

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**The Dayton Power and Light Company)
AES Ohio Generation, LLC)**

Docket No. EC16-173-000

**LIMITED PROTEST OF
THE ELECTRIC POWER SUPPLY ASSOCIATION,
THE PJM POWER PROVIDERS GROUP AND
THE RETAIL ENERGY SUPPLY ASSOCIATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the Electric Power Supply Association (“EPSA”),² the PJM Power Providers Group (“P3”)³ and the Retail Energy Supply Association (“RESA”)⁴ (collectively, the “Indicated Trade Associations”) submit this limited protest to the August 25, 2016 application⁵ in the above-captioned proceeding. The EC16-173 Application seeks Commission approval under Section 203 of the Federal Power Act (the “FPA”)⁶ for a transaction (the “Transaction”) whereby The

¹ 18 C.F.R. § 385.211 (2016).

² The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA has separately moved to intervene in this proceeding. See (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EC16-173-000 (filed Sept. 6, 2016).

³ The statements in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. P3 has separately moved to intervene in this proceeding. See (doc-less) Motion to Intervene of the PJM Power Providers Group, Docket No. EC16-173-000 (filed Sept. 9, 2016).

⁴ The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. RESA has separately moved to intervene in this proceeding. See Motion to Intervene of the Retail Energy Supply Association, Docket No. EC16-173-000 (filed Sept. 15, 2016).

⁵ Application for Authorization Under Section 203 of the Federal Power Act and Request for Waivers, Docket No. EC16-173-000 (filed Aug. 25, 2016) (the “EC16-173 Application”).

⁶ 16 U.S.C. § 824b (2012).

Dayton Power and Light Company (“DP&L”) will divest its generation assets to an “unregulated” affiliate, AES Ohio Generation, LLC (“Ohio Genco” and together with DP&L, “Applicants”). As a general matter, the Indicated Trade Associations support the separation of DP&L’s generation assets from its transmission and distribution assets, consistent with their longstanding position that breaking up vertically-integrated utilities can be good for competition and good for consumers.⁷ The Indicated Trade Associations are concerned, however, about potential cross-subsidization that may result from the Transaction in light of a pending proposal before the Public Utilities Commission of Ohio (the “PUCO”) under which DP&L would provide subsidies to Ohio Genco for the continued operation of these same generation assets following the consummation of the Transaction. Such an arrangement would cause the Transaction to result in precisely the sort of “cross-subsidization of a non-utility associate company” that is prohibited by Section 203(a)(4) of the FPA.⁸ The Commission should, therefore, condition its approval of the EC16-173 Application appropriately to prevent that or any similar cross-subsidization.

⁷ See, e.g., EPSA, *Retail Electric Competition: Getting It Right!*, <http://www.epsa.org/forms/documents/DocumentFormPublic/view?id=305000000231>(explaining that the potential benefits of generation divestiture by vertically-integrated utilities include “elimination of vertical market power; reduction in horizontal market power by replacing a single generation monopoly with multiple competing generators; accurate establishment of a market value for the generation assets for purposes of calculating stranded costs; and potential collection of a sale price in excess of net book value, thereby lowering stranded costs, reducing the transition period and raising the shopping credit”).

⁸ 16 U.S.C. § 824b(a)(4) (2012).

I. BACKGROUND

A. DP&L's Subsidy Proposal Before The PUCO

DP&L proposed its third Electric Security Plan ("ESP III") in a February 22, 2016 application to the PUCO.⁹ In the ESP III Application, DP&L explained that the PUCO has ordered it to divest its generation assets to an affiliate by January 1, 2017, but claimed that "[d]ue to adverse conditions in the energy and capacity markets, and a series of new and upcoming environmental regulations," those assets "are at risk of closure, and will remain at risk" following the divestiture.¹⁰

In order to "allow[these] at-risk generation plants to remain operational" after the divestiture, DP&L proposed the so-called "Reliable Electricity Rider" (the "RER").¹¹ Under the RER, DP&L would, on an annual basis, calculate the "variance" between (1) the projected revenue requirement for the divested assets, and (2) revenues those assets are projected to earn from the sale of energy, capacity and ancillary services in the markets administered by PJM Interconnection, L.L.C.¹² That "variance would be transferred between DP&L and Ohio Genco"¹³ and "billed to all customers on a non-bypassable basis."¹⁴ DP&L proposed that the RER be in effect for a 10-year term commencing January 1, 2017.

⁹ 2016 Electric Security Plan, PUCO Case Nos. 16-0395-EL-SSO, *et al.* (filed Feb. 22, 2016) (the "ESP III Application"), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16B22B33152F03093.pdf>.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ Direct Testimony of Claire E. Hale at 2, PUCO Case Nos. 16-0395-EL-SSO, *et al.* (filed Feb. 22, 2016), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16B22B35231E03101.pdf>.

In the alternative, DP&L asked that the PUCO approve another 10-year non-bypassable rider that would allow it to recover “a fixed amount each year with no true-up.”¹⁵ DP&L argued that this alternative rider should be approved for the same reasons as the RER.¹⁶

B. The EC16-173 Application

In light of the PUCO’s order authorizing the divestiture of DP&L’s generation assets on or before January 1, 2017, the EC16-173 Application seeks the Commission’s approval for the Transaction, which “involves the transfer by DP&L of generation facilities, along with ancillary assets and property associated with generation assets, to an affiliated entity, [Ohio Genco].”¹⁷ Upon consummation of the Transaction, Ohio Genco “will consolidate such assets with its existing generation assets and will continue to use its existing and newly acquired generation assets to make wholesale sales in interstate commerce under its market based rate authority granted by the Commission.”¹⁸

Without any mention of ESP III, the RER, or DP&L’s alternative rider proposal, the EC16-173 Application asserts that the Transaction does not raise cross-subsidization concerns because “neither DP&L nor Ohio Genco has captive customers,” and “the Transaction is subject to (and has already been subjected to) review by a state commission.”¹⁹

¹⁵ ESP III Application at 7.

¹⁶ *See id.*

¹⁷ EC16-173 Application at 2.

¹⁸ *Id.* (footnote omitted).

¹⁹ *Id.* at 17-18. *See also id.* at Exhibit M.

II. LIMITED PROTEST

As amended by the Energy Policy Act of 2005, Section 203 of the FPA provides that the Commission may not grant Section 203 approval for a transaction that will “result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”²⁰ As the Commission has previously observed, in issuing this “clear directive” regarding cross-subsidization,²¹ Congress “intended that cross-subsidization and related concerns should be a focal point of the Commission’s Section 203 analysis.”²² In promulgating regulations to implement this directive, the Commission emphasized that “[t]he applicant bears the burden of proof to demonstrate that customers will be protected” from cross-subsidization.²³ In this case, Applicants have not even attempted to carry that burden.

If the PUCO approves the RER or DP&L’s alternative rider proposal, the Transaction will clearly result in cross-subsidization²⁴ by DP&L and its customers of

²⁰ 16 U.S.C. § 824b(a)(4) (2012).

²¹ *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 147 (2005) (“Order No. 669”), *on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

²² *Id.* at P 164.

²³ *Id.* at P 167 (citation omitted).

²⁴ The Commission has explained that “[w]hen ‘cross-subsidization’ occurs, some of the costs of dealings between the affiliated regulated and unregulated companies are borne by the regulated utility affiliate.” *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at n.14 (2007) (the “*Supplemental Policy Statement*”), *clarified*, 122 FERC ¶ 61,157 (2008).

Ohio Genco, a non-utility associate company of DP&L.²⁵ As the Commission has recognized, “Congress was concerned with the potential for abuse when a traditionally regulated public utility (*i.e.*, one that is subject to the Commission’s traditional cost-based regulation) subsidizes an ‘unregulated’ affiliate company within the same holding company system.”²⁶ That is precisely what will occur here: through the RER or the alternative rider proposal, DP&L’s customers will pay a non-bypassable charge intended to reflect the net cost of service of the divested assets, and DP&L will transfer the payments to Ohio Genco.²⁷ Given the Commission’s recent holdings that non-bypassable retail charges, like the RER or DP&L’s alternative proposal, render retail customers captive notwithstanding retail choice,²⁸ this case will indisputably involve “a transfer of benefits from a public utility’s captive customers to shareholders of the public

²⁵ As indicated in the EC16-173 Application, both DP&L and Ohio Genco are wholly owned indirect subsidiaries of DPL Inc. (“DPL”) and The AES Corporation (“AES”). See EC16-173 Application at 4-5. As such, they are both members of the DPL and AES holding company systems and are thus associate companies of each other. See 42 U.S.C. § 16451(2) (2012) (defining “associate company”). Because Ohio Genco does not have customers served at cost-based rates, see EC16-173 Application at 14, it is a non-utility associate company of DP&L. See 18 C.F.R. § 33.1(b)(2) (defining “non-utility associate company”). See also Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 93 (explaining that the definition of “non-utility associate company” includes, among other things, “a power marketer, generator that does not have captive customers, a gas marketer, a fuel supply company or company that provides inputs to power production, or a company that is involved in business activities not related to generation”).

²⁶ Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 92.

²⁷ See ESP III Application at 1-7. With respect to the four specific factors identified in Section 33.2(j)(ii)(A) of the Commission’s regulations, the Transaction, by its terms, involves a “transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company.” 18 C.F.R. § 33.2(j)(ii)(A) (2016).

²⁸ See *Electric Power Supply Ass’n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 at P 55 (2016) (“*FirstEnergy Solutions*”); *Electric Power Supply Ass’n v. AEP Generation Res., Inc.*, 155 FERC ¶ 61,102 at P 57 (2016) (“*AEP Generation*”).

utility's holding company due to an intra-system transaction”²⁹ This will “harm not only customers of [DP&L]” but will “also harm competition by giving [Ohio Genco] a competitive advantage.”³⁰ And, with the payments tied directly to the generation assets being transferred as part of the Transaction, that cross-subsidization would be a direct result of the Transaction for which Applicants are seeking Section 203 approval.³¹

In the EC16-173 Application, Applicants do not acknowledge, much less attempt to grapple with the FPA Section 203 implications of, DP&L’s subsidy proposals. Rather, they claim the benefit of two of three “safe harbors”³² established by the Commission for “classes of transactions that are unlikely to raise the cross-subsidization concerns described in the Order No. 669 rulemaking proceeding.”³³ Specifically, Applicants claim that the Transaction qualifies for safe harbors for transactions that (1) do not involve franchised public utilities with captive customers, or (2) are subject to review by a State commission.³⁴ Notwithstanding Applicants’ assertions to the contrary, the Transaction does not qualify for either of these safe harbors.

First, the Transaction **does** involve a franchised public utility with captive

²⁹ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 13.

³⁰ *Transactions Subject to FPA Section 203*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,589 at P 42 (2005).

³¹ It has no bearing on the analysis that the PUCO’s divestiture requirement pre-dates the ESP III Application or that the form of Asset Contribution Agreement in Exhibit I to the EC16-173 Application does not address the subsidy proposals one way or another. The Commission has held that its inquiry is not “limited to effects that are directly required or provided for as part of a . . . transaction,” because FPA Section 203(a)(4) “addresses whether a transaction will result in cross-subsidization of a non-utility company, not whether cross-subsidization is provided for in the transaction.” *National Grid plc*, 117 FERC ¶ 61,080 at P 64 (2006) (citation omitted), *reh’g denied*, 122 FERC ¶ 61,096 (2008).

³² See EC16-173 Application at 17-18.

³³ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 16.

³⁴ See EC16-173 Application at 17-18.

customers and thus **does not** qualify for the safe harbor for transactions not involving such entities. Although the State of Ohio has adopted retail choice, retail customers in DP&L's service territory will still be captive with respect to the generation assets involved in the Transaction if the RER or DP&L's alternative proposal is approved, because, like the Ohio retail customers in *FirstEnergy Solutions* and *AEP Generation*, "they [will] have no choice as to payment of the non-bypassable generation-related charges."³⁵

Second, the Transaction does not qualify for the safe harbor for transactions subject to review by State commissions, notwithstanding the PUCO's review and approval. This safe harbor is available only upon a showing, which Applicants have not made, that a proposed transaction "complies with specific state regulatory protections against inappropriate cross-subsidization."³⁶ This safe harbor reflects the Commission's "inten[t] to defer to state commissions where the state adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or the encumbrance of utility assets for the benefit of the 'unregulated' affiliates."³⁷ Ring-fencing involves measures to "separate and protect the financial assets and ratings of the regulated utility from the business risks of other members of the holding company family"³⁸ The RER and DP&L's alternative proposal would do exactly the opposite

³⁵ *FirstEnergy Solutions*, 155 FERC ¶ 61,101 at P 55. See also *AEP Generation*, 155 FERC ¶ 61,102 at P 57 (same).

³⁶ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 18. See also *Puget Energy, Inc.*, 123 FERC ¶ 61,050 at P 36 (2008) (conditioning acceptance of this safe harbor on approval of ring-fencing measures relied upon by applicants); *Bangor Hydro Elec. Co.*, 144 FERC ¶ 61,030 at P 28 (2013) (same).

³⁷ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 18.

³⁸ *Id.* at n.14.

by making DP&L, the regulated utility, and in turn, DP&L's captive customers, bear the business risks of Ohio Genco's operation of the generation assets that DP&L is required to divest.

In any event, even if the Transaction, considered in light of DP&L's subsidy proposals, still qualified for one or both of the safe harbors, that would not be the end of the matter. The Commission has made clear that reliance on the safe harbors is only sufficient to satisfy the cross-subsidization prong of its analysis "absent concerns identified by the Commission or evidence from intervenors that there is a cross-subsidy problem based on the particular circumstances presented."³⁹ The subsidy proposals currently pending before the PUCO demonstrate that the Transaction presents a serious cross-subsidization problem that must be addressed in order to satisfy the requirements of Section 203(a)(4) of the FPA. The Commission should, therefore, condition its approval of the EC16-173 Application on the implementation of appropriate measures to ensure that consummation of the Transaction will not result in DP&L cross-subsidizing Ohio Genco's continued operation of the generation assets being transferred.⁴⁰

³⁹ See *id.* at P 16.

⁴⁰ Cf. *Ohio Power Co.*, 143 FERC ¶ 61,075 at P 54 (2013) (noting that imposition of conditions would ensure that the transaction in that case did not result in cross-subsidization), *on reh'g*, 146 FERC ¶ 61,016 (2014); *Cinergy Corp.*, 126 FERC ¶ 61,146 at P 58 (2009) (same).

III. CONCLUSION

Wherefore, for the foregoing reasons, the Indicated Trade Associations respectfully request that the Commission condition its approval of the EC16-173 Application as requested herein.

ELECTRIC POWER SUPPLY ASSOCIATION

By: /s/ David Tewksbury
David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Nancy Bagot
Senior Vice President
Sharon Theodore
Director of Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, 12th Floor
Washington, DC 20005

On behalf of the **Electric Power
Supply Association**

THE PJM POWER PROVIDERS GROUP

By: /s/ Glen Thomas
Glen Thomas
Laura Chappelle
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355

On behalf of the **PJM Power
Providers Group**

RETAIL ENERGY SUPPLY ASSOCIATION

By: /s/ Elizabeth Whittle
Elizabeth W. Whittle
NIXON PEABODY LLP
799 Ninth Street, NW, Suite 500
Washington, DC 20001

Counsel for the **Retail Energy
Supply Association**

Dated: September 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington DC, this 15th day of September, 2016.

/s/ Stephanie Lim
Stephanie S. Lim