

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

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**THE DAYTON POWER AND LIGHT COMPANY'S  
MEMORANDUM IN OPPOSITION TO THE MOTION TO TAKE ADMINISTRATIVE  
NOTICE BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION AND SUMMARY**

The Office of Ohio Consumers Counsel ("OCC") argues that the Commission should take administrative notice of the Form 8-K that was recently filed by The Dayton Power and Light Company ("DP&L"), and should lower the Distribution Modernization Rider ("DMR") amount in light of a potential asset sale announced in that Form 8-K. The Commission should reject OCC's argument for two reasons.

First, the Commission should not take administrative notice of events that occur after the hearing closed, since doing so would deprive DP&L of its right to present evidence addressing facts that were subject to the administrative notice. Second, in any event, the evidence at the hearing showed that a sale of DP&L's generation assets should not affect the DMR amount.

## II. THE COMMISSION SHOULD NOT TAKE ADMINISTRATIVE NOTICE

The Supreme Court of Ohio has held that it is error for the Commission to take administrative notice of evidence not available at the time of hearing. Forest Hills Utility Co. v. Pub. Util. Comm'n, 39 Ohio St.2d 1, 3, 313 N.E.2d 801 (1974). The Court explained that "[e]ven though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut." Id. (citation omitted). Thus, "the factors [the Court] deem[s] significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." Allen v. Pub. Util. Comm'n, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988).  
Accord: Canton Storage & Transfer Co. v. Pub. Util. Comm'n, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995).

Following that precedent, the Commission refused to take administrative notice after the evidentiary record closed in an AEP-Ohio ESP case. Oct. 3, 2011 Opinion and Order, p. 9 (Case No. 08-917-EL-SSO). In that case, AEP-Ohio referred to POLR charges of other Ohio electric distribution utilities in its post-hearing briefs. Id. OCC and other intervenors argued that the Commission should not take administrative notice of those charges because it was "inappropriate to take administrative notice of the information after the record is closed, as it denies them the opportunity to explain and rebut the information through cross-examination, contrary to Ohio Supreme Court and Commission precedent." Id. The Commission agreed and held that "it would be improper to take administrative notice . . . at this stage in the proceedings." Id.

While it was known at the time of the hearing that an asset sale was possible (DP&L's evidence regarding a possible asset sale is discussed below), the specifics of such a sale (including the potential price and timing) were not known. The Commission thus would prejudice DP&L if it were to take administrative notice of the Form 8-K at this late stage of this proceeding. Id. The evidentiary hearing concluded over a month ago, and post-hearing briefs already have been filed. DP&L would not have any opportunity to explain the specific information in the document and rebut any erroneous interpretations of its contents in the evidentiary record. Thus, taking administrative notice would violate DP&L's right to explain whether the information in the Form 8-K demonstrated that the DMR amount should be reduced.

**III. IF THE COMMISSION TAKES ADMINISTRATIVE NOTICE, THEN IT SHOULD NOT LOWER THE DMR AMOUNT**

In the event the Commission were to take administrative notice of the Form 8-K, it should reject OCC's argument (p. 4) that the Commission should reduce the DMR amount, for two reasons.

First, while the specifics of a potential sale were not known at the time of the hearing, the evidence at the hearing did demonstrate that a sale of the assets should not affect the DMR amount:

"Q. Mr. Malinak, you have been asked a number of questions about whether your modeling included the potential sale of certain generation assets that have been identified in the stipulation as being subject to the sale or the closure of Stuart and Killen. My question to you is would including those items in your modeling have any material effect on your results or conclusion?

A. No.

Q. Why not?

- A. Well, because with respect to the sale, I assume they are going to sell it at market price so that's going to be equal to the present value of the future free cash flows which is all -- which is what I currently included in my model, so it's really getting it early. You are getting it later. You know, you are still going to have a positive rating impact from those -- from those -- the sale of those assets."

Trans. Vol. I, pp. 224-25.

In other words, since the projected profits from the plants are already included in DP&L's financial projections, the sale of the plants does not make a material difference to DP&L's financial integrity issues. *Id.* There is thus no justification for lowering the DMR amount.

Second, Stipulation ¶ II.2.a (pp. 4-5) establishes that the DMR amount will be \$105 million for three years, and that DP&L can apply to extend the DMR for two additional years. Paragraphs II.1.d and e (p. 4) further provide that DP&L will commence a sale process for Conesville, Miami Fort and Zimmer Stations, and that any proceeds from any sale will be used to make discretionary debt payments. As Craig Jackson testified, he does not believe the DMR alone will be enough to reach an appropriate FFO to debt ratio. Trans. Vol. I, p. 45 ("I don't believe that the 105 will get us there."). There is no provision in the Stipulation that specifies that the DMR amount should be reduced if the sale process is successful.

Indeed, as described in the Form 8-K, the sale is subject to: (1) changes in the purchase price based upon inventories and other items; (2) approval by the Federal Energy Regulatory Commission; and (3) certain closing conditions. It thus is not known at this time whether the transaction will in fact close, and if so, what the price will be. The Commission thus should not lower the DMR amount even if it were to take administrative notice of the Form 8-K.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Take Administrative Notice by The Office of the Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 22nd day of May, 2017:

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Summary: Response The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company