BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates.	)))	Case No. 15-1830-EL-AIR
In the Matter of the Application of the Dayton Power and Light Company for Approval to Change Accounting Methods.	)))	Case No. 15-1831-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Tariff Approval.	)))	Case No. 15-1832-EL-ATA
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 the 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

JOINT MEMORANDUM IN OPPOSITION TO THE MOTION OF APPLICANT THE DAYTON POWER AND LIGHT COMPANY FOR CASE MANAGEMENT ORDER TO ESTABLISH DEADLINES AND TO COORDINATE CASES
BY
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The Public Utilities Commission of Ohio (the "PUCO") should deny Dayton Power and Light Company's ("DP&L") case management motion[1] because it proposes a schedule that is unworkable, unreasonable, and unfairly prejudices the rights of intervenors and DP&L's customers. DP&L proposes a discovery and trial schedule that is expedited, compressed, and does not permit the development of a complete, robust record in either case.

DP&L's purported justification for rushing through these cases is that its financial integrity will be compromised without relief by January 1, 2017. But DP&L never offers any facts to support this rationale, other than stating that "the record will show in both cases, DP&L needs new rates from the cases to go into effect no later than January 1, 2017."[2] This unsupported assertion is insufficient to warrant undue haste in these cases, given that DP&L's current distribution rate has already been in effect for more than 20 years and its current Electric Security Plan does not expire until May 2017. In light of these circumstances, the burden must be on DP&L to articulate why its current rates cannot remain in effect a few months longer without significant harm to its finances. DP&L has not done so.

Moreover, DP&L, and DP&L alone, is responsible for choosing when to file the cases and to file them simultaneously. DP&L filed the application in its distribution rate case (the "Rate Case") on November 30, 2015, even though the PUCO had previously ordered DP&L to file a case by July 1, 2014.[3] Before the November 30, 2015 filing,

[1] *See* Motion of Applicant the Dayton Power and Light Company for Case Management Order to Establish Deadlines and to Coordinate Cases (Apr. 15, 2016) ("Motion").

[2] Motion at 2.

[3] *See* section I below.

DP&L had not filed a rate case since 1991. DP&L chose not to file a Rate Case until the end of November and then, less than three months later, chose to file an Electric Security Plan case (the "ESP Case"). Given precedent, DP&L could not reasonably have expected that both of these cases would be decided by the end of 2016, and its lack of diligence in filing both cases undercuts the suggestion that a decision by January 1, 2017 is in fact vital to DP&L's financial integrity.

Whatever alleged problems DP&L may be facing are those of its own making. The PUCO should not bail DP&L out at the expense of due process and on the backs of intervenors, consumers, and the public interest. The PUCO should not deny parties the right to develop a full record in these cases. With many millions, if not billions of dollars at stake, the PUCO cannot rush through these cases simply because DP&L desires an expedited process.

The PUCO should not grant the Motion and should not adopt the schedule that DP&L has proposed. Rather, the parties to this Memorandum Contra (the "Joint Intervenors") propose the following schedule (the "Intervenor Proposed Schedule"), which more equitably balances the interests of all parties in these cases:

July 1, 2016 (estimated)[4]	Staff Report (Rate Case)
July 15, 2016	Written Discovery Cutoff (Rate Case)
August 1, 2016	Objections to Staff Report Due (Rate Case)
August 18, 2016	Intervenor Testimony Due (Rate Case)
September 1, 2016	Written Discovery Cutoff (ESP Case)
September 12, 2016	Rebuttal Testimony Due (Rate Case)
September 19, 2016	Rate Case Hearing Begins
October 7, 2016	Rate Case Hearing Ends
October 21, 2016	Intervenor Testimony Due (ESP Case)
October 28, 2016	Opening Briefs (Rate Case)
November 14, 2016	Reply Briefs (Rate Case)
November 23, 2016	Rebuttal Testimony Due (ESP Case)
November 30, 2016	ESP Case Hearing Begins
December 21, 2016	ESP Case Hearing Ends
January 13, 2017	Opening Briefs (ESP Case)
January 27, 2017	Reply Briefs (ESP Case)

I. THERE IS NO GOOD CAUSE TO PREJUDICE INTERVENORS DUE TO DP&L'S DECISION AS TO WHEN TO FILE THESE CASES AND TO FILE THEM SIMULTANEOUSLY.

DP&L's Motion is premised on the false assertion that DP&L's financial integrity will be compromised if rates are not increased and the Reliable Electricity Rider is not effective by January 1, 2017.[5] This bare assertion does not justify the expedited, compressed, and prejudicial schedule that DP&L proposes.

Foremost, DP&L does not offer any specific facts to support its contention that a decision later than January 1, 2017 will significantly harm its financial integrity. DP&L

[4] All proposed dates should be adjusted accordingly depending on the actual date that the Staff Report is issued.

[5] *See* Motion at 1.

filed its last rate case in 1991.[6] If DP&L's financial integrity were truly threatened by the continuation of that longstanding distribution rate, it could have filed its application early enough to ensure a decision by January 1, 2017, while still allowing for a reasonable litigation schedule. It did not do so, and has not explained why a distribution rate change that goes into effect after January 1, 2017 will unduly damage its finances. Similarly, DP&L's current ESP does not expire until May 31, 2017, and DP&L has not indicated why it would need its pending ESP application approved five full months before that date.[7] In neither case has DP&L provided sufficient justification for an accelerated schedule aimed at obtaining a PUCO decision before January 1, 2017.

In its Motion, DP&L claims that its proposed schedule must be used to address the "inevitable scheduling, discovery and logistical difficulties" involved in litigating two cases simultaneously.[8] There is nothing "inevitable" about these difficulties. DP&L chose to file the Rate Case and ESP Case at the same time. DP&L planned poorly and now asks the PUCO to prejudice the rights of intervenors and customers by expediting and compressing the schedule to resolve these cases.

In DP&L's last ESP case,[9] the PUCO stated that "DP&L must file an application for a distribution rate case, in accordance with Section 4909.18, Revised Code, no later than July 1, 2014."[10] DP&L did not do this. Instead, DP&L filed the application in the Rate Case on November 30, 2015 (more than 500 days late). DP&L's last distribution

[6] *See* Case No. 91-414-EL-AIR (application filed Apr. 2, 1991).

[7] The PUCO issued its last ESP decision, in Case No. 14-1297-EL-SSO, on March 31, 2016 – just two months before that ESP was scheduled to expire on May 31, 2016.

[8] *See* Motion at 1.

[9] Case No. 12-426-EL-SSO.

[10] *See* Case No. 12-426-EL-SSO, Opinion and Order at 27 (Sept. 4, 2013).

rate case was filed over 25 years ago in 1991.[11] DP&L has had ample time to manage the filing of its Rate Case, and it failed to comply with the PUCO's directive that it file a rate case by July 1, 2014. On top of that, while the Rate Case was pending, DP&L filed the ESP Case on February 22, 2016.

DP&L alone has caused any purported time crunch in these cases.[12] DP&L could have filed these two cases earlier and at different times. But it chose to pursue them at the same time. DP&L should not be rewarded for its poor planning by forcing intervenors to litigate these cases on an abbreviated, compressed, and prejudicial schedule.

II. DP&L'S PROPOSED SCHEDULE VIOLATES THE PUCO RULES, IS UNREASONABLE, AND UNDULY PREJUDICES INTERVENORS.

A. The proposed schedule restricts parties' discovery rights.

The Ohio Revised Code provides parties and intervenors with a statutory right to "full and reasonable discovery."[13] Consistent with this directive, the PUCO has adopted broad discovery rules that are designed to permit "thorough and adequate preparation for participation in commission proceedings."[14] DP&L's proposed schedule, on the other hand, seeks to limit parties' discovery rights. It does not permit parties to thoroughly and adequately prepare for participation in these cases.

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[11] *See* Case No. 91-414-EL-AIR (application filed Apr. 2, 1991).

[12] In point of fact, there is no time crunch. DP&L claims that these cases must be decided quickly so that it can increase rates and implement a "Reliable Electricity Rider" by January 1, 2017. *See* Motion at 1. The Joint Intervenors dispute DP&L's contention that its financial integrity will be harmed if rate increases do not incur on January 1, 2017 and if a Reliable Electricity Rider is not put into place. Further, DP&L's current ESP remains effective through May 31, 2017. *See* Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc ¶ 4 (Sept. 6, 2013) (PUCO entry finding that DP&L's ESP ends on May 31, 2017). Thus, the PUCO does not need to decide these cases by the false January 1, 2017 deadline that DP&L identifies in its Motion.

[13] *See* R.C. 4903.082.

[14] Ohio Admin. Code 4901-1-16(A).

1. The proposed schedule requires intervenors to file testimony before DP&L's deadline to respond to written discovery.

Several of the deadlines in the proposed schedule simply do not work. For example, DP&L proposes a July 8, 2016 cutoff for written discovery in both cases. DP&L also proposes a July 18, 2016 cutoff for intervenor testimony in the ESP case, just ten days after the discovery cutoff date. Under PUCO rules, discovery responses are due within 20 days of service.[15] Thus, if discovery is served on or around the July 8 cutoff, responses will not be due until well after the July 18 deadline for intervenor testimony. Intervenors cannot be required to file their testimony before DP&L even responds to their written discovery requests.[16] The schedule should provide parties with adequate time to receive, review, and analyze DP&L's responses to discovery requests before intervenor testimony is due.

2. The proposed schedule cuts in half the time that intervenors have to serve discovery after issuance of the Staff Report.

Under Ohio Administrative Code 4901-1-17, parties are permitted to serve discovery requests in a rate case up to fourteen days after the Staff Report is filed. DP&L proposes, to the contrary, that written discovery requests be served just seven days after the Staff Report is filed.[17] DP&L provides no justification for shortening this deadline. A seven-day deadline for discovery following the Staff Report unduly prejudices the rights of intervenors to full and reasonable discovery and is inconsistent with PUCO

[15] *See* Ohio Admin. Code 4901-1-19(A), 4901-1-20(C).

[16] And if the past is any indicator, intervenors cannot expect that DP&L will provide complete responses to their discovery requests in a timely fashion. In the Rate Case, the Office of the Ohio Consumers' Counsel filed a motion to compel discovery responses after DP&L failed to respond to its discovery requests within 20 days. *See* Rate Case, Motion to Compel (Mar. 22, 2016). DP&L has also required 20-day extensions to respond to discovery requests in both the Rate Case and the ESP Case.

[17] *See* Motion, Ex. 1.

practice. It also places an undue burden on parties by requiring them to review and analyze the Staff Report (which is likely to be close to 200 pages long[18]), meet with their clients and consultants, and formulate all necessary discovery requests in just seven days. This abbreviated schedule inhibits parties and the PUCO from developing a full factual record in the Rate Case. The PUCO should not approve any case management schedule that does not grant parties the full 14 days to serve discovery following issuance of the Staff Report in the Rate Case as envisioned by the PUCO rules.

3. Discovery in the ESP Case is unfairly abbreviated.

The proposed schedule does not allow for full and reasonable discovery in the ESP Case. Under DP&L's proposed schedule, written discovery would be due July 8, intervenor testimony would be due July 18, and the ESP Case hearing would begin August 15. In other words, intervenors may have just a few weeks or less to incorporate final written discovery responses into expert testimony and preparation for a three-week hearing. This schedule is ambitious on its own given the complex issues raised by DP&L's ESP application, but is unrealistic given that DP&L expects intervenors to simultaneously prepare expert testimony for the Rate Case by August 1 and get ready for that hearing immediately following the ESP Case hearing. This schedule is plainly unduly prejudicial to parties and seems to be a concerted effort to thwart interested parties from intervening and fully participating in the case.

In its Motion, DP&L complains that a "compressed schedule is unreasonable and prejudicial to DP&L" because it makes it "substantially more difficult for counsel for

[18] *See* Case No. 12-1682-EL-AIR, Staff Report (Jan. 4, 2013) (186 pages); Case No. 11-352-EL-AIR, Staff Report (Sept. 15, 2011) (240 pages); Case No. 08-709-EL-AIR, Staff Report (Jan. 27, 2009) (153 pages); Case No. 07-551-EL-AIR, Staff Report (Dec. 4, 2007) (191 pages).

DP&L to meet with their client and witnesses."[19] In the same breath, however, DP&L claims that its proposed schedule — which is itself compressed — "will not increase the workload for the Intervenors" and that intervenors will not be prejudiced by the abbreviated timeframe.[20] DP&L also admits that it is unfair to "rush to complete discovery" because such a rush "prejudices the settlement process."[21] By DP&L's own admission, the compressed schedule that it proposes is unfair and prejudicial to intervenors.

B. The proposed hearing schedule places an undue burden on all parties.

Under the proposed schedule, the PUCO will hold a three-week ESP Case hearing and then hold a three-week Rate Case hearing immediately after the ESP Case hearing ends.[22] It is unreasonable to expect parties to prepare for consecutive, lengthy hearings in these cases without any preparation time between hearings.

As DP&L acknowledges, these are large cases involving complex issues. DP&L's Motion identifies many of the reasons that back-to-back hearings should not be held. For example, DP&L states that "counsel should have a meaningful opportunity to meet with their client in the weeks immediately preceding hearing."[23] The Joint Intervenors agree. It is unreasonable, therefore, to expect intervenors to prepare for the Rate Case hearing while many of those same intervenors are participating in the ESP Case hearings.

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[19] *See* Motion at 3.

[20] *See id.* at 3-4.

[21] *See id.* at 4.

[22] *See id.* at Ex. 1.

[23] *See id.* at 4.

DP&L also asserts that two weeks is not enough to prepare for hearing on large cases like these.[24] But its proposed schedule provides intervenors with precisely two weeks to prepare for the Rate Case hearing. Under the proposed schedule, objections to the Staff Report and intervenor testimony in the Rate Case are due August 1, 2016, and the hearing on the ESP Case starts two weeks later on August 15, 2016.[25] Most intervenors are likely to be involved in both of these cases. Thus, intervenors would have to either (a) prepare for the Rate Case hearing in the middle of the ESP Case hearing (which, as discussed above, is unreasonable), or (b) prepare for the Rate Case hearing in the two-week period from August 1 and August 15. It is unfair for DP&L to compress the trial preparation schedule, especially given DP&L's own suggestion that it needs four to five weeks to prepare for a hearing in large cases like these.[26]

Extending the schedule proposed by DP&L also provides time for the Utility to depose intervenor witnesses and file rebuttal testimony prior to the beginning of each hearing. As DP&L itself points out, a schedule that forces a party to evaluate and prepare cross-examination regarding testimony just before or during a hearing "is unreasonable and prejudicial."[27] That difficulty is only magnified here, where parties will be dealing with preparation for one hearing while another is ongoing. As evidenced in a recent decision regarding FirstEnergy's ESP, rebuttal testimony may serve as an important part of the record relied upon by the Commission, and therefore it is vital to allow intervenors

[24] *See id.* at 3.

[25] *See id.* at Ex. 1.

[26] *See id.* at 3 (stating that testimony must be filed at least four weeks before hearing to allow adequate preparation time); *id.* at 4 (requesting five weeks of lead time between the end of discovery and the start of the ESP Case hearing).

[27] *Id.* at 3.

adequate time to analyze that testimony.[28] Providing for the filing of rebuttal testimony before each hearing commences will resolve this important issue without prejudicing DP&L.

C. DP&L could not have reasonably expected the ESP Case to be resolved before the end of 2016.

DP&L filed the ESP Case on February 22, 2016. Now, DP&L claims that time is of the essence and its application in the ESP Case must be approved in time to increase rates by January 1, 2017. DP&L knew when it filed the ESP Case that it could not reasonably expect the case to be resolved before the end of 2016.

First, as DP&L is undoubtedly aware, the PUCO recently ruled on similar ESP cases filed by FirstEnergy[29] and AEP Ohio.[30] FirstEnergy filed its case in early August 2014, and AEP Ohio filed its case in early October 2014. The PUCO orders in these cases were issued on March 31, 2016—nearly 19 months after the FirstEnergy case was filed and nearly 17 months after the AEP Ohio case was filed. And in neither of these cases was the utility simultaneously litigating a distribution rate case. Similarly, in DP&L's last ESP case, the PUCO did not enter an order until more than 17 months after the application was filed.[31]

DP&L filed the ESP Case in February 2016 with knowledge that similar, recent ESP cases typically take at least 18 months to resolve. If DP&L truly needed relief in the ESP Case before the end of 2016, it would have filed that case much earlier. The PUCO, therefore, should not give any weight to DP&L's assertion that its financial integrity will

[28] *See* Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 82 (citing utility's rebuttal testimony, Co. Ex. 151, as significant part of rationale for disregarding intervenor testimony).

[29] Case No. 14-1297-EL-SSO.

[30] Case No. 14-1693-EL-RDR.

[31] *See* Case No. 12-426-EL-SSO (application filed March 20, 2012 and order entered September 4, 2013).

be harmed if rates do not increase by January 1, 2017.[32] It would be unduly prejudicial to force intervenors to litigate the ESP Case without proper development of the factual record and proper consideration of all legal issues.

In its Motion, DP&L states that "the best course is to try the ESP case first and to try the distribution rate case immediately after the hearing in the ESP case is completed."[33] DP&L does not address why this is the "best course" and provides no basis for this conclusion. The suggestion that the ESP Case be heard first appears designed to further DP&L's goal of pushing the ESP Case through the PUCO docket at an unreasonable pace and to the detriment of intervenors.

III. THE JOINT INTERVENORS' PROPOSED SCHEDULED PERMITS DEVELOPMENT OF A FULL RECORD AND PROVIDES A FAIR OPPORTUNITY FOR PARTICIPATION BY ALL PARTIES.

Unlike DP&L's proposed schedule, the Intervenor Proposed Schedule permits the development of a full record. It also provides all parties, including DP&L, with adequate time to complete discovery and properly prepare for the hearings in both the Rate Case and the ESP Case.

The Joint Intervenors propose that the Rate Case be heard first because it was filed first and discovery has been ongoing for several months longer than in the ESP Case. DP&L has not submitted any evidence or justification for hearing the ESP Case first.

The Intervenor Proposed Schedule assumes, for purposes of argument, that the Staff Report will be filed on July 1, 2016. Because the exact date of the Staff Report is

[32] Moreover, DP&L's current ESP does not expire until after May 31, 2017. *See* Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc ¶ 4 ("The end date of the modified ESP should be corrected to May 31, 2017 . . .").

[33] *See* Motion at 2.

not known, the Joint Intervenors contemplate that all other proposed dates be adjusted based on the actual date that the Staff Report is filed.

The Intervenor Proposed Schedule is reasonable and improves upon the schedule proposed by DP&L because

a) parties have 14 days after the filing of the Staff Report to serve written discovery as required by Ohio Admin. Code 4901-1-17;

b) intervenors in the ESP Case have a reasonable opportunity to formulate and serve discovery after the deadline for filing motions to intervene;

c) it provides that intervenors in both cases are not required to file testimony until two weeks after DP&L's deadline to respond to discovery;

d) it allows time between the end of the Rate Case hearing and the start of the ESP Case hearing so that parties will not be required to prepare for the ESP Case hearing in the middle of the Rate Case hearing; and

e) it affords the PUCO and all parties with an opportunity to fully develop the factual record that is necessary to properly evaluate and adjudicate these complex cases.

Accordingly, the Joint Intervenors respectfully request that the PUCO adopt a schedule that is substantially similar as the Intervenor Proposed Schedule contained herein.

IV. CONCLUSION

DP&L's proposed schedule places an undue burden on parties and deprives them of the right to develop a complete record in these cases. To the extent that DP&L faces any problems as a result of the timing of these cases, those problems are self-inflicted. DP&L chose to delay the filing of its Rate Case, and DP&L chose to file the ESP Case shortly thereafter. Now, DP&L asks customers, parties, and the public interest to suffer so that it can obtain rate increases on an expedited basis. The PUCO should deny the

Motion and instead should adopt a schedule that gives all parties a fair opportunity to develop a factual record and litigate these cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Memorandum in Opposition to the Motion of Applicant the Dayton Power and Light Company for Case Management Order to Establish Deadlines and to Coordinate Cases was served on the persons stated below via electronic transmission, this 2nd day of May 2016.

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Case No(s). 15-1830-EL-AIR, 15-1831-EL-AAM, 15-1832-EL-ATA, 16-0395-EL-SSO, 16-0396-EL-ATA, 1

Summary: Memorandum Joint Memorandum in Opposition to the Motion of Applicant Dayton Power and Light Company for Case Management Order to Establish Deadlines and to Coordinate Cases by Electric Power Supply Assoc., Environmental Defense Fund, Environmental Law and Policy Center, Office of the Ohio Consumers' Counsel, Ohio Environmental Council, PJM Power Providers Group, and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.