BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY IN SUPPORT OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO TAKE ADMINSTRATIVE NOTICE

I. INTRODUCTION

Dayton Power and Light Company's ("DP&L") opposition to the Office of the Ohio Consumers' Counsel's ("OCC") Motion for Administrative Notice takes the outlandish position that the Public Utilities Commission of Ohio ("PUCO") should not take administrative notice of undisputed facts clearly attested to by DP&L. DP&L's arguments are not well founded. Accepting them would harm consumers by depriving the PUCO of a robust, complete record on which to make a decision involving consumers' money.

DP&L's 8-K – the document that OCC seeks to admit – is a document that DP&L filed with the Securities and Exchange Commission ("SEC") and is attested to by an officer of DP&L.[1] To have a robust and complete record, the PUCO should have the

[1] OCC's Motion to Take Administrative Notice at Attachment 1 (May 15, 2017).

opportunity to consider the information in DP&L's 8-K before ruling on this case. The information bears directly on the settlement that has been supported by DP&L and other parties in this proceeding and was discussed extensively at hearing.[2] Further, DP&L has had ample opportunity to explain and rebut the information.

II. RECOMMENDATIONS

A. The PUCO should take administrative notice of DP&L's own 8-K.

DP&L argues that it is inappropriate for the PUCO to take administrative notice of evidence not available at the time of the hearing. DP&L cites an Ohio Supreme Court (the "Court") ruling that states that "[e]ven though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decisions or findings upon facts so obtained unless such evidence is introduced at a hearing *or otherwise brought to the knowledge of the interests parties prior to decision, with an opportunity to explain and rebut*."[3] DP&L asserts that the two relevant factors are "whether the complaining party had prior knowledge [of the facts]" and whether they "had an adequate opportunity to explain and rebut, the facts administratively noticed."[4]

Unfortunately for DP&L, both factors are met here. First, DP&L had prior knowledge of these facts. It is the party that attested to the facts and filed a document, the 8-K, that contained them with the SEC.[5] Second, DP&L had two separate opportunities to "explain and rebut" these facts: (1) in its Memorandum Contra OCC's

[2] Settlement at 4 (Mar. 14, 2017).

[3] *Forest Hills Co. v. Public Util. Comm'n*, 39 Ohio St.2d 1, 3 (1974) (citation omitted).

[4] *Allen v. Pub. Util. Comm'n*, 40 Ohio St.3d 184, 186 (1988).

[5] OCC's Motion to Take Administrative Notice at Attachment 1.

motion, and (2) in its reply brief after these same facts were discussed in Murray Energy's initial brief.[6] DP&L chose to do neither.

Additionally, the fact that the hearing is over is not germane. The PUCO has not issued an order in this case.[7] Under the Ohio Rules of Evidence, "[j]udicial [n]otice may be taken at any stage of the proceeding."[8]

The Court has "previously recognized neither an absolute right to nor prohibition against the commission's authority to take administrative notice. *Each case has been resolved based on the particular facts presented.*"[9] The facts presented in this case support taking administrative notice because the information could not have been presented earlier, was information known to DP&L, and DP&L had the opportunity to address the information.

DP&L, nonetheless, cites cases where the Court overturned PUCO decisions taking administrative notice. But the cases are factually distinguishable from the situation currently facing the PUCO.

In *Forest Hills Utility Company v. Public Utilities Commission*, the Court rejected the PUCO's reliance on annual reports that were included only in the decision even though they were available and could have been used in the hearing.[10] Unlike that situation, the document that OCC is seeking to be noticed was not available at the time of the hearing

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[6] See e.g., Joint Post-Hearing Brief of Murray Energy Corporation and The Citizens to Protect DP&L Jobs at 3 (May 5, 2017).

[7] In fact, if DP&L would like a greater opportunity to rebut the evidence, OCC would not object to reopening the proceedings to take witness and evidence on this issue. See O.A.C. 4901-1-34.

[8] Ohio R. Evid. 201(F).

[9] See *Allen*, 40 Ohio St.3d at 185 (italics added).

[10] See *Forest Hills*, 39 Ohio St.2d at 2-3.

In *Canton Storage & Transfer Company v. Public Utilities Commission*, the Court overturned the PUCO taking administrative notice of witnesses to support applications that were outside the scope of the proceedings.[11] Here, the SEC filing detailing the sale of plants is wholly within the scope of this proceeding – it reflects an event directly contemplated by the settlement[12] that was discussed at length during the hearing.[13] Here, the document and the facts would make the record clear, more robust, and more complete.

Finally, in the AEP ESP case cited by DP&L, AEP sought to include information regarding *other* Ohio utilities' POLR charges.[14] The PUCO noted that AEP offered "no reason for having waited until the briefing stage to present the information."[15] This set of facts is the exact opposite of the instant facts. The 8-K includes DP&L's *own* information that was *not* publicly available during the hearing[16] and is directly relevant to the settlement and DP&L's hearing testimony.[17] The PUCO should reject DP&L's flawed arguments and take administrative notice of DP&L's 8-K in order to have a more robust and complete record.

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[11] *See Canton Storage & Transfer Co. v. PUC*, 72 Ohio St.3d 1, 8-10 (1995).

[12] Settlement at 4.

[13] *See e.g.*, Tr. I at 150:2-5 (DP&L witness Jackson stated, "Yeah, I've not tried to model the sale of the [generation] assets. It would be speculative to try to figure out when and how they would be sold and for how much."). Taking administrative notice of this document now would clear up some of the speculation discussed at the hearing and allow for a more complete and robust record.

[14] *In the Matter of the Application of Ohio Power Company for Approval of its Electric Service Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Opinion and Order at 9-10 (Oct. 3, 2011).

[15] Id.

[16] The hearing ended on April 11, 2017, the document was filed with the SEC on April 24, 2017.

[17] Settlement at 4.

B. The PUCO should protect consumers by lowering the DMR amount based upon DP&L's sale of its interests in Miami Fort and Zimmer for $50 million.

As discussed above, the PUCO should take administrative notice of DP&L's own 8-K. DP&L makes two faulty arguments about why, once this information is in the record, the PUCO should not lower the DMR amount accordingly. First, DP&L argues that "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."[18] Second, DP&L argues that "[t]here is no provision in the Stipulation that specifies that the DMR amount should be reduced if the sale process is successful."[19] DP&L's arguments should be rejected.

First, OCC agrees that "[w]hile it was known at the time of the hearing that an asset sale was possible . . . , the specifics of such a sale (including the potential price and timing) were not known."[20] But now the facts are known – DP&L has agreed to sell its interests in Zimmer and Miami Fort Units 7 and 8 to Dynegy for $50 million. The PUCO should consider the proceeds from this transaction and reduce the amount charged under the DMR in proportion to the asset sale price relative to the total outstanding debt at DPL Inc. and DP&L, or $525,000 per year for each year of the DMR.[21]

Further, DP&L Witness Malinak assumed that DP&L was "going to sell [the plants] *at market price* so that's going to be equal to the present value of the future free

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[18] DP&L Memo Contra at 3.

[19] DP&L Memo Contra at 4.

[20] DP&L Memo Contra at 3. Further, Company Witness Jackson testified that trying to include a "sale of assets" would "be speculative to try and figure out when and how they would be sold and for how much." Transcript Vol. I at 149:12-150:9. Again, these facts are all known. There is no more speculation – the proceeds from the sale should be included in DP&L's calculations.

[21] $50 million is .005% of the approximately $1 billion in outstanding debt at DP&L and DPL. $525,000 is .005% of the $105 million DMR in the proposed Settlement.

cash flows."[22] But he also concedes that it is possible for the plants to sell at a "positive amount [that] is market *or better*."[23] So DP&L Witness Malinak's analysis did not include a sale for "better" than market value. This is particularly important here because Dynegy – who also recently purchased AEP Ohio's ownership interests in Miami Fort and Zimmer – likely has a higher value on these generation assets than DP&L (a "control premium"). For example, by purchasing DP&L's interests in Zimmer, Dynegy will now own 100 percent of this generation asset.[24] Someone who owns 100 percent of an asset and can better control its costs and operations may very well value it more than someone who only owns 28.1 percent (or 71.9 percent) of the same asset.

Because all of the relevant facts concerning these asset sales are now known and DP&L Witness Malinak did not include them in his analysis, the PUCO needs to do so here. The DMR amount should be lowered in proportion to the asset sale price relative to the total outstanding debt at DPL Inc. and DP&L, or $525,000 per year for each year of the DMR.[25]

Second, DP&L argues that the sale proceeds cannot impact the DMR amount because "[t]here is no provision in the Stipulation that specifies that the DMR amount

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[22] DP&L Memo Contra at 4 (citing Trans. Vol. I, pp. 224-25) (emphasis added).

[23] Trans. Vol. I 215:6-18 (emphasis added).

[24] Dynegy 8-k at 9 (Feb. 23, 2017), *available at* http://phx.corporateir.net/phoenix.zhtml?c=147906&p=irolSECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTExNDIwNjA1JkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVElPTl9FTlRJUkUmc3Vic2lkPTU3 (noting that Dynegy acquired AEP Ohio's ownership interest in Zimmer and that "[a]s a result, Dynegy will own 71.9 percent of Zimmer facility). In this transaction, Dynegy is acquiring the other 28.1 percent from DP&L. See DP&L 8-K at 2 (Apr. 21, 2017) ("noting that as part of the Asset Purchase Agreement, [DP&L agrees to] sell to Dynegy Zimmer . . . an entire 28.1% undivided interest in the Wm. H. Zimmer Generating Station."). See also http://www.bizjournals.com/columbus/news/2017/02/24/aep-dynegy-swap-ohio-power-plant-ownership.html.

[25] See note 21, supra.

should be reduced if the sale process is successful."[26] But that is the decision before the PUCO right now. The PUCO has broad authority to accept, reject, or modify a settlement in any way it sees fit.[27] The OCC recommends that the PUCO protect consumers by modifying the Settlement to reduce the DMR amount proportionately to the asset sale price relative to the total outstanding debt at DPL Inc. and DP&L.

III. CONCLUSION

The PUCO should take administrative notice of DP&L's 8K, evidence that was not available at the time of the hearing. In the alternative, the PUCO should reopen the record to hear evidence on the sale of DP&L's generation assets. This information should be in the record and used to protect consumers by adjusting the authorized DMR collection from customers to reflect the proceeds from the asset sale.

[26] DP&L Memo Contra at 4.

[27] Of course, because this is an ESP, DP&L has the ability to withdraw its application if it does not agree with the PUCO's modifications. See R.C. §4928.143(C)(2)(a).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of OCC's Motion to take Administrative Notice* has been served via electronic transmission upon those persons listed below this 30th day of May 2017.

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