

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of : Case No. 14-1505
The Dayton Power and Light Company for :
Approval of Its Electric Security Plan, etc. : Appeal from the Public Utilities
 : Commission of Ohio
 :
 : Public Utilities Commission of Ohio
 : Case Nos. 12-426-EL-SSO,
 : 12-427-EL-ATA,
 : 12-428-EL-AAM,
 : 12-429-EL-WVR, and
 : 12-672-EL-RDR

**FOURTH BRIEF OF CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY**

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BRIEF OF CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY

I. INTRODUCTION AND SUMMARY

This Court should reverse the Commission's Order in this case on three separate issues.

First, R.C. 4928.143(B)(2)(d) authorizes a utility to receive a stability charge, provided that the charge satisfies the three elements contained in that section. The Commission authorized DP&L to receive a Service Stability Rider ("SSR") under that section through December 31, 2016, and authorized DP&L to receive an extension of the SSR ("SSR-E") through May 31, 2017. However, the Commission's Order states that DP&L can receive the SSR-E only if DP&L satisfies five additional conditions. The Commission cannot rewrite a statute to add elements; those five conditions are not contained in R.C. 4928.143(B)(2)(d), and are thus unlawful.

Second, the evidence at the hearing showed that DP&L could not transfer its generation assets to an affiliate before May 31, 2017. There was no evidence -- none -- showing that DP&L could transfer those assets to an affiliate at an earlier date. Further, DP&L has attempted to find a third party to buy the generation assets, but has been unsuccessful. The Commission nonetheless ordered DP&L to transfer its generation assets by January 1, 2017. There was no evidence supporting that deadline, and the Court should thus order the Commission to establish a May 31, 2017 deadline.

Third, the evidence at the hearing showed that DP&L's financial integrity -- and, thus, its ability to continue to provide safe, reliable and stable service -- would be jeopardized by the implementation of competitive bidding (i.e., consumers receiving generation from the lowest

bidder, instead of from DP&L). DP&L proposed that competitive bidding be implemented, but that it be implemented gradually so that DP&L could maintain its financial integrity. The Commission nonetheless ordered DP&L to implement competitive bidding on an accelerated schedule. There was no evidence showing that DP&L could maintain its financial integrity under the schedule set by the Commission, and the Court should therefore order the Commission to institute the competitive bidding schedule proposed by DP&L.

II. THE COMMISSION PLACED UNLAWFUL CONDITIONS UPON DP&L'S RIGHT TO RECEIVE A STABILITY CHARGE UNDER SECTION 4928.143(B)(2)(d)

R.C. 4928.143(B)(2)(d) authorizes a stability charge for a utility, provided that it satisfies three elements: (1) it must be a "[t]erm[], condition[] or charge[]"; (2) it must "relat[e] to" one of the items listed in the statute; and (3) it must have the effect of "stabilizing" service. (OCC Appx. 131.) Under that section, the Commission approved the SSR for DP&L to run through December 31, 2016, and authorized DP&L to apply for an extension of the SSR (the "SSR-E") to run from January 1, 2017 through May 31, 2017.¹

However, the Commission imposed five onerous conditions upon DP&L's ability to receive the SSR-E. Sept. 4, 2013 Opinion and Order ("9/4/13 Order"), pp. 27-28 (OCC Appx. 37-38). DP&L demonstrated in its initial brief (pp. 40-45) that those conditions were not lawful, because they were not contained in R.C. 4928.143(B)(2)(d). In response, the Commission argues: (a) that DP&L's appeal is premature because DP&L has not yet been denied the SSR-E; and (b) Section 4928.143(B)(2)(d) permits the Commission to impose the conditions. As demonstrated below, the Court should reject those arguments.

¹ Sept. 6, 2013 Entry Nunc Pro Tunc ("9/6/13 Entry"), p. 2 (OCC Appx. 66).

A. DP&L'S APPEAL IS NOT PREMATURE

The Commission (Third Merit Brief, pp. 2-4) argues that DP&L's appeal is premature because DP&L has not yet been denied the SSR-E. The Court should reject that argument for three separate and independent reasons.

1. The Conditions Imposed by the Commission Affect a Substantial Right of DP&L

Under the Ohio Constitution, the Court is vested with "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law[.]" Ohio Constitution, Article IV, Section 2(B)(2)(d). (OCC Appx. 87.) The Ohio Revised Code, in turn, provides that the Court may reverse, vacate, or modify "[a] *final order* made by the public utilities commission." R.C. 4903.13 (emphasis added). (OCC Appx. 124.) *Accord: Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus ("Appeal lies only on behalf of a party aggrieved by the final order appealed from.").

The Court has held that the term "final order" under R.C. 4903.13 has the same meaning as "final order" under R.C. 2505.02. *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 209, 364 N.E.2d 852 (1977) (per curiam). Section 2505.02 states that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial" when it falls into one of seven categories. R.C. 2505.02(B). (OCC Appx. 89.)

One category of final order is any "order that affects a substantial right made in a special proceeding." R.C. 2505.02(B)(2). The Court has held that Commission proceedings are "special proceeding[s]" for purpose of that statute. *Hall China Co.*, 50 Ohio St.2d at 209. Thus, any Commission order that affects a "substantial right" is a final order that may be reviewed by the Court.

Here, the conditions imposed upon DP&L affect a substantial right of DP&L, for two reasons. First, the Commission imposed the following conditions upon DP&L's right to receive the SSR-E:

- (1) demonstrate that its financial integrity is threatened (9/4/13 Order, p. 27) (OCC App. 37);
- (2) file a distribution rate case by July 1, 2014 (*id.*);
- (3) file by December 31, 2013, an application to separate its generation assets by January 1, 2017 (9/4/13 Order, p. 27) (OCC Appx. 37); (June 4, 2014 Fourth Entry on Rehearing, p. 5) (OCC App. 106);
- (4) file by July 1, 2014 a proposal to implement SmartGrid and Advanced Metering Infrastructure ("AMI") (9/4/13 Order, p. 28) (OCC App. 38); and
- (5) file by December 31, 2014, a plan to modernize its billing system (*id.*).

The deadline for the last four of those conditions has already passed, and DP&L did not meet the deadlines for three of those onerous conditions (items (2), (4) and (5)). The conditions thus affect a substantial right of DP&L, because DP&L has not met the deadlines in three of the conditions.

Second, the evidence at the hearing established that DP&L would earn negative returns and could not maintain its financial integrity without a stability charge.² Further, to satisfy the first condition that the Commission imposed on the SSR-E -- that DP&L demonstrate that its financial integrity is threatened -- DP&L would need to make a filing close in time to when the SSR-E would begin.

² That evidence is discussed at length in DP&L's initial Brief, pp. 6-8.

For example, if DP&L filed an Application for the SSR-E in January 2016 (i.e., one year before the SSR-E was scheduled to begin), then the Commission proceeding would likely take at least six months. After the Commission denied DP&L's Application (for failing to satisfy the conditions), an appeal to this Court would likely take at least one year. Thus, a decision by this Court on whether the conditions were lawful would not issue until the summer of 2017, at the earliest.

The problem with that timeline is that the SSR expires on December 31, 2016, and the SSR-E (if DP&L had satisfied the five conditions) would expire on May 31, 2017. DP&L will thus be without a decision from this Court as to the lawfulness of the SSR-E conditions before the SSR-E is set to expire. The evidence showed that DP&L could not maintain its financial integrity and provide safe and reliable service without a stability charge. A delay in the ruling on the lawfulness of the conditions will thus impair a substantial right of DP&L, because it would jeopardize DP&L's ability to maintain its financial integrity and provide safe and reliable service.

2. The Conditions Deny DP&L a Provisional Remedy

Another category of final order is any "order that grants or denies a provisional remedy and to which both of the following apply: (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy. (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4). The statute defines "provisional remedy" as "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [and]

suppression of evidence" R.C. 2505.02(A)(3). The Court has held that "an ancillary proceeding is one that is attendant upon or aids another proceeding." (Internal quotation marks and citation omitted.) *State v. Muncie*, 91 Ohio St.3d 440, 449, 746 N.E.2d 1092 (2001) (emphasis deleted).

Here, the SSR-E conditions relate to a "provisional remedy" since the Commission ordered DP&L to file another proceeding to recover the SSR-E. 9/4/13 Order, pp. 27-28 (OCC Appx. 37-38). That proceeding would thus be "a proceeding ancillary to [DP&L's ESP] action." R.C. 2505.02(A)(3).

Further, the SSR-E conditions satisfy the two requirements in R.C. 2505.02(B)(4). As to the requirements in R.C. 2505.02(B)(4)(a), the conditions that the Commission imposed upon DP&L's right to receive the SSR-E "determine[] the action with respect to the provision remedy and prevent[] a judgment in the action in favor of [DP&L]" because DP&L has not met the deadline to satisfy three of the conditions.

The SSR-E conditions also satisfy the requirement in R.C. 2505.02(B)(4)(b) that DP&L "would not be afforded a meaningful or effective remedy by an appeal" because the evidence shows that DP&L needs a stability charge under R.C. 4928.143(B)(2)(d) to maintain its financial integrity so that it can continue to provide stable and safe service. As demonstrated above, under the procedure advocated by the Commission, DP&L would need to file an Application for the SSR-E close in time to when the SSR-E was to be implemented, and a decision by this Court regarding whether the SSR-E conditions were lawful would be issued after the SSR-E is set to expire. DP&L's financial integrity would be jeopardized by the delay, so an appeal would not provide a meaningful remedy.

3. The Court Should Avoid Piecemeal Litigation

The Court has repeatedly stated "its disfavor of piecemeal appeals arising from commission proceedings." *City of Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 368, 588 N.E.2d 775 (1992) (per curiam), citing *Toledo Edison Co. v. Pub. Util. Comm.*, 5 Ohio St.3d 95, 449 N.E.2d 428 (1983) (per curiam) and *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 533 N.E.2d 353 (1988) (per curiam). The Commission's position in this case could lead to piecemeal litigation. The issue is before the Court now and was decided by the Commission in the Order on appeal. The issue thus should be decided now, not in a potential future case.

B. THE CONDITIONS IMPOSED BY THE COMMISSION ARE UNLAWFUL

The five onerous conditions that the Commission imposed on DP&L's ability to recover the SSR-E are not lawful, because they are not contained in the statute authorizing the SSR-E. Specifically, R.C. 4928.143(B)(2)(d) contains three elements that DP&L must satisfy to receive a stability charge:

1. It must be a "[t]erm[], condition[] or charge[]";
2. It must "relat[e] to" one of the items listed; and
3. It must "have the effect of stabilizing or providing certainty regarding retail electric service."

The Commission does not deny that the SSR-E satisfies those three elements. Indeed, the SSR-E is an extension of the SSR, and the Commission argues in its Second Merit Brief (pp. 4-12) that the SSR satisfies those elements.

The five conditions that the Commission imposed upon DP&L's right to receive the SSR-E are not contained in R.C. 4928.143(B)(2)(d), and are thus unlawful. It is well settled

that "the commission may not legislate in its own right" and that the Commission does not have "the authority to rewrite the statutes." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166-67, 423 N.E.2d 820 (1981).

The Commission (Third Merit Brief, pp. 5-6) attempts to avoid the point that its five conditions are not listed in the statute by arguing that the section permits "[t]erms, conditions or charges." R.C. 4928.143(B)(2)(d) (emphasis added). The Commission argues (*id.*) that the statute thus permits it to impose "conditions" on DP&L's right to receive "charges" under that section.

Not so. The statute permits "charges," provided that the charges satisfy the second two elements in the statute ("relating to" and "stabilizing or providing certainty"). R.C. 4928.143(B)(2)(d). The statute also permits "conditions" that satisfy those second two elements. *Id.*

However, there is nothing in R.C. 4928.143(B)(2)(d) that authorizes the Commission to impose additional conditions on DP&L's right to receive a "charge" under that section. In other words, the statute authorizes a charge (or a condition) that satisfies the second two elements, but does not authorize the Commission to create additional conditions on the right of a utility to receive a charge. The statute could have been written to state that a utility can receive a charge "subject to such additional conditions as the Commission may impose," but it was not written that way. It is well settled that "[i]n construing a statute, we may not add or delete words." (Internal quotation marks and citation omitted.) *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶ 32 (per curiam)

("Adopting the commission's argument would add the appealability of a commission order as a condition to its duty under R.C. 4903.21. But we cannot add this condition to the statute. ").

In short, R.C. 4928.143(B)(2)(d) places two conditions on DP&L's ability to recover a stability "charge" -- it must "relat[e] to" one of the listed items, and it must "have the effect of stabilization or providing certainty." The statute does not authorize the Commission to create new conditions that are not listed.

C. THE SSR-E IS LAWFUL FOR THE SAME REASONS THAT THE SSR IS LAWFUL

OCC (Third Merit Brief, pp. 21) and IEU (Third Merit Brief, pp. 32-33) argue that the SSR is not lawful, and that the SSR-E is not lawful for the same reasons. DP&L has already fully briefed the issue of whether the SSR is lawful in its initial Brief, pp. 9-27, and will not repeat its arguments here.

III. THE COMMISSION'S DECISIONS TO ACCELERATE THE DEADLINE FOR DP&L TO TRANSFER ITS GENERATION ASSETS AND IMPLEMENT COMPETITIVE BIDDING WERE UNREASONABLE

DP&L's initial Brief (pp. 45-49) demonstrated that there was no evidence supporting the Commission's decision to accelerate the deadline for DP&L to transfer its generation assets and for DP&L to implement competitive bidding. The Commission argues (Third Merit Brief, pp. 9-15) that the deadlines that it set were an exercise of its discretion. However, it is well settled that the Commission's decisions must have "record support" and that a Commission order is unlawful if "no evidence" supports the decision. *In re Columbus S. Power*

Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25, 29.³ As demonstrated below, there is no evidence to support the Commission's decision to accelerate those deadlines.

A. THE EVIDENCE ESTABLISHES THAT DP&L CANNOT TRANSFER ITS GENERATION ASSETS BEFORE MAY 31, 2017

At the time of hearing in this case (March 2013), DP&L planned to transfer its generation assets to an affiliate. DP&L Ex. 8, pp. 5-6 (DP&L Supp. 53-54.) *Accord:* Tr. 1141, 258-59. (DP&L Supp. 259, 232-33.) The evidence at the hearing showed that DP&L could not transfer its generation assets to an affiliate before May 31, 2017, for two reasons: (1) DP&L has terms and conditions in certain Pollution Control Bonds and First Mortgage Bonds that significantly impede upon its ability to transfer its generation assets before September 1, 2016; and (2) due to adverse market conditions, DP&L would not have sufficient cash flow to refinance the bonds before May 31, 2017. DP&L Ex. 16, pp. 2-4. (DP&L Supp. 79-81.) *Accord:* Tr. 260-62 (DP&L Supp. 234-36), 2897, 2911 (DP&L Supp. 335, 336); Tr. 1148-50 (DP&L Supp. 260-62); Tr. 800-05 (DP&L Supp. 251-56). The Commission originally agreed with DP&L's position, and set a date of May 31, 2017 for DP&L to transfer its generation assets. 9/6/13 Entry (p. 2) (OCC Appx. 66).

After the hearing in DP&L's ESP case, there were material adverse changes in market conditions. For example, at the time of the ESP hearing, DP&L projected that capacity

³ *Accord: Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 29 (a Commission order is unlawful if there was no "factual basis supporting the commission's finding"); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 ("[I]n order to meet the requirements of R.C. 4903.09, * * * the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based . . .") (emphasis added) (first omission of text in original) (internal quotation marks and citation omitted).

prices during the 2016/2017 PJM delivery year would be \$174.25/MW-day. FES Ex. 1, p. 53808. (DP&L Supp. 155.) DP&L projected that it would earn capacity revenues in 2016 of \$146 million and in 2017 of \$168 million. *Id.* However, after the hearing, publicly available market-price data showed that the PJM capacity price for the 2016/2017 delivery year cleared on May 24, 2013 at a price of \$59.37 (*i.e.*, only one-third of DP&L's projected price).⁴

In light of those volatile market conditions, DP&L decided to explore the possibility of selling its generation assets to a third party. The Commission ordered DP&L to file an amendment to transfer its generation assets by December 31, 2013. 9/4/13 Order, p. 27. (OCC Appx. 37.) Pursuant to that Order, DP&L filed a separate proceeding at the Commission regarding the transfer of its generation assets. DP&L described its plan to either transfer its generation assets to an affiliate or to sell those assets to a third party in its February 25, 2014 Supplemental Application of The Dayton Power and Light Company to Transfer or Sell Its Generation Assets, ¶¶ 5-7 (Commission Case No. 13-2420-EL-UNC). (DP&L Supp. 338.)

That application stated that DP&L might sell its generation assets to a third party as early as 2014. *Id.* The reason that DP&L might have been able to transfer the assets as part of a third party sale process as early as 2014, but that it could not transfer the assets to an affiliate before May 31, 2017, is that a third party might have been willing to purchase those assets at a

⁴ <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx>. (DP&L Supp. 198-228.) The Court may take judicial notice of published reports of market prices. Evid.R. 201(B) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.") (DP&L Appx. 35); Evid.R. 201(D) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.") (DP&L Appx. 35); Evid.R. 803(17) (excepting from the general rule against hearsay "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations"). (DP&L Appx. 38.)

price that would help DP&L to offset costs of releasing the generation assets from the Company's mortgage and otherwise restructuring/refinancing its debt. No third party was willing to pay an acceptable price, and DP&L eventually announced that it did not intend to sell its generation assets to a third party.

In its Second Entry on Rehearing, the Commission accelerated the deadline for DP&L to transfer its generation assets to January 1, 2016. March 19, 2014 Entry, pp. 17-18 (OCC Appx. 84-85.) The Commission stated that it had decided to accelerate the asset transfer deadline, due to statements made by DP&L in its Supplemental Application in its generation asset transfer case (Commission Case No. 13-2420-EL-UNC) that DP&L may transfer its generation assets as soon as 2014. *Id.* DP&L sought rehearing, and asked the Commission to restore the May 31, 2017 generation asset transfer date. In its Fourth Entry on Rehearing (p. 5) (OCC Appx. 106), the Commission implemented January 1, 2017 as a modified deadline for DP&L to transfer its generation assets.

However, as DP&L demonstrated at the hearing, there are both structural and financial obstacles which prevent DP&L from transferring its generation assets to an affiliate before May 31, 2017. DP&L Ex. 16, pp. 2-4. (DP&L Supp. 79-81.) *Accord:* Tr. 260-62 (DP&L Supp. 234-36), 2897 (DP&L Supp. 335), 2911 (DP&L Supp. 336), 1148-50 (DP&L Supp. 260-62), 800-05 (DP&L Supp. 251-56). Further, no third party has offered an acceptable price for the generation assets.

Significantly, the Commission does not cite any evidence -- none at all -- showing that either (a) DP&L could transfer its generation assets to an affiliate by January 1, 2017; or (b) a third party would be willing to purchase those assets at an acceptable price by January 1,

2017. Not a single witness sponsored (recommended) the January 1, 2017 date. The Commission bases its argument on the fact that DP&L stated that it may be able to sell its generation assets to a third party in 2014 to show that DP&L could transfer its generation assets by January 1, 2017. However, without a third-party buyer (and there is none), DP&L cannot transfer those generation assets until May 31, 2017 (at the earliest). There is thus "no evidence" supporting the Commission's Order, and the Court should reverse it.⁵

B. THE COURT SHOULD ORDER THE COMMISSION TO RESTORE THE BLENDING SCHEDULE THAT THE COMMISSION ESTABLISHED IN ITS ENTRY NUNC PRO TUNC

In its Second Entry on Rehearing (pp. 18-19) (OCC Appx. 85-86), the Commission also altered the blending schedule that it had previously approved. The Commission stated "[i]n determining the CBP blending schedule in the Order, the Commission relied upon the fact that DP&L would be unable to divest its generation assets before September 1, 2016. . . . Based upon the new information contained in DP&L's supplemental application in Case No. 13-2420-EL-UNC, we find that DP&L's CBP blending schedule should be accelerated." *Id.* at 18. (OCC Appx. 85.) The Commission then established a blending schedule that was substantially accelerated from the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc. *Id.* at 18-19. (OCC Appx. 85-86.)

DP&L demonstrated at the hearing that its financial integrity would be jeopardized if accelerated blending was implemented. Tr. 1849 (DP&L Supp. 300.); DP&L,

⁵ The Commission argues (Third Merit Brief, p. 13 n.13) that DP&L failed to seek rehearing on the Commission's Order establishing the January 1, 2017 asset-transfer deadline, and DP&L is thus barred from raising the issue on appeal. Not so. DP&L fully briefed this issue in its November 10, 2014 opposition to a motion to dismiss DP&L's appeal; DP&L incorporates here the arguments made in that opposition.

Ex. 16, p. 6 and CLJ-6. (Public Version at DP&L Supp. 83, 89); DP&L Ex. 14, pp. 5-9, 28-29 (Public Version at DP&L Supp. 58-62, 76-77); Tr. 637-38 (DP&L Supp. 245-46), 640-41 (DP&L Supp. 247-48) ("[A] faster transition to market results in lower revenues [T]hat factor would tend to lead to, all else equal, point to a higher SSR."); Tr. 1096 (DP&L Supp. 269); Tr. 1298 (DP&L Supp. 274). There was no contrary testimony.

Again, the Commission argues (pp. 11-13) that the Court should defer to its discretion as to the appropriate blending schedule. However, the Commission does not cite to any evidence establishing that DP&L could maintain its financial integrity under the more-aggressive blending schedule that it established. The Court should thus conclude that no evidence supports the Commission's ruling, and the Court should order the Commission to implement the blending schedule proposed by DP&L.

IV. CONCLUSION

It was unlawful and unreasonable for the Commission to: (1) limit the amount of, and require DP&L to satisfy conditions to receive, the SSR-E; (2) accelerate the deadline for DP&L to transfer its generation assets; and (3) accelerate the blending schedule.

Respectfully submitted,

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