

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
the Dayton Power and Light Company for) Case No. 16-0395-EL-SSO
Approval of its Electric Security Plan.)

In the Matter of the Application of the Dayton)
Power and Light Company for Approval of) Case No. 16-0396-EL-ATA
Revised Tariffs.)

In the Matter of the Application of the Dayton)
Power and Light Company for Approval of) Case No. 16-0397-EL-AAM
Certain Accounting Authority Pursuant to)
Ohio Rev. Code § 4905.13.)

**MOTION TO TAKE ADMINISTRATIVE NOTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

This case involves the unlawful proposal of the Dayton Power and Light Company (“DP&L”) to charge consumers \$315 million (or more) through the so-called Distribution Modernization Rider (“DMR”) to preserve “financial integrity”.¹ DP&L claims that to maintain financial integrity all of the DMR funds will go to pay down debt.² Thus, the amount of debt is an issue in this case that is directly related to how much (if any) DP&L should collect through the DMR.

The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor on behalf of DP&L’s approximately 515,000 residential utility customers, submits this Motion for the Public Utilities Commission of Ohio (“PUCO”) to take administrative notice of the filing

¹ Amended Stipulation and Recommendation (“Settlement”) at 4-6 (March 13, 2017).

² DP&L Initial Post Hearing Brief at 44.

of a form 8-K with the United States Securities and Exchange Commission (“SEC”) by DP&L.³ In that filing, made after the evidentiary hearing in this proceeding, DP&L declared that it had entered into an asset purchase agreement with Dynegy Zimmer, LLC and Dynegy Miami Fort, LLC (collectively “Dynegy”) for the purchase of DP&L’s interest in the Wm. H. Zimmer Generating Station (“Zimmer”) and their interest in Miami Fort Unit 7 and Miami Fort Unit 8 (collectively “Miami Fort”).⁴

This 8-K is relevant here because DP&L has made representations regarding how proceeds from asset sales will be used.⁵ The proceeds would be used to pay debt. Thus, to the extent that DP&L received proceeds from these sales, that should reduce the needs for the DMR, correspondingly. The record in this proceeding should be expanded to incorporate the administratively noticed material so the PUCO can have before it a more complete record on these issues that could affect customers’ rates.

There is good cause for granting this motion, as explained in the following memorandum in support. No parties will be prejudiced by taking administrative notice of this document because this document simply acknowledges a widely available and known fact attested to by DP&L before a federal agency.

³ Attachment 1.

⁴ Attachment 1.

⁵ Settlement at 4.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ William J. Michael

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Dayton Power and Light Company for) Case No. 16-0397-EL-AAM
Approval of Certain Accounting Authority)
Pursuant to Ohio Rev. Code § 4905.13.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case involves an examination of DP&L’s financial condition and that of its parent, DPL, Inc. (“DPL”), and ultimate parent, AES. Among other things, this review requires consideration of the amount of money available to pay down certain debt linked to DP&L’s generation assets. The financial condition of DP&L, DPL, and AES to pay this debt is an issue in this case because DP&L has proposed to use the proceeds of the DMR to pay down debt. Further, a process for the sale of generation assets was a provision in the Settlement.⁶ All proceeds of a sale must go to pay off debt.⁷ Because the generation assets, their sale, and the disposition of sale proceeds is a prominent issue in this case, the OCC seeks to have the information that a sale has occurred, and the sale

⁶ Settlement at 4.

⁷ Id.

amount, admitted into the record in this proceeding. This information will assist the PUCO in determining the appropriate level, if any, of the DMR.

II. DISCUSSION

A. **The PUCO can take administrative notice of facts that are not subject to reasonable dispute.**

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill gaps in the record. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Subsection (F) of Rule 201 states: “Judicial notice may be taken at any stage of the proceeding.”

The Supreme Court of Ohio (“Court”) has held that, while there is no absolute right for the taking of administrative notice, there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.⁸ The Court has held that the PUCO may take administrative notice of the record of an earlier proceeding, subject to review on a case-by-case basis.⁹ The important factors for applying administrative notice are that the complaining party has prior knowledge of and an opportunity to rebut the materials judicially noticed.¹⁰

⁸ See *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18, citing to *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

⁹ *Allen*, 40 Ohio St.3d at 185-186.

¹⁰ See, e.g., *id.*, 40 Ohio St.3d at 186.

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,¹¹ cases,¹² entries,¹³ expert opinion testimony, and briefs and other pleadings filed in separate proceedings.¹⁴ The PUCO has also taken administrative notice of the entire record¹⁵ and evidence presented in separate cases.¹⁶ And the PUCO, in taking administrative notice of the entire record of a prior proceeding in a FirstEnergy Electric Security Plan proceeding, allowed all briefs and other pleadings administratively noticed to be “used for any appropriate purposes.”¹⁷ Additionally, the PUCO has followed Rule

¹¹ *In the Matter of the Review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry (February 22, 1989) at ¶6 (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code).

¹² *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-GA-ORD, Entry on Rehearing (May 16, 2006) at 33 (administrative notice taken of case filed where utility presented problems with remote technology, and sought to discontinue new installation of remote meters).

¹³ *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order (August 19, 1990) at 110 (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket).

¹⁴ *See In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 19-21 (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff'd* by Entry on Rehearing (May 13, 2010) at ¶14 (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings “may be used for any appropriate purposes”).

¹⁵ Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff'd* by Entry on Rehearing (May 13, 2010) at ¶14.

¹⁶ *Id.*; *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992) at 19 (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case); *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service.*, Case No. 91-418-EL-AIR, Opinion and Order (May 12, 1992) at 6 (taking administrative notice of entire record of Zimmer Restatement Case).

¹⁷ Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff'd* by Entry on Rehearing (May 13, 2010) at ¶14.

201(F) and has permitted administrative notice to be taken at any time, and as late as the time when applications for rehearing are being filed.¹⁸

The document (and the facts therein) that OCC is asking the PUCO to take administrative notice of here are not subject to reasonable dispute because they have been filed with a federal agency and attested to by an officer of DP&L.¹⁹ There is no doubt that the events specified in the 8-K filing have occurred. But the filing occurred after the hearing in this case had concluded, and as a result it was not available to be admitted into the record earlier.

B. Filing sought to be administratively noticed.

OCC seeks administrative notice of the 8-K filing at the Security Exchange Commission (“SEC”) attached to this motion.²⁰ This filing describes the sale of Zimmer and Miami Fort, and is an event that is specifically provided for in the Settlement. It specifies that “AES Corporation will use all proceeds from any sale of the coal generation assets to make discretionary debt repayments at DP&L and DPL, Inc.”²¹

The information on the sale of these assets was not available to the PUCO at the time of the hearing. The OCC seeks to make this information available to the PUCO now. This filing indicates that DP&L received \$50 million and the assumption of certain liabilities from Dynegy.²² The PUCO should proportionally reduce the proposed DMR to account for the reduction in debt and liabilities that have occurred as a result of this sale.

¹⁸ *Cincinnati Bell Telephone Company v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 284-285 (Supreme Court upheld administrative notice taken through an application for rehearing).

¹⁹ Attachment 1 (Signed by Judy Sobecki, the General Counsel of DP&L).

²⁰ Attachment 1.

²¹ Settlement at 4.

²² Attachment 1.

III. CONCLUSION

The 8-K filed by DP&L at the SEC speaks directly to the issues in this case.²³ Thus there is good cause for the PUCO to administratively notice the material requested herein. Taking administrative notice will provide information related to how the PUCO's decision in this case may affect charges to residential customers. The DMR that is proposed in the Settlement should be reduced to account for the proceeds received from the sale of Zimmer and Miami Fort.

Respectfully submitted,

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(All will accept service via email)

²³ Id.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 15th day of May 2017.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549**

FORM 8-K

**CURRENT REPORT
Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934**

Date of report (Date of earliest event reported): April 21, 2017

<u>Commission File Number</u>	<u>Registrant, State of Incorporation Address and Telephone Number</u>	<u>Employer Identification No.</u>
1-9052	DPL INC. (An Ohio corporation) 1065 Woodman Drive Dayton, Ohio 45432 937-259-7215	31-1163136
1-2385	THE DAYTON POWER AND LIGHT COMPANY (An Ohio corporation) 1065 Woodman Drive Dayton, Ohio 45432 937-259-7215	31-0258470

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (*see* General Instruction A.2. below):

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§ 230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§ 240.12b-2 of this chapter).

Emerging growth company

DPL Inc.	<input type="checkbox"/>
The Dayton Power and Light Company	<input type="checkbox"/>

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended

Attachment 1

transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

DPL Inc.	o
The Dayton Power and Light Company	o

Item 1.01 Entry into a Material Definitive Agreement.

On April 21, 2017, The Dayton Power and Light Company (“DP&L”) and AES Ohio Generation, LLC (“AES Ohio”), direct wholly-owned subsidiaries of DPL Inc. (“DPL”), entered into an Asset Purchase Agreement with Dynegy Zimmer, LLC (“Dynegy Zimmer”) and Dynegy Miami Fort, LLC (“Dynegy Miami Fort”), indirect wholly-owned subsidiaries of Dynegy Inc., pursuant to which DP&L (or, upon completion of a divestiture by DP&L of its generation assets to AES Ohio (“Generation Separation”), AES Ohio) will, subject to the terms and conditions in the Asset Purchase Agreement, sell to Dynegy Zimmer and Dynegy Miami Fort, as applicable, an entire 28.1% undivided interest in the Wm. H. Zimmer Generating Station (the “Zimmer Station”), a coal-fired electric generating plant located in Moscow, Ohio, and 36.0% undivided interest in Miami Fort Unit 7 and Miami Fort Unit 8 (the “Miami Fort Station”), a coal-fired electric generating plant located in North Bend, Ohio, approximately 740 megawatts in total (summer capacity), for \$50 million in cash and the assumption of certain liabilities, including environmental liabilities. The cash purchase price is subject to adjustment at closing based on the amount of certain inventories, pre-paid amounts, employment benefits, insurance premiums, property taxes and other costs prior to closing.

The sale transaction is subject to approval by the Federal Energy Regulatory Commission under Section 203 of the Federal Power Act, as amended, and certain waivable closing conditions, including completion of Generation Separation. The Asset Purchase Agreement includes customary representations, warranties and covenants by the parties. The Asset Purchase Agreement also contains certain termination rights for the parties, including if the closing does not occur within 12 months following the date of the Asset Purchase Agreement (subject to extension to 18 months, if necessary to obtain applicable governmental approvals). Each party has agreed to indemnify other parties for breaches of representations and warranties, breaches of covenants and certain other matters, subject to certain exceptions and limitations.

The foregoing description of the terms of the Asset Purchase Agreement is qualified in its entirety by reference to the full text of the Asset Purchase Agreement, a copy of which is attached as Exhibit 2.1 hereto and is incorporated herein by reference.

DP&L currently co-owns the Miami Fort Station with Dynegy Miami Fort and currently co-owns the Zimmer Station with Dynegy Zimmer and a third party not affiliated with either DP&L or Dynegy Inc. Dynegy Inc. or its subsidiaries also currently co-own certain other generation plants with DP&L.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

Exhibit 2.1 Asset Purchase Agreement dated April 21, 2017, by and among Dynegy Zimmer, LLC, Dynegy Miami Fort, LLC, AES Ohio Generation, LLC and The Dayton Power and Light Company*

*Pursuant to Item 601(b)(2) of Regulation S-K exhibits and schedules (and similar attachments) have been omitted. DPL and DP&L each agrees to furnish, supplementally, a copy of any omitted schedule or exhibit to the Securities and Exchange Commission upon request by the Commission.

Forward-Looking Statements

This current report contains forward-looking statements within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. These statements include, but are not limited to, statements regarding management's intents, beliefs and current expectations and typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "forecast," "target," "will," "would," "intend," "believe," "project," "estimate," "plan" and similar words. Such forward-looking statements include, but are not limited to, the occurrence or timing of Generation Separation or the transactions contemplated under the Asset Purchase Agreement, strategic objectives, business prospects, anticipated economic performance and financial condition, management's expectations and other similar matters. Forward-looking statements are not intended to be a guarantee of future results, but instead constitute current expectations based on reasonable assumptions. Forecasted financial information is based on certain material assumptions. These assumptions include, but are not limited to, timing of events, accurate projections of market conditions and regulatory rates, future interest rates, commodity prices, continued normal levels of operating performance and electricity volume at distribution companies and operational performance at generation businesses consistent with historical levels, as well as achievements of planned productivity improvements and incremental growth investments at normalized investment levels and expected rates of return.

Actual results could differ materially from those projected in our forward-looking statements due to risks, uncertainties and other factors. Important factors that could affect actual results are discussed in DPL's and DP&L's filings with the Securities and Exchange Commission, including, but not limited to, the risks discussed under Item 1A "Risk Factors" in DPL's and DP&L's 2016 Annual Report on Form 10-K. Readers are encouraged to read DPL's and DP&L's filings to learn more about the risk factors associated with DPL's and DP&L's businesses. DPL and DP&L undertake no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise. Any security holder who desires copies of DPL or DP&L's periodic reports filed with the Securities and Exchange Commission may obtain copies (excluding Exhibits) without charge by addressing a request to the Office of the Secretary, DPL Inc., 1065 Woodman Drive, Dayton, Ohio 45432. Exhibits also may be requested, but a charge equal to the reproduction cost thereof will be made. Copies of such reports also may be obtained by visiting DPL's website at www.dplinc.com.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

DPL Inc.

Date: April 24, 2017

By: /s/ Judi L. Sobecki

Name: Judi L. Sobecki

Title: General Counsel and Secretary

The Dayton Power and Light Company

Date: April 24, 2017

By: /s/ Judi L. Sobecki

Name: Judi L. Sobecki

Title: Vice President, General Counsel and
Secretary

This foregoing document was electronically filed with the Public Utilities

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in

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

Summary: Motion Motion to Take Administrative Notice by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.