. Second Street, Suite 700 East
Dayton, Ohio 45402
Telephone: (937) 535-4419
ejacobs@ablelaw.org
(electronically subscribed)

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Contra will be served on this 29th day of April 2016 by the Commission's e-filing system to these parties who have electronically subscribed to these cases.

/s/Colleen Mooney
Colleen L. Mooney

cfaruki@cficlaw.com
djireland@ficlaw.com
jshakey@ficlaw.com
Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
ORourke@carpenterlipps.com
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mfleisher@elpc.org
joliker@igsenergy.com
Jeffrey.mayes@monitoringanalytics.com
Evelyn.robinson@pjm.com
Schmidt@sppgrp.com
mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
Michelle.d.grant@dynegy.com
gthomas@gtpowergroup.com
stheordore@epsa.org
laurac@chappelleconsulting.net
mdortch@kravitzllc.com
tdoughtery@theOEC.org
rsahli@columbus.rr.com
Amy.spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com
ricksites@ohiohospitals.org
gpoulos@enernoc.com
Sechler@carpenterlipps.com
slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
William.wright@puc.state.oh.us

haydenm@firstenergycorp.com
jejadwin@aep.com
Tony_long@ham.honda.com
bmcmahon@emh-law.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
mjsatterwhite@aep.com
stnourse@aep.com
vparisi@igsenergy.com
mswhite@igsenergy.com
zkravitz@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Chris.michael@icemiller.com
Bill.wells@wpafb.af.mil
Chris.thompson.2@tyndall.af.mil
dakutik@jonesday.com
rukeiley@igc.org
matt@matthewcoxlaw.com
ssherman@kdlegal.com
gchapman@kdlegal.com
Carolyn.Flahive@thompsonhine.com
ihague@kdlegal.com
Stephanie.Chmiel@thompsonhine.com
Philip.Sineneng@thompsonhine.com
Michael.Dillard@thompsonhine.com

Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM, 12-0426-EL-SSO, 12-0427-EL-ATA,

Summary: Memorandum Contra of Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition electronically filed by Colleen L Mooney on behalf of Low Income Advocates