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. 16-395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case No. 16-396-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. 16-397-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS, IN PART, THE ELECTRIC SECURITY PLAN APPLICATION FILED BY THE DAYTON POWER AND LIGHT COMPANY WITH RESPECT TO THE REGULATORY COMPLIANCE RIDER, UNCOLLECTIBLE RIDER, STORM COST RECOVERY RIDER, RECONCILIATION RIDER, AND TRANSMISSION COST RECOVERY RIDER-NONBYPASSABLE AND MEMORANDUM IN SUPPORT

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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Industrial Energy Users-Ohio ("IEU-Ohio") moves the Public Utilities Commission of Ohio ("Commission") pursuant to Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), to dismiss from The Dayton Power and Light Company's ("DP&L") October 11, 2016 application to establish an electric security plan ("ESP") ("Amended Application") the Regulatory Compliance Rider ("RCR"), Uncollectible Rider ("UEX"), Storm Cost Recovery Rider ("Storm Rider"), Reconciliation Rider ("RR"), and Transmission Cost Recovery Rider-Nonbypassable ("TCRR-N").

In violation of Rule 4901:1-35-03(C)(1), O.A.C., and R.C. 4928.143(C)(1), DP&L has failed to provide any description of the RCR, UEX, or Storm Rider in its Amended Application and has failed to offer any supporting testimony for these riders. Because DP&L has failed to comply with the Commission's rules and cannot meet its statutory burden of proof, these riders cannot be approved.

Furthermore, the TCRR-N and RR are also unlawful and cannot be authorized. The TCRR-N violates Rule 4901:1-36-04(B), O.A.C., as well as state and federal law. The RR violates R.C. 4928.38 as it would allow DP&L to collect transition revenue or its equivalent.

Just as important though, the Commission should recognize the need for judicial economy and prevent further waste of resources in addressing requests that cannot be lawfully authorized. In this case alone, parties have had to expend considerable resources responding to DP&L's request to implement the Service Stability Rider-Extension ("SSR-E") despite DP&L's blatant failure to satisfy the prerequisites established by the Commission for recovery under that rider. Parties have expended additional resources analyzing and preparing for the most significant aspect of DP&L's Amended Application, the Reliable Energy Rider ("RER"), only to have DP&L withdraw the proposal six months after it was filed. Parties now have to spend additional resources analyzing and preparing for DP&L's newest subsidy request, the Distribution Modernization Rider ("DMR"). The wasted resources due to DP&L's actions in this ESP case are not unique either. In its last case to establish a standard service offer ("SSO"), parties first prepared for DP&L's proposed market rate offer ("MRO"), which was

subsequently withdrawn, then began preparing for an ESP application which was again modified after its filing.

The constant moving target that DP&L has presented to other parties results in significant wasted resources, as does addressing issues, *i.e.* the RCR, UEX, Storm Rider, RR, and TCRR-N, that cannot be lawfully authorized. Because the Commission cannot lawfully authorize the RCR, UEX, Storm Rider, RR, or TCRR-N, this motion should be granted and these five riders should be dismissed from DP&L's Amended Application.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

In DP&L's pending distribution rate case, DP&L requested authorization of three riders, the RCR, UEX, and Storm Rider. In its Amended Application in this case, DP&L conditionally requests these three riders be authorized if the Commission does not authorize them in its distribution case.[1] DP&L's request for approval of these three riders in this case, however, is improper and should be stricken. DP&L has not provided any description in this case of the purpose of the riders, nor has DP&L offered any testimony in this case supporting the riders, as required by the Commission's rules. Based on the pleadings before the Commission at this time that do not fully describe or

[1] Amended Application at 7 (Oct. 11, 2016).

support these requested riders, DP&L will not be able to prove any set of facts that will entitle it to the relief it seeks.

Additionally, the Commission cannot lawfully authorize the RR and TCRR-N. The RR is designed to permit DP&L to collect above-market costs associated with its interest in the Ohio Valley Electric Corporation ("OVEC"). The authorization of the rider would allow DP&L to unlawfully collect transition revenue or its equivalent. The TCRR-N is also unlawful as it violates Rule 4901:1-36-04(B), O.A.C., which requires transmission riders to be fully bypassable. The proposed TCRR-N is further unlawful because it violates state and federal law.

Accordingly, the Commission should grant this Motion to Dismiss and strike the RCR, UEX, Storm Rider, RR, and TCRR-N from DP&L's Amended Application.

II. STANDARD OF REVIEW

Although not strictly bound by the Rules of Civil Procedure, R.C. 4903.082 directs the Commission to rely on those rules "wherever practicable." Under the Rules of Civil Procedure, a party may file a motion to dismiss for "failure to state a claim upon which relief can be granted." Civ.R. 12(B)(6).

"The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward." *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5. "In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Id.* (*citing O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, syllabus (1975)). "Furthermore, '[i]n construing a complaint upon a motion to dismiss for failure to state a claim, [the court] must

presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.'" *Id.* (*quoting Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192 (1988)).

The Commission has confirmed that motions to dismiss may be filed in Commission proceedings. For example, in the recent proceeding addressing Duke Energy Ohio, Inc.'s ("Duke") request to increase its capacity charges, Commissioner Slaby issued a concurring opinion finding that it was appropriate to address a pending motion to dismiss prior to the evidentiary hearing because the motion mooted out all of the remaining issues addressed by the parties.[2]

III. ARGUMENT

A. DP&L can prove no set of facts that would entitle it to relief with respect to the RCR, UEX, and Storm Rider because it failed to include a complete description of these riders and failed to support the riders with testimony. Rule 4901:1-35-03(C)(1), O.A.C.; R.C. 4928.143(C)(1).

In order for DP&L to present a valid claim for relief under the ESP statute, DP&L must provide a complete description of the ESP and must support each aspect with supporting testimony. Rule 4901:1-35-03(C)(1), O.A.C. DP&L failed to provide a complete description of the RCR, UEX, and Storm Rider and failed to support any of these riders with testimony. By failing to present the complete description of the riders supported by testimony, DP&L has not complied with Rule 4901:1-35-03(C)(1), O.A.C., and cannot meet the burden of proof imposed on DP&L under R.C. 4928.143(C)(1).

[2] *In the Matter of the Application of Duke Energy Ohio, Inc. for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.,* Opinion and Order, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014).

Accordingly, DP&L is not entitled to the relief it seeks with respect to the RCR, UEX, and Storm Rider.

The Commission's rules require that an application for an ESP contain a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." Rule 4901:1-35-03(C)(1), O.A.C. DP&L has not satisfied this requirement. The only discussion of these riders is contained in paragraph 21 of the Amended Application and a few lines in witness Parke's testimony.[3] The only discussion of these riders in the Amended Application is as follows:

> The riders that DP&L proposes in this case are structured assuming that the riders that DP&L proposed in Case No. 15-1830-EL-AIR case are approved. Modifications to the riders in this case will be necessary for uncollectible dollars (bad debt) if the Uncollectible Rider is not approved in that case. Additionally, if the Commission concludes that the riders proposed in Case No. 15-1830-EL-AIR case should be included in this case, then DP&L requests approval of the Regulatory Compliance Rider, Uncollectible Rider, and Storm Cost Recovery Rider that were proposed and fully supported in Case No. 15-1830-EL-AIR.[4]

The only testimony mentioning these riders is as follows:

> Q. Are there other proposed tariff changes at this time?
>
> A. There are three proposed riders in the Distribution Rate case, Case No. 15-1830-EL-AIR. The rates and riders in this case assume the Uncollectible Rider will be approved in that case. In the event that it is not, DP&L will need to make adjustments in this case to address uncollectible costs in each proposed rate/rider. Additionally, to the extent the Commission determines that this case is a more appropriate forum, DP&L requests approval of the Storm Cost Recovery Rider, Uncollectible Rider, and Regulatory Compliance Rider that are fully supported in Case No. 15-1830-EL-AIR.[5]

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[3] Amended Application at 7 (Oct. 11, 2016); Direct Testimony of Nathan C. Parke at 6 (Oct. 11, 2016).

[4] Amended Application at 7 (Oct. 11, 2016).

[5] Direct Testimony of Nathan C. Parke at 6 (Oct. 11, 2016).

The Commission, however, has held that brevity of this degree is insufficient to authorize the Commission to approve a charge under an ESP. For example, in AEP-Ohio's ESP III Case, AEP-Ohio sought authorization of the NERC Compliance and Cybersecurity Rider.[6] In its application, AEP-Ohio briefly described the rider as needed due to the increasing scope of North American Electric Reliability Corporation ("NERC") compliance and cybersecurity activities and requested authority to track and defer future capital and operations and maintenance ("O&M") expenses associated with new NERC compliance and cybersecurity measures.[7] AEP-Ohio also addressed this rider in the prefiled testimony of Mr. Vegas.[8] However, AEP-Ohio failed to offer evidence demonstrating it would incur any future NERC compliance costs and failed to demonstrate the types of future investments and the projected magnitude of those investments that it would be seeking future recovery of under the proposed rider. Based on that record, the Commission held that AEP-Ohio failed to meet its burden of proof.[9]

In this instance, DP&L has offered even less than what AEP-Ohio presented. DP&L has not set forth the types of costs or investments that it would seek to recover in the future under the riders, the projected magnitude of costs that would be collected under the riders, or the purpose or parameters of the riders. In fact, DP&L has not included any description of the RCR, UEX, or Storm Rider in its Amended Application or supporting testimony.

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[6] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 60-62 (Feb. 25, 2015) ("*AEP-Ohio ESP III Case*").

[7] *AEP-Ohio ESP III Case*, Application at 11-12 (Dec. 20, 2013).

[8] *AEP-Ohio ESP III Case*, Direct Testimony of Pablo Vegas at 13-18 (Dec. 20, 2013).

[9] *AEP-Ohio ESP III Case*, Opinion and Order at 62 (Feb. 25, 2015).

Accordingly, based on DP&L's Amended Application and testimony, DP&L can prove no set of facts that would entitle it to its requested authorization for the RCR, UEX, or Storm Rider.

B. The proposed RR would allow DP&L to collect unlawful transition revenue. *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608.

Under the proposed nonbypassable RR, DP&L seeks to collect historic and future above-market costs associated with its ownership in OVEC.[10] Such a proposal is unlawful, as confirmed by two recent Ohio Supreme Court cases. Ohio law bars the Commission from authorizing (under an ESP or otherwise) an electric distribution utility ("EDU") to collect above-market generation-related revenue by prohibiting the authorization of transition revenue or its equivalent.[11]

As the Court explained in *Columbus Southern*, "[u]tilities had until December 31, 2005 … to receive generation transition revenue … [and] were also permitted to receive transition revenue associated with regulatory assets … until December 31, 2010."[12] "After that date, R.C. 4928.38 prohibits the commission from 'authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility.'"[13] The Court also

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[10] DP&L's current tariffs include a nonbypassable RR, but the purpose of the existing RR was to true-up significant over- or under-recovery balances associated with the bypassable FUEL Rider, bypassable Reliability Pricing Model ("RPM") rider, bypassable Alternative Energy Rider ("AER"), and bypassable Competitive Bid True-up ("CBT") rider. The RR rates are currently zero, and in the last update to the RR, the Commission directed DP&L to work with Staff on the conclusion of the current RR. *In the Matter of the Application of The Dayton Power and Light Company to Update its Reconciliation Rider Nonbypassable*, Case No. 15-43-EL-RDR, Finding and Order at 3 (Dec. 9, 2015). DP&L witness Parke also discusses the status of the current RR in his testimony and concludes that the current RR "is no longer applicable." Direct Testimony of Nathan C. Parke at 7 (Oct. 11, 2016). Thus, the RR proposed in this case is an entirely new rider and the only similarity to the current RR is in name alone.

[11] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608; *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490.

[12] *Columbus Southern*, at ¶ 16.

[13] *Id.*

noted that subsequent legislation enacted in 2008 further "expressly prohibits the recovery of transition costs" under "a standard service offer made through an ESP."[14]

Turning to the record in the *Columbus Southern* case, the Court looked at the true nature of the challenged Retail Stability Rider ("RSR") to determine if it allowed the collection of transition revenue or its equivalent. The Court found that AEP-Ohio "proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period."[15] To achieve this result, AEP-Ohio requested that the Commission "guarantee recovery of lost revenue" through the RSR charge related to three sources of generation revenue: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching.[16] "According to [AEP-Ohio's] witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015."[17]

Based on the nature of AEP-Ohio's RSR, the Court held that the record supported a finding that the Commission unlawfully authorized AEP-Ohio to collect transition revenue or its equivalent.[18] The Court found that the nature of the RSR served the same purpose as transition revenue: both were designed to aid in transitioning to a competitive market.[19] The Court also noted that transition revenue

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[14] *Id.* at ¶ 17.

[15] *Id.* at ¶ 23.

[16] *Id.* at ¶ 23-24.

[17] *Id.* at ¶ 23.

[18] *Id.* at ¶ 22.

[19] *Id.* at ¶ 22-23.

represented costs that would not be recovered in a competitive market and the RSR provided AEP-Ohio with revenue lost in the competitive market.[20] "Based on [this] record," the Court concluded that AEP-Ohio's RSR "recovers the equivalent of transition revenue …."[21]

Like AEP-Ohio's RSR, DP&L's SSR permitted DP&L to collect transition revenue or its equivalent. DP&L proposed the SSR for similar reasons as AEP-Ohio: to make up for revenue DP&L was not receiving in the competitive generation market primarily related to "increased [customer] switching, declining wholesale prices, and declining capacity prices."[22] The Court reached the same conclusion on DP&L's SSR as it did with respect to AEP-Ohio's RSR, holding that "[t]he decision of the Public Utilities Commission [authorizing DP&L's SSR] is reversed on the authority of [*Columbus Southern*]."[23]

DP&L's pleadings indicate that the nature of proposed RR is the same as the RSR and SSR that the Court struck down: the proposed RR is designed to provide DP&L with revenue it cannot secure in the competitive generation market. DP&L provides the following description of the purpose of the RR in its Amended Application:

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[20] *Id.* at ¶ 22-23.

[21] *Id.* at ¶ *25.*

[22] *Compare 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 17 (Sept. 4, 2013) ("DP&L ESP II Order") *with Columbus Southern*, at ¶ 24 (in calculating a revenue requirement for AEP-Ohio's charge, the Commission focused on three generation-related factors: nonfuel generation revenue, capacity revenues, and customer switching). DP&L also confirmed during the hearing that the SSR charge was driven solely by its generation business as it admitted that its revenue from its other two utility lines of business, transmission and distribution, were adequate and would remain so. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Supreme Court Case No. 2014-1505, First Merit Brief of Appellant Industrial Energy Users-Ohio at 17-18 (*citing* DP&L Ex. 1 at 13 (Supp. at 2); Tr. Vol. I at 118 (Supp. at 73); Tr. Vol. I at 150 (Supp. at 81)).

[23] *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, ¶ 1.

> The costs that DP&L seeks to recover [through the RR] are the difference between its OVEC expenses and the amounts that DP&L received from selling that generation into PJM's day-ahead markets, to the extent that those costs are not recovered through DP&L's Fuel Rider. The amount of $10.5 million through December 31, 2015 is requested to set the initial rate for the Reconciliation Rider. The rider will have an annual true-up filing.[24]

DP&L witness Parke also confirms that the purpose of the proposed RR is to collect generation-related costs associated with its interest in OVEC that it cannot collect in the competitive PJM markets.[25] Thus, DP&L's pleadings demonstrate that the nature of the RR is to collect transition revenue or its equivalent.

Accordingly, the proposed RR would violate R.C. 4928.38 and R.C. 4928.141. The Court has twice reversed the Commission's authorization of charges designed to provide above-market revenue supplements to EDUs' generation businesses and the Commission should not invite a third reversal by the Court. Because the Commission may not authorize DP&L's proposed RR, the portion of the Amended Application seeking authorization of the RR should be dismissed.

C. DP&L's proposed nonbypassable TCRR-N violates state and federal law and therefore the Commission should direct DP&L to revise and refile the TCRR as a bypassable rider.

In its original Application and in its Amended Application, DP&L seeks a waiver of the Commission's rule that requires transmission riders to be fully bypassable.[26]

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[24] Amended Application at 5 (Oct. 11, 2016).

[25] Direct Testimony of Nathan C. Parke at 7 (Oct. 11, 2016).

[26] Application at 18 (Feb. 22, 2016); Amended Application at 14 (Oct. 11, 2016).

IEU-Ohio opposed the waiver request in the original Application and addresses the waiver request in the Amended Application below.[27]

In the Amended Application, DP&L seeks continued authorization of a nonbypassable transmission rider, the 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.[28] In support of its request for continued authorization of the TCRR-N, DP&L seeks a waiver of Rule 4901:1-36-04(B), O.A.C., which requires that a transmission rider be avoidable by all customers that choose alternative generation suppliers.[29] In support of its request for a waiver, DP&L states only that the Commission has previously authorized a nonbypassable transmission rider.[30]

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 Interconnection, LLC ("PJM") Open Access Transmission Tariff ("OATT"). Under the FPA, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over terms and conditions of retail transmission services applicable to retail customers in Ohio. Because FERC's

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[27] 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 (Mar. 11, 2016).

[28] Amended Application, Proposed Tariff Schedules, Tariff Sheet Nos. T3 and T8 (Oct. 11, 2016).

[29] Amended Application at 14 (Oct. 11, 2016).

[30] *Id*.

jurisdiction over the retail transmission tariff is exclusive, the Commission, without FERC approval, cannot lawfully approve 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 Amended 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 a 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 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 nonbypassable TCRR-N is unlawful and the request for waiver is unsupported, the Commission should deny DP&L's request. Additionally, the Commission should order DP&L to file proposed transmission tariff sheets that provide

for a bypassable transmission tariff rider and that do not include terms and conditions that permit DP&L to bill and collect for transmission services in a manner that conflicts with the provisions of the PJM OATT.

1. 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 unbundled retail electric service.

In Order No. 888,[31] FERC "clarifie[d] Federal/state jurisdiction over transmission in interstate commerce and local distribution"[32] 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 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."[33] 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."[34]

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[31] *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 (last accessed Nov. 18, 2016).

[32] Order No. 888 at 4.

[33] *Id*. at 431.

[34] *Id*.

FERC further required that retail customers will take transmission service pursuant to an OATT.[35] As guidance, the Order included as an appendix a Pro Forma OATT containing non-price minimum terms and conditions of non-discriminatory transmission.[36] As set out in the Pro Forma OATT, unbundled transmission service is available to Eligible Customers.[37] Eligible Customers include "any retail customer taking unbundled Transmission Service pursuant to a state retail access program."[38] Although FERC has exclusive jurisdiction over retail transmission service in states that have 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 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*

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[35] *Id*. at 440.

[36] *Id*. at 5.

[37] *Id*., Appendix D, Pro Forma Open Access Transmission Tariff, Original Sheet No. 37 (availability of service agreements).

[38] *Id*., Appendix D, Pro Forma Open Access Transmission Tariff, Original Sheet No. 10 (definition of Eligible Customer).

services."[39] FERC required that parties file an application for approval of a separate tariff.[40]

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.[41] 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]."[42]

FERC's assertion of jurisdiction over retail transmission service was affirmed by the United States Supreme Court in *New York v. FERC*.[43] 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,"[44] 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

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[39] *Id*. at 440 (emphasis added).

[40] *Id*.

[41] *See, e.g., Entergy*, 91 FERC ¶ 61,155 at 61591 (May 18, 2000) (approving modifications of the Entergy OATT to implement a 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 an 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*.

[42] *NY State Elec. and Gas Corp*., 77 FERC ¶ 61,044 at 61154 (Oct. 18, 1996).

[43] 535 U.S. 1 (2002).

[44] *Id*. at 7.

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."[45]

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."[46] As a principal governing RTOs, FERC sought to assure that customers would have uniform access to transmission facilities in the region:

> 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.[47]

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[45] *Id*. at 19-20 (emphasis in original).

[46] Regional Transmission Organizations, FERC Stats & Regs. ¶31,089 at 3 (Jan. 6, 2000) (internal citation omitted) ("Order No. 2000") (references are to a copy of the order available at http://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf, last accessed Nov. 18, 2016) (last accessed Nov. 21, 2016).

[47] *Id.* at 330.

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.[48]

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.[49] The parties under the tariff are the Transmission Provider and the Transmission Customer.[50] 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.[51] An Eligible Customer includes any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider or a Transmission Owner offer the transmission service.[52]

PJM is responsible for providing NITS to Network Customers.[53] "Network Integration Transmission Service allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve

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[48] 18 C.F.R. § 35.34(k)(1).

[49] PJM OATT, Part I, Definitions – T – U – V (eff. 7/18/16), available at http://pjm.com/documents/agreements.aspx. Citations to the PJM OATT contain the effective date of the identified section.

[50] *Id.*, Part I, Definitions – O – P – Q (eff. 8/20/16).

[51] *Id.*, Part I, Definitions – T – U - V (eff. 7/18/16).

[52] *Id.*, Part I, Definitions – E – F (eff. 7/18/16).

[53] *Id.*, Part III, Preamble (eff. 1/1/11).

its Network Load in a manner comparable to that in which each Transmission Owner utilizes the Transmission System to serve its Native Load Customers."[54] 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.[55] An Eligible Customer also includes a retail customer that takes electric service on an unbundled basis under a state required retail access program.[56] To secure transmission service, an Eligible Customer must make an application[57] and "arrang[e] for the delivery of its energy from the delivery point or interconnection."[58]

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.[59]

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,

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[54] *Id.*

[55] *Id.*, Part III, § 30.7 (eff. 9/17/10).

[56] *Id.*, Part I, Definitions – E – F (eff. 7/18/16).

[57] *Id.*, Part III, §§ 29.1 & 29.2 (eff. 7/14/11 & 9/17/10).

[58] *Id.*, Part III, § 29.4 (eff. 9/17/10).

[59] *Id.,* Part III, §§ 34 & 34.1 (eff. 1/11/11 & 9/17/10).

including losses.[60] 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).[61]

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.[62] Based on its exclusive jurisdiction, FERC has determined that unbundled retail transmission is "Commission-jurisdictional,"[63] 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.[64]

b. Ohio law requires an 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.

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 a retail customer 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.[65] As part of the transition from the provision of retail electric service from the

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[60] *Id.*, Part III, § 34.1 (eff. 9/17/10).

[61] *Id.*

[62] 16 U.S.C. § 824d(d).

[63] *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).

[64] *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*.

[65] R.C. 4928.03, 4928.07, & 4928.31

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.[66] 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.[67] 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 ("MDP"). Although the MDP for an EDU was required to end no later than December 31, 2005,[68] 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.[69]

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 transmission facilities to the transmission operator.[70] 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.[71] The transmission entity is required to be approved by FERC, separate control

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[66] R.C. 4928.31(A)(1).

[67] R.C. 4928.34(A)(1).

[68] R.C. 4928.40.

[69] Rule 4901:1-10-22, O.A.C.

[70] R.C. 4928.12(A).

[71] R.C. 4928.35(G).

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 marketplace, 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.[72]

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 FERC or an RTO, independent system operator, or similar organization approved by FERC.[73] The Commission has also implemented rules governing the authorization of a transmission rider and required that the transmission rider be bypassable. Rule 4901:1-36-04(B), O.A.C., 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."

[72] R.C. 4928.12(B).

[73] R.C. 4928.05(A)(2).

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.[74] Over the objection of IEU-Ohio, the Commission authorized the nonbypassable rider.[75] In this Amended 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."[76] "Billing Demand shall be determined as defined on the applicable Electric Distribution Service Tariff Sheet Nos. D17 through D25."[77] 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 month, or the higher of on or off-peak demand during certain months over the prior eleven month period.[78]

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[74] *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).

[75] *Id*. at 36.

[76] The Dayton Power and Light Company, Eleventh Revised Sheet No. T8, Page 3 of 4, available at http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Transmission.pdf ("DP&L Transmission Tariffs") (last accessed Nov. 18, 2016).

[77] *Id.*

[78] The Dayton Power and Light Company, Thirteenth Revised Sheet No. D19 (Secondary), Thirteenth Revised Sheet No. D20 (Primary), Eleventh Revised Sheet No. D21 (Primary-Substation),

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.[79]

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 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

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and Tenth Revised Sheet No. D22 (High Voltage), available at http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Distribution.pdf (last accessed Nov. 18, 2016).

[79] DP&L Transmission Tariffs, Third Revised Sheet No. T3, page 2 of 3. Currently, DP&L also has a bypassable transmission tariff that is set at 0. *Id.*, Fourteenth Revised Sheet No. T9.

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 Amended 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 DP&L's retail transmission service rates, terms, and conditions are within the exclusive jurisdiction of FERC and the proposed retail transmission tariff conflicts with the terms and conditions of the PJM OATT, and no relief has been sought at FERC, 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. Accordingly, the request for a waiver of Rule 4901:1-36-04(B), O.A.C., should be denied.

2. DP&L's request for a waiver of Rule 4901:1-36-04, O.A.C., 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 for good cause.[80] Because the Commission has not defined what constitutes "good cause," the term should be defined by the ordinary and natural definition of the term.[81] Under the ordinary and natural definition of the phrase, "good cause" means a "[s]ubstantial reason, one that affords legal excuse."[82] Although DP&L seeks a waiver of Rule 4901:1-36-04, O.A.C., it offers no substantial reason for granting the waiver.

The Amended 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.[83] 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.

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 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

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[80] Rule 4901:1-36-02(B), O.A.C.

[81] *State v. Brown*, 38 Ohio St.3d 305, 308 (1988).

[82] *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 the 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).

[83] Amended Application at 14 (Oct. 11, 2016).

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 benefits of reduced transmission investment 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 any substantial reason to grant the waiver and a waiver would continue the harm 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.

3. The Commission should direct DP&L to revise and file amended tariff sheets that comply with federal and state law.

As discussed above, the request for a waiver of Rule 4901:1-36-04(B), O.A.C., seeks an outcome that the Commission cannot lawfully authorize and, in any case DP&L failed to provide grounds to support the waiver. Accordingly, the Commission should deny DP&L's request for a waiver of the requirement that the transmission rider be bypassable. Once the Commission finds that request for waiver should be denied, the Commission should also order DP&L to file proposed transmission tariff sheets that provide for a bypassable transmission rider and that do not include terms and conditions that permit DP&L to bill and collect for transmission services in a manner that conflicts with the provisions of the PJM OATT.

IV. CONCLUSION

DP&L is required by the law to fully describe each aspect of an ESP application and support each aspect of an ESP application with testimony. With respect to the RCR, UEX and Storm Rider, DP&L has failed to do either. Furthermore, DP&L has proposed the RR which would allow DP&L to unlawfully collect transition revenue or its equivalent. Finally, DP&L seeks a waiver of Rule 4901:1-36-04(B), O.A.C., to allow its transmission rider to be nonbypassable, a request that is unsupported by any demonstration of good cause and which would be unlawful if granted.

Accordingly, the Commission should grant this Motion to Dismiss, strike the RCR, UEX, Storm Rider, RR, and TCRR-N from DP&L's proposed ESP, and direct DP&L to file transmission tariff sheets that comply with state and federal law.

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 *Industrial Energy Users-Ohio's Motion to Dismiss, in Part, the Electric Security Plan Application filed by The Dayton Power and Light Company with Respect to the Regulatory Compliance Rider, Uncollectible Rider, Storm Cost Recovery Rider, Reconciliation Rider, and Transmission Cost Recovery Rider-Nonbypassable and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 21st day of November 2016, *via* electronic transmission.

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Summary: Motion to Dismiss RCR, UEX, Storm Rider, RR and TCRR-N of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio