

**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
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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
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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
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**THE ENVIRONMENTAL LAW & POLICY CENTER’S
REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS WITHOUT PREJUDICE AND
FOR THE COMMISSION TO DIRECT THE DAYTON POWER AND LIGHT
COMPANY TO RE-FILE ITS APPLICATION**

DP&L’s Opposition to ELPC’s Motion to Dismiss makes a number of arguments, but it fails to respond to ELPC’s fundamental argument that DP&L has not provided the Commission sufficient information to determine whether the Company’s modernization plan meets any minimal burden of proof. As ELPC pointed out in its Motion to Dismiss, DP&L’s vague and incomplete plan leaves the Commission with only an after-the-fact prudency review to protect customers. ELPC Mot. to Dismiss at 13. Nothing in DP&L’s Opposition—which focuses on the Company’s plans to work with stakeholders to develop details *after* receiving Commission approval, along with a series of procedural arguments—suggests otherwise. Therefore, the Commission should dismiss DP&L’s Application.

I. DP&L concedes that its pilot proposals lack detail, but incorrectly suggests that defect can be cured after the Commission approves its plan.

ELPC moved to dismiss DP&L’s Application because the Company’s pilot¹ proposals—which are an integral part of DP&L’s grid modernization plan—lack sufficient detail to meet its burden of proof. ELPC Mem. ISO Mot. to Dismiss at 1. ELPC explained that the Company’s plan “leaves virtually every question regarding the benefits, cost-effectiveness, design, implementation, and evaluation of [its] pilots unanswered.” ELPC Mot. to Dismiss at 1.

In response, DP&L does not contest that its pilot proposals lack detail. DP&L Memo. in Opp’n at 5. In fact, the Company concedes that its testimony includes only “high level plans.” *Id.* But, the essence of the Company’s argument is that those high-level plans are sufficient to secure Commission approval, because it “plan[s] to work with interested parties to develop specifics for its demonstration projects (battery, community solar, Micro-Grid, electric vehicle charging stations).” *Id.* It adds that this approach “is not novel,” and that “[i]nterested parties working as a team to further develop specific plans has been an effective approach at the Commission for many years.” *Id.*

ELPC never suggested that DP&L’s approach or case is “novel.” ELPC explained, however, why it nevertheless merits dismissal. In order to secure Commission approval for a grid modernization plan that will cost its customers \$866.9 million over 20 years, DP&L must at a minimum meet its burden of proof and demonstrate that its plan is just and reasonable. ELPC Mem. ISO Mot. to Dismiss at 3. The Company’s direct case, however, lacks sufficient detail to allow the Commission to make that determination. *See* ELPC Mem. ISO Mot. to Dismiss at 4-

¹ Consistent with ELPC’s Motion to Dismiss, we use the term “pilots” or “pilot projects” in this reply to include the “pilot projects,” “demonstration projects,” and “initiatives” described in DP&L’s Application and testimony. Those pilots include its distributed energy demonstration projects, its microgrid pilot, its electric vehicle (EV) charging initiative, and its conservation voltage reduction and volt/Var optimization (CVR/VVO) initiative. *See* ELPC Mem. ISO Mot. to Dismiss at 1, 4.

11. The Application also lacks the information required by the PowerForward Roadmap—a point which the Ohio Office of Consumers’ Counsel explains in-depth in its Memorandum Contra to ELPC’s Motion. *See* OCC Mem. Contra ELPC Mot. to Dismiss at 3. The Commission, therefore, should dismiss DP&L’s Application.

ELPC welcomes DP&L’s desire to work “as a team” with interested parties to develop specific plans for its pilot projects. The Company is correct 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 Mem. in Opp’n at 5. But DP&L still has not explained why it cannot (and did not) work with parties to develop robust pilot proposals *before* it asks for the Commission’s approval of those proposals.

DP&L requests approval of a plan to spend customer money without providing any detail on how it plans to spend that money, and asks the Commission to simply trust that it will work with parties to develop just and reasonable pilot proposals. However, once the Commission approves DP&L’s spending on its pilots, the Commission gives DP&L authority to spend that money as it chooses. If DP&L fails to reach consensus with the parties, it would have Commission approval to spend that money as it chooses with no oversight. The Commission will then have no ability to amend or reject the pilots. While DP&L’s willingness to work with customers to develop pilots sounds admirable, the law requires the Company to *first* develop a proposal that meets the “just and reasonable” standard, *then* ask for Commission approval of that proposal. DP&L’s approach flips that sequence, and the Commission should reject it.

II. Dismissal of DP&L’s entire case is appropriate because the pilot proposals are integral to the grid modernization plan.

DP&L asserts that even if the Commission concluded that ELPC’s motion had merit, “the appropriate remedy would not be the dismissal of DP&L’s entire plan.” The Company claims

that “[t]he demonstration projects on which ELPC focuses are a small portion of DP&L’s plan,” and characterizes ELPC’s motion as a “throw the baby out with the bathwater” request. DP&L Mem. in Opp’n at 9.

In fact, and as ELPC has explained, DP&L’s pilot programs constitute far more than “bathwater”—they form an integral part of the Company’s grid modernization plan. *See* ELPC Mem. ISO Mot. to Dismiss at 1-2. DP&L focuses on the future grid needing to adapt to the evolving way customers and competitors use the grid. The Company highlights its customers’ desire to purchase EVs and implement distributed energy resources (DERs) as two of the four customer trends influencing the “vision” behind its modernization plan as a whole. DP&L Appl. at 3. As DP&L’s own witness explains, as the presence of DERs grows on DP&L’s grid, “it will become increasingly important for utilities to manage DERs on the grid while continuing to provide customers with safe and reliable electric service.” Hall Direct Test. at 27. The proposed pilot projects give DP&L the opportunity “to learn about the impacts of DERs and how to better promote and manage DERs using smart grid technologies.” *Id.* It follows, then, that if the Company does not design meaningful pilot programs, it will not be adequately prepared for any impacts related to increasing DER and EV penetration, or positioned to promote and manage DERs. To meet the just and reasonable standard, DP&L’s modernization plan must provide the grid of the future that DP&L envisions and is the driver for its proposed upgrades.

Consistent with the rationale for upgrading the grid, DP&L relies on its pilot proposals to deliver a significant proportion of the total benefits that the Company claims will result from its Plan. “Seamless integration of DERs on to the grid” and “An increase in EVs for public and private use” are two of the six “primary customer benefits” that DP&L expects its modernization plan to deliver. DP&L Appl. at 3. While DP&L has not provided a clear accounting of the

benefits associated with each Plan component, the Company's workpapers indicate that the Company relies on conservation voltage reduction, battery storage, and electric vehicles to deliver nearly 50% of the customer benefits from its grid modernization plan. *See* Schedules and Workpapers, WP-B. Similarly, the Company workpapers indicate it relies on conservation voltage reduction, volt/Var optimization, electric vehicles, and the community solar demonstration project to deliver over 50% of the societal benefits of its plan. *See* Schedules and Workpapers, WP-C. Therefore, the Company has to provide sufficiently detailed information about the pilot proposals for the Commission to reasonably determine whether the Company's plan, as a whole, will benefit customers. DP&L fails to do so, and in fact, admits as much.

III. DP&L tries to muddy the waters by inserting a series of procedural arguments that have nothing to do with the substance of ELPC's motion.

DP&L focuses much of its response to ELPC's Motion by raising a series of procedural arguments. Those arguments have nothing to do with the substance of ELPC's Motion, and should not distract from the Company's failure to convincingly respond to the thrust of ELPC's Motion, that DP&L's Application is fundamentally flawed and should be dismissed. ELPC responds to each of DP&L's procedural arguments below.

A. DP&L did not object to ELPC's intervention, and should not be permitted to belatedly challenge standing here.

DP&L asks the Commission to deny ELPC's Motion because "ELPC is not a customer of The Dayton Power and Light Company . . . and has failed to establish that it has standing to seek the relief sought in its motion." DP&L Mem. in Opp'n at 1. However, ELPC is not required to assert or establish standing in its motion—it has already done so in its Motion to Intervene. ELPC Mem. ISO Mot. to Intervene (Jan. 30, 2019). In that motion, ELPC described its real and substantial interests in this proceeding, including in "ensuring the cost-effective implementation of grid modernization technologies to reduce energy consumption and produce corresponding

environmental benefits” and in “ensuring that utilities recognize the value of distributed energy resources.” *Id.* at 2. ELPC also asserted that it intends to “ensure DP&L’s application complies with applicable law and policy.” *Id.* ELPC’s Motion to Dismiss reflects both the interests and legal position articulated in its Motion to Intervene. Moreover, DP&L did not object to ELPC’s Motion to Intervene within the fifteen-day time period prescribed by the Commission’s rules. Ohio Adm. Code 4901-1-12. The Commission should reject the Company’s attempt to use its Response as a belated opposition to ELPC’s intervention.

B. ELPC’s Motion to Dismiss is timely and would not result in prejudice to DP&L.

DP&L asserts that ELPC’s Motion to Dismiss is not timely because it filed its Application over nine months ago. It claims that the Company would be “unfairly prejudiced if ELPC was permitted to file a motion to dismiss at this late date.” DP&L Mem. in Opp’n at 2-3. However, DP&L fails to point to any rule that precludes a motion to dismiss at this stage of the proceeding (indeed, no such rule exists). Moreover, it makes no effort to explain why ELPC’s Motion unfairly prejudices the Company. Neither Staff nor any intervenor has submitted testimony in this proceeding, no hearing has occurred, and no party has filed briefs. In fact, the Commission has not even established a procedural schedule for this case yet. Hence, ELPC’s Motion does not come at a “late date” as the Company claims—on the contrary, it comes early in the proceeding, when the parties have expended a small fraction of the resources they would expend if this case were allowed to continue.

C. ELPC’s counsel remain associated with local counsel.

DP&L accuses ELPC’s counsel of engaging in the unauthorized practice of law in Ohio. Its basis for this accusation is that on September 13, 2019, Ms. Miranda Leppla, with whom

ELPC continues to be associated in this case, served a notice of withdrawal of counsel for ELPC. That argument has no merit.

Ms. Madeline Fleisher, ELPC's original counsel of record in this case, designated Ms. Leppla (an attorney with the Ohio Environmental Council) ELPC's counsel of record in this case before Ms. Fleisher left ELPC earlier this year. *See Env'tl Law & Policy Center, Notice of Withdrawal of Counsel and Designation of Counsel of Record* (June 21, 2019). On August 23, 2019, Mr. Nikhil Vijaykar of ELPC filed a motion to appear pro hac vice in this proceeding. Subsequently, on August 29, 2019, Mr. Robert Kelter, also of ELPC, filed a motion to appear pro hac vice in this proceeding. In their respective motions to appear, both Mr. Vijaykar and Mr. Kelter truthfully represented that Ms. Leppla, an active Ohio attorney in good standing, has agreed to associate with them in this proceeding, satisfying Ohio Adm. Code 4901-1-08(B) and Gov. Bar R. XII(2). Mr. Vijaykar and Mr. Kelter continue to be associated with Ms. Leppla for the purposes of this proceeding, and Ms. Leppla continues to actively participate in this proceeding. However, once Mr. Vijaykar and Mr. Kelter filed motions to appear in this proceeding, they assumed principal responsibility for ELPC's participation in this proceeding, and replaced Ms. Leppla as ELPC's counsel of record in this case. Ohio Adm. Code 4901-1-08(E). Ms. Leppla then noticed the parties that Mr. Vijaykar was replacing her as ELPC's counsel of record on September 13, 2019. DP&L's argument that ELPC's counsel are "engaged in the unauthorized practice of law" simply because Ms. Leppla informed the parties that Mr. Vijaykar would be replacing her as counsel of record is meritless and the Commission should disregard it.

IV. Conclusion

Ohio law requires DP&L to provide the Commission with sufficient information to evaluate the Company's request to spend \$866.9 million over twenty years. The Company fails

to meet this requirement, and instead argues that it will work with parties to develop specifics, and that dismissal of its entire case would be unreasonable. As set forth above, DP&L's commitment to work with parties to develop specifics *after* filing does not satisfy the utility's burden of proof. In addition to failing to meet its legal requirement, this strategy leaves customers completely unprotected in the event that DP&L disagrees with the ideas parties propose in discussions to determine the details of the pilots. Further, as ELPC has explained, the lack of detailed pilot proposals requires dismissal of DP&L's entire case because those pilots are integral to DP&L's grid modernization plan. Based on the flaws in DP&L's Application outlined above, the Commission should dismiss DP&L's Application, and require the Company to provide the Commission with a developed plan that satisfies its burden of proof, meets the requirements of the Commission's PowerForward Roadmap, and provides customers real benefits.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *The Environmental Law and Policy Center's Reply Memorandum In Support of Its Motion to Dismiss Without Prejudice and for the Commission to Direct the Dayton Power and Light Company to Re-file its Application* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on October 14, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Reply Memorandum in Support of its Motion to Dismiss Without Prejudice and for the Commission to Direct the Dayton Power and Light Company to Re-File its Application electronically filed by Mr. Nikhil Vijaykar on behalf of Environmental Law & Policy Center