

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid : Case No. 18-1875-EL-GRD

In the Matter of the Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2) : Case No. 18-1876-EL-WVR

In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods : Case No. 18-1877-EL-AAM

**MEMORANDUM IN OPPOSITION OF THE DAYTON POWER AND
LIGHT COMPANY TO ENVIRONMENTAL LAW &
POLICY CENTER'S MOTION TO DISMISS**

I. INTRODUCTION AND SUMMARY

The Commission should deny the motion to dismiss filed by the Environmental Law & Policy Center ("ELPC") for the following reasons:

1. ELPC relies on Ohio Civ. R. 41(B)(2), but that rule does not apply here, and even if it did, ELPC has waited too long to file a motion to dismiss.
2. ELPC is not a customer of The Dayton Power and Light Company ("DP&L"), and has failed to establish that it has standing to seek the relief sought in its motion.

3. DP&L's plan to work with interested parties to develop the specifics of its demonstration projects is reasonable, and the collaboration will assist DP&L to develop the best possible projects.
4. DP&L's cost-benefit analysis provides a detailed showing of the costs and benefits of DP&L's plan, and does not violate the Commission's Order.
5. DP&L's plan provides sufficient details to determine whether it complies with the Commission's PowerForward Roadmap.
6. The demonstration projects are a small portion of DP&L's plan, and it would be unreasonable to dismiss DP&L's entire Distribution Modernization Plan ("DMP") even if DP&L's collaborative approach was not reasonable.

II. OHIO CIV. R. 41(B)(2) DOES NOT APPLY TO COMMISSION PROCEEDINGS

ELPC (p. 1) purports to move to dismiss DP&L's DMP under Ohio Civ. R. 41(B)(2) and Ohio Administrative Code § 4901-1-12. However, the Ohio Rules of Civil Procedure do not apply here, and the Commission's rules do not authorize a motion to dismiss at this stage of the proceedings.

Further, assuming for sake of argument that ELPC could file a motion to dismiss under those rules, its motion is not timely. DP&L filed its application in this case on December 21, 2018, over nine months ago. To the extent that ELPC could file a motion to dismiss, it should have filed the motion many months ago. This case has been ongoing for over

nine months, extensive discovery has occurred and settlement negotiations are ongoing. DP&L would be unfairly prejudiced if ELPC was permitted to file a motion to dismiss at this late date.

III. ELPC LACKS STANDING

The Supreme Court of Ohio has long recognized that while intervention is liberally permitted before the Commission, such proceedings are not a "free-for-all" in which everyone, regardless of interest, is entitled to be heard. City of Cleveland v. Pub. Util. Comm., 127 Ohio St. 432, 440, 189 N.E. 5 (1934). "If such were the law, it would be bad law, as it would run counter to the fundamental rule to the effect that 'He who has no interest in the subject of litigation has no right to be heard.' Such a departure from the established rules of procedure could result in nothing less than bedlam." Id. "But such is not the law." Id.

To have standing, a party must show that it has "suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." State ex rel. Food & Water Watch v. State, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19 (citation omitted). Further, an organization has standing on behalf of its members only when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Ohio Contrs. Ass'n v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (citation omitted).

Here, ELPC does not claim to be a DP&L customer. ELPC never explains how its motion would achieve its goals, or how it would be injured if its motion were denied.

Instead, on nearly every single page of its motion, ELPC focuses on whether DP&L's plan will benefit customers:

- p. 1 -- discussing "cost-effectiveness" of DP&L's plan;
- p. 2 -- discussing whether DP&L's DMP will "provide customers real value";
- p. 4 -- discussing "how it will benefit customers";
- p. 5 -- arguing that DP&L's plan fails to identify "what it will cost";
- p. 6 -- saying DP&L's plan does not identify how "customers could elect to participate";
- p. 7 -- arguing that DP&L's plan "does not adequately protect ratepayers" or "provide valuable benefits to customers";
- p. 8 -- arguing that DP&L's plan fails to address "how much the project would cost; how it would benefit customers";
- p. 9 -- arguing that DP&L's plan "makes no mention of the rate customers will be charged";
- p. 10 -- asserting that another utility's plan included "fees and rates it would charge station users" and that DP&L's plan does not have that information;
- p. 11 -- arguing that DP&L's plan does not include an adequate cost-benefit analysis;
- p. 12 -- arguing that the Commission should ensure that DP&L's plan will "spend ratepayer dollars wisely" and provide "net value to customers";
- p. 13 -- DP&L should make "cost-effective modernization investments."

ELPC's motion is written as if ELPC were a DP&L customer. However, ELPC is not a DP&L customer, and it has no standing to protect customer interests. ELPC has made no effort to show how its motion would advance its interests, and the Commission should thus conclude that ELPC lacks standing.

In any event, even if ELPC were a DP&L customer (or its members were DP&L customers), ELPC still would not have standing. To have standing, "the interests [an organization] seeks to protect [must be] germane to the organization's purpose." Ohio Contrs., 71 Ohio St.3d at 320. ELPC never explains why saving customers money is germane to its purpose of protecting the environment.

IV. DP&L'S PLAN TO WORK WITH INTERESTED PARTIES WILL LEAD TO THE BEST RESULT

ELPC does get one thing right in its motion -- DP&L does plan to work with interested parties to develop specifics for its demonstration projects (battery, community solar, Micro-Grid, electric vehicle charging stations). DP&L's high level plans for those projects are contained in Hall Test., pp. 28-33. DP&L intends to further develop those projects by working with interested parties. Interested parties working as a team to further develop specific plans has been an effective approach at the Commission for many years. It is hardly novel.

DP&L is aware that different parties have different views regarding whether it should go forward with its demonstration projects, and if so, how they should be structured. DP&L is also aware that some of the parties to the case have more experience than DP&L regarding the demonstration projects (either from being in the industry or working with other Ohio utilities that have had similar projects). DP&L concluded that the best way to implement the best possible demonstration projects was to work with a team of interested parties.¹

¹ ELPC (p. 3) cites to R.C. 4909.18 to support its argument. That section is inapplicable, as this filing was authorized by DP&L's Third Electric Service Plan (Case No. 16-0395-EL-SSO, et. at.) and is thus governed by R.C. 4928.143.

V. **DP&L'S COST-BENEFIT ANALYSIS IS REASONABLE AND COMPLETE**

ELPC asserts (p. 11) that DP&L has failed to provide an adequate cost-benefit analysis of the components of DP&L's DMP. Not true.

DP&L has provided detailed workpapers showing the investments and expenses that it anticipates making over a ten-year period. See WP 1.1 - WP 7.4. Those workpapers are supported by testimony of DP&L's witnesses that describes the benefits of DP&L's plans, and how the workpapers were assembled. See testimony of DP&L witnesses Storm, Narvaez, Gebele, Tatham, Hall, Fuller and Hulsebosch.

DP&L's workpapers also included a detailed calculation of the benefits of DP&L's grid modification plan. See WP-A - WP-C. The testimony of DP&L witnesses Hall and Hulsebosch explains those benefits and how those calculations were created.

ELPC (p. 11) complains that it cannot identify the costs and benefits of specific smart grid components, and cites the Micro-Grid Demonstration Project as an example. There are two defects to that argument. First, as discussed above, the specifics of the Micro-Grid Demonstration Project are still being developed, so it is impossible for DP&L to estimate the precise costs and benefits of that project at this time.

Second, more generally, the benefits tied to grid modernization are interdependent, and it is not always possible to assign specific benefits to specific costs. For example, DP&L's proposed Customer Information System ("CIS") is needed to allow DP&L to fully implement time-of-use rates, prepaid billing, DP&L's Mobile Order Management System, Workforce Management System, Meter Assist Management System, Remote

Connect/Disconnect capabilities, theft detection, meter tampering and other meter-to-cash analytics, and Advanced Distribution Management System. Narvaez Test., pp. 5-6.

Implementing those items will require significant investment beyond just a CIS, including advanced meters, the listed equipment, etc. Storm Test., pp. 7, 17-19, 28, 29; Gebele Test., pp. 23-25, 26-28.

As another example, one of the benefits of DP&L's DMP is "Reduction of Residential Reconnect/Disconnect Costs (smart meters)," which is projected to have a 10-year benefit of \$9,534,251. WP-A, p. 1, 1.3. To get any of that benefit, DP&L needs to install smart meters, equipment to communicate with those smart meters, and a new CIS. Storm Test., p. 28; Gebele Test., p. 29; Narvaez Test., pp. 7-10. It is thus impossible to identify with specificity the benefits of a new CIS system, since the system is necessary but not sufficient to achieve many of the benefits of DP&L's DMP.

Given the interdependent nature of DP&L's DMP investments, it is not always possible to conduct an individualized cost/benefit analysis as to each component. The best method to conduct a cost-benefit analysis is to identify the total costs and the total benefits with specificity, and determine whether the total benefits exceed the total costs. That is what DP&L has done. See WP-1.1 - WP-7.4; WP-A - WP-C.

Indeed, the Commission has approved grid modernization plans with cost/benefit analysis that had less detail. In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Plan, Opinion and Order, ¶¶ 111-22 (Case No. 16-481-EL-UNC) (July 17, 2019) (approving cost/benefit analysis in Attachment B of Stipulation and Recommendation, Case No. 16-481-EL-

UNC). DP&L's cost/benefit analysis is considerably more detailed than the one that the Commission approved in that case.

VI. DP&L'S DMP IS CONSISTENT WITH THE COMMISSION'S POWERFORWARD ROADMAP

ELPC also complains (p. 12) that DP&L's DMP does not contain sufficient information to determine whether it complies with the Commission's PowerForward Roadmap. Again, not true.

DP&L's schedules, workpapers and supporting testimony describe DP&L's plan in great detail, and show that DP&L's plan is consistent with the Commission's PowerForward Roadmap. In particular, the testimony of DP&L's witness Hall (pp. 13-15) includes charts demonstrating how DP&L's plan complies with and extends beyond the Commission's PowerForward Roadmap.

ELPC's reasoning (p. 12) is that DP&L's DMP does not include "costs and benefits associated with each component of the DMP," so the Commission cannot determine whether DP&L's plan complies with the Commission's PowerForward Roadmap. However, as demonstrated in the prior section, that is simply not true. DP&L's cost/benefit analysis is consistent with the Commission's requirements and provides ample information to the Commission.

VII. DISMISSAL OF THE ENTIRE CASE IS NOT AN APPROPRIATE REMEDY

Even if the Commission were to conclude that ELPC's motion had merit, the appropriate remedy would not be the dismissal of DP&L's entire plan. The demonstration projects on which ELPC focuses are a small portion of DP&L's plan. ELPC never explains why

DP&L's entire DMP should be dismissed if DP&L has failed to sufficiently identify specifics for a relatively small portion of its plan. This sort of "throw the baby out with the bathwater" request is drastic given the fact the ELPC acknowledges that other larger portions of the filing have a plethora of support. See, ELPC Motion at p. 4.

VIII. ELPC'S COUNSEL ARE ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW IN OHIO

In proceedings before the Commission, "each party not appearing in propria persona shall be represented by an attorney-at-law authorized to practice before the courts of this state," subject to three narrow exceptions. Ohio Admin. Code § 4901-1-08(A). "Corporations must be represented by an attorney-at-law." Id. The only exception at issue here is for out-of-state attorneys, who "may seek permission to appear pro hac vice before the commission in any activity of a case upon the filing of a motion" consistent with the Rules for the Government of the Bar of Ohio. Ohio Admin. Code § 4901-1-08(B).

The Rules for the Government of the Bar of Ohio provide that "[a] tribunal of this state may grant permission to appear pro hac vice to any attorney who is admitted to practice in the highest court of a state, commonwealth, territory, or possession of the United States or the District of Columbia, or who is admitted to practice in the courts of a foreign state and is in good standing to appear pro hac vice in a proceeding." Gov.Bar R. XII(2)(A). A tribunal, in turn, is defined to include administrative agencies. Gov.Bar R. XII(1)(A).

The out-of-state attorney must associate with "an active Ohio attorney, in good standing." Gov.Bar.R. XII(2)(A)(7)(e) (emphasis added). Accord: Prof.Cond.R. 5.5(c)(1) (allowing out-of-state attorneys to practice in Ohio on a temporary basis when "the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who

actively participates in the matter."). (Emphasis added.) The filing of motions before the Commission constitutes the practice of law. In the Matter of the Complaint of the Ohio Consumers' Counsel, et al. v. Interstate Gas Supply, Inc., Pub. Util. Comm. 10-2395-GA-CSS (Nov. 2, 2011 Entry), 2011 Ohio PUC LEXIS 1193, *6-8 (finding that a motion filed by a non-Ohio attorney who had not appeared pro hac vice should be denied as "procedurally defective").

Here, ELPC's Motion was signed by Robert Kelter and Nikhil Vijaykar, neither of whom are Ohio attorneys. Aug. 29, 2019 Motion to Appear Pro Hac Vice of Robert Kelter; Aug. 23, 2019 Motion to Appear Pro Hac Vice of Nikhil Vijaykar. In their motions to appear pro hac vice, Messrs. Kelter and Vijaykar each represented that Miranda Leppla had agreed to associate with them. Id. However, on September 13, 2019 (six days before ELPC filed its motion to dismiss), Ms. Leppla served via email on all counsel (including Messrs. Kelter and Vijaykar) a notice of withdrawal of counsel for ELPC. Ms. Leppla also filed that notice in Case No. 18-1877. Counsel for DP&L understands from Ms. Leppla that the notice inadvertently was not filed in Case Nos. 18-1875 and 18-1876. On October 2, 2019, Ms. Leppla filed the notice to withdraw in those cases.

IX. CONCLUSION

The Commission should deny ELPC's motion to dismiss for the reasons set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 2019, I electronically served the foregoing Memorandum in Opposition of The Dayton Power and Light Company to Environmental Law & Policy Center's Motion to Dismiss upon the following counsel of record:

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Summary: Memorandum Memorandum in Opposition of The Dayton Power and Light Company to Environmental Law & Policy Center's Motion to Dismiss electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company