

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	:	Case No. 12-426-EL-SSO
The Dayton Power and Light Company for	:	
Approval of Its Market Rate Offer	:	
	:	
In the Matter of the Application of	:	Case No. 12-427-EL-ATA
The Dayton Power and Light Company for	:	
Approval of Revised Tariffs	:	
	:	
In the Matter of the Application of	:	Case No. 12-428-EL-AAM
The Dayton Power and Light Company for	:	
Approval of Certain Accounting Authority	:	
	:	
In the Matter of the Application of	:	
The Dayton Power and Light Company for the	:	Case No. 12-429-EL-WVR
Waiver of Certain Commission Rules	:	
	:	
In the Matter of the Application of	:	Case No. 12-672-EL-RDR
The Dayton Power and Light Company	:	
to Establish Tariff Riders	:	

**JOINT MEMORANDUM CONTRA DAYTON POWER AND LIGHT
COMPANY'S
MOTION TO EXTEND CURRENT RATES**

November 23, 2012

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I. INTRODUCTION

On June 24, 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order² ("ESP I Order") in the *ESP I Case* adopting the ESP I

¹ The parties to this Joint Memorandum Contra are Industrial Energy Users-Ohio ("IEU-Ohio"), Ohio Partners for Affordable Energy ("OPAE"), Honda of America Manufacturing, Inc. ("Honda"), SolarVision, LLC ("SolarVision"), the OMA Energy Group ("OMAEG"), the Ohio Energy Group ("OEG"), Wal-Mart Stores East LP and Sam's East, Inc. and the Office of the Ohio Consumers' Counsel ("OCC"). These parties have previously filed a "Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio" that requested relief similar to that requested in this Joint Memorandum Contra. Thus, these parties will be referred to as "Joint Movants".

² *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Opinion and Order (June 24, 2009) (hereinafter, "*ESP I Case*"). DP&L's ESP was resolved through a Stipulation and Recommendation submitted on February 24, 2009 (hereinafter, "ESP I Settlement").

Settlement and approving an electric security plan (“ESP”) for the Dayton Power & Light Company (“DP&L”). The ESP I Settlement contained the following key provisions:

To assist in maintaining rate certainty, the parties agree to extend DP&L's current rate plan through December 31, 2012, except as expressly modified herein.³

* * *

The current RSS [RSC] charge will continue as a non-bypassable charge through December 31, 2012.⁴

* * *

DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for a period beginning January 1, 2013. At least 120 days prior to March 31, 2012, DP&L will consult with interested Signatory Parties to discuss the filing.⁵

The ESP I Settlement clearly addresses the duration of the non-bypassable Rate Stabilization Charge (“RSC”). The duration of the RSC is limited to December 31, 2012. Although some provisions of the ESP may continue beyond its established term by operation of law, the ESP I Settlement does not permit the RSC to be paid by DP&L's customers beyond December 31, 2012. The ESP I Settlement provision regarding the timing of the filing of DP&L's successor Standard Service Offer (“SSO”) Application was clearly designed to prevent signatory parties from having to enter an end-of-year regulatory fist fight to force DP&L to adhere to its RSC commitment.

Despite these clear provisions of the ESP I Settlement, DP&L takes a contrary view and has filed a Motion requesting that the Commission take action to prevent the requirements of the ESP I Settlement from being enforced. More specifically, on September 7, 2012, nearly six months after it filed its Market Rate Offer (“MRO”)

³ ESP I Settlement at 4 (Section 1).

⁴ *Id.* (Section 3).

⁵ *Id.* at 7 (Section 9).

Application, DP&L withdrew its MRO and announced that it planned to file a new application proposing an ESP. Although DP&L claimed it had negotiated and withdrew its MRO in “good faith,” it is clear that DP&L was in fact inspired by Commission’s decisions with respect to Ohio Power Company (“AEP-Ohio”). DP&L’s MRO withdrawal was part of a plan to “[f]rame discussions in light of recent developments” and implement an ESP based on AES Corporation’s (“AES”) understanding that the Commission will, in an ESP, authorize a “non-bypassable charge designed to maintain utility’s financial integrity....”⁶ In any event, because DP&L claimed that it would file an application for an ESP on or before October 8, 2012, it appeared highly unlikely that a successor SSO would be in place by the end of DP&L’s current ESP— December 31, 2012.

In light of these events, Joint Movants submitted a Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio (“Joint Motion”). The Joint Motion proactively requested that the Commission require DP&L to comply with Commission-approved settlement agreements. More specifically, the Joint Motion requested “that the Commission require DP&L to comply with Commission-approved settlement agreements previously agreed upon by filing tariffs that delete the non-bypassable Rate Stabilization Charge (“RSC”) provision to be effective for all bills rendered on or after January 1, 2013.”⁷ The relief requested “will provide shopping and non-shopping customers with a better ability to project future electric bills, compare SSO prices with prices available from competitive

⁶ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTUzNjg4fENoaWxkSUQ9LTF8VHlwZT0z&t=1> (last accessed November 20, 2012).

⁷ Joint Motion (Sep. 26, 2012) at page 5.

retail electric service (“CRES”) providers and make such future electric bills more stable and certain.”⁸

DP&L responded on October 11, 2012, contesting the claims in the Joint Motion. Holding up the AEP-Ohio decision⁹ as game-changing precedent, DP&L also claimed that ending the RSC would threaten DP&L’s financial integrity. Such an argument does not support the Commission authorizing DP&L to collect a charge from its customers in 2013 that DP&L agreed that it would not collect beyond December 31, 2012. Furthermore, DP&L attempts to advance its financial integrity argument by basing its claims on a mathematical presentation of financial performance that includes all lines of regulated, unregulated, retail, wholesale, distribution, transmission and generation business (including the very significant competitive wholesale generation business between DP&L and its affiliated competitive retail electric services (“CRES”) provider, Dayton Power and Light Energy Resources (“DPLER”)). In other words, DP&L is effectively asking the Commission to, through DP&L’s total company financial integrity math, allow DP&L, an electric distribution utility (“EDU”), to continue to maintain a RSC to underwrite the financial performance of lines of business and services over which the Commission has no regulatory jurisdiction. This argument should be rejected by the Commission.

As indicated above, DP&L’s total company return on equity is largely influenced by shopping and its market-based wholesale generation supply agreement with DPLER.

⁸ *Id.*

⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143 Revised Code, in the Form of an Electric Security Plan*, Opinion and Order (Aug. 8, 2012); DP&L Reply to Joint Motion at 4, 6, 11; DP&L Motion at 2, 9-11, 18 and 19.

DP&L's claim, though disguised as a total company financial integrity issue, is in fact a request that the Commission prop up the earnings of DP&L's competitive wholesale generation business.

Joint Movants submitted their Joint Reply on October 18, 2012, again urging the Commission to act on the Joint Motion and enforce the terms of the ESP I Settlement, noting that DP&L's financial integrity claims were unsubstantiated.

On November 7, 2012, DP&L filed a Motion to Continue Briefly Current Rates Until Implementation of Terms of a Commission Order ("Motion"). The Motion is divided into two parts. The first part urges the Commission to approve its successor SSO prior to December 31, 2012. Because the Commission has scheduled the hearing for February 2011, the first portion of DP&L's Motion is moot. Notwithstanding the rules for pleadings and motions,¹⁰ the second part of DP&L's Motion responds to arguments included in the Joint Reply. That part of DP&L's Motion is clearly an improper surreply in violation of the Commission's rules and should not be considered by the Commission.

The only issue before the Commission is whether the ESP I Settlement only authorizes DP&L to collect the RSC until December 31, 2012. DP&L and Joint Movants agree that the Commission must address this question. Because DP&L agreed in the ESP I Settlement that the Company would not collect the RSC after December 31, 2012, it would be unlawful and unreasonable to continue the collection of the RSC from customers into 2013. DP&L's claim that the Commission should disregard the terms of the ESP I Settlement to protect DP&L's financial integrity should also be rejected because: (1) DP&L has failed to file for rate relief based on a financial integrity claim

¹⁰ Rule 4901:1-12, OAC, provides that a party may file a motion and any party may file a memorandum contra responding to the Motion. The moving party may file a reply to the memorandum contra. But, the rules do not provide for an opportunity to file a response to a reply.

that is actionable by the Commission under Section 4909.16, Revised Code, and applicable precedent; (2) DP&L has failed to provide jurisdictionalized financial information with respect to its retail generation, distribution, and transmission functions; (3), DP&L's claim is unfounded because it is based on annualized statistics, incorrect calculations, and inflated shopping statistics even assuming that DP&L had filed an actionable request for relief from its ESP obligations based on financial integrity grounds.

II. JOINT MOVANT'S RESPONSE TO DP&L'S IMPROPER SURREPLY

A. DP&L's ESP Continues as Specified in the ESP I Settlement.

On January 1, 2013, the provisions, terms and conditions of DP&L's ESP may continue by operation of law unless the Commission finds that the ESP contains any terms and provisions with expiration dates (that cannot be extended into a carry-over ESP) or approves a successor SSO. Since it is likely that there will be a need for a carry-over ESP, the parties have asked the Commission to determine if the RSC will be paid by DP&L's customers after December 31, 2012. The Joint Motion and DP&L's Motion both urge the Commission to resolve this question prior to the commencement of 2013 and the sooner the better.

As identified in the Joint Motion and Joint Reply, the ESP I Settlement states that the RSC's life must terminate on December 31, 2012. Despite the express terms of the ESP I Settlement, DP&L claims that because the language in paragraph 1 of the ESP I Settlement regarding the term of the ESP is the same or similar to language in the separate paragraph regarding the RSC, then the Commission must extend the RSC into

2013. DP&L's argument is premised on its construction of the word "through," which DP&L defines to mean "establishes only that those rates are set through that date."¹¹

First, the separate paragraph regarding the RSC indicates that the Commission-approved ESP I Settlement assigned meaning to the language used in the separate RSC paragraph. DP&L's interpretation of the ESP I Settlement effectively reads the separate RSC paragraph out of the ESP I Settlement and would have the Commission find that the separate RSC paragraph has no meaning whatsoever. DP&L's effort to make the RSC paragraph meaningless is unreasonable and unlawful; it violates the rule of construction (applied to both legislation and agreements) that requires that meaning be assigned to all terms and provisions and the assigned meaning be based on the entire agreement.¹²

Second, the Commission should reject DP&L's claim that the word "through" December 31, 2012 implies only that rates are established through a certain period. The phrase "through December 31, 2012" was inserted in the ESP I Settlement to provide a specific term for the duration of the ESP. Thus, "through December 31, 2012" as it is used in paragraph 1 is defined to mean that this specific term of the ESP expires on December 31, 2012. In the context of the entire settlement, paragraph 3's use of the word "through" means that the RSC must end on December 31, 2012. Although, in general, an

¹¹ Motion at 12.

¹² "One may not regard only the right hand which giveth, if the left hand also taketh away. The intention of the parties must be derived instead from the instrument as a whole, and not from detached or isolated parts thereof." *Gomolka v. State Automobile Ins. Co.*, 70 Ohio St.2d 166, 172 (1982); *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104 at ¶ 29 (citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997)) ("Where possible, a court must construe the agreement to give effect to every provision in the agreement."); *Molnar v. Castle Bail Bonds, Inc.*, 4th Dist. No. 04CA-2808, 2005-Ohio-6643 at ¶ 42 (quoting *Bank v. Insurance Co.*, 83 Ohio St.309 (1911) ("In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.")).

expiring ESP may continue by operation of law, an expiring term of an ESP does not because the carry-over ESP must effectuate the provisions, terms, and conditions of the existing ESP. And, the expiration of the RSC was a specific term of the ESP I Settlement. The carry-over ESP approved by the Commission must effectuate this term and condition included in the Commission-approved ESP I Settlement.

An order directing DP&L to cease collecting the RSC would be consistent with Commission precedent.¹³ In the FirstEnergy Order, the Commission determined that terms and provisions with an expiration date cannot be extended into a carry-over ESP: “[t]he provisions of the RCP set forth terms and conditions that require a specific end date for the RTCs; therefore, the RTCs must be terminated in accordance with the terms and conditions of the RCP on December 31, 2008, for OE and TE.”¹⁴ Because the ESP I Settlement provided that the RSC must expire on December 31, 2012, the Commission must issue an Order to effectuate this term of the ESP I Settlement in any order approving a carry-over ESP.

DP&L claims that because competition has increased in DP&L’s service territory, the goal of the ESP I Settlement has already been achieved. There is “[t]hus no reason to eliminate the RSC to achieve that goal.”¹⁵ DP&L’s argument should be rejected. The RSC provides DP&L a non-bypassable revenue guarantee that clearly works against further development of the competitive market; otherwise, DP&L would not be asking

¹³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Finding and Order (Jan. 7, 2009) (“*FirstEnergy ESP I Case*” and “*FirstEnergy Order*,” respectively).

¹⁴ FirstEnergy Order at 8-9.

¹⁵ *Id.*

that the Commission act to continue the RSC to prop up the financial performance of DP&L.

Finally, DP&L claims that the RSC was approved as part of a settlement package, and “[t]he Commission should thus continue the entire package — not just part of it — until a new ESP is approved.” In principle, DP&L is correct. But the package that was agreed to in the ESP I Settlement provided that the RSC would terminate December 31, 2012. It is DP&L, not other parties, that is trying to avoid being accountable for the performance called for by the entire package as approved by the Commission, a package the Commission is obligated to respect and to define the terms and conditions of ESP I that are eligible to extend beyond December 31, 2012. The Commission should enforce the terms of the entire settlement package approved by the Commission, and not permit DP&L to continue to collect from customers the RSC after December 31, 2012.

B. Governmental Aggregation

Several communities in DP&L’s service area have passed ordinances allowing the communities to become government aggregators for the purpose of offering alternative electric generation supplies to their citizens. To date, nine organizations have filed with the Commission to initiate aggregation programs.¹⁶ In its current form, the RSC is bypassable for customers served through government aggregation programs that elect to return to default generation supply at market-based rates. The relief requested by the Joint Motion (ending the RSC) would eliminate the current discrimination between customers not participating in government aggregation and customers that do; it would

¹⁶ *Id.* at 12.

level the playing field between government aggregation program style shopping and all individual customers.

In its Motion, DP&L now claims that the law requires discrimination between individual customers and government aggregation.¹⁷ While the law may require governmental aggregation to receive certain rights, the law does not require that DP&L discriminate against its customers compared to governmental aggregation customers. Eliminating the RSC as of December 31, 2012 as required by the ESP 1 Settlement would remove this discrimination and further enhance competition as the settlement package requires.

C. The Commission Should Reject DP&L's Claim That The RSC Must Be Maintained In Its Current Form To Protect DP&L's Financial Integrity.

DP&L's Motion also asserts that even if the ESP I Settlement dictated that the RSC should not continue in its present form beyond 2012, the Commission should continue the RSC anyway. The Motion chants the words "financial integrity" and "takings" much the same way as AEP-Ohio chanted. In redacted format, DP&L has offered projected total company return on equity ("ROE") computations. DP&L claims that Dr. Chambers' ROE forecasts provide "ample support for DP&L's "takings" argument.

The ROE projections contained in the DP&L Motion misstate the scope and significance of the relief requested by the Joint Motion because DP&L's ROE projections are based on the total company common equity balance (the denominator) and total company income (the numerator). Neither the numerator nor the denominator have been

¹⁷ *Id.* at 18.

specified so as to focus only on the distribution-related investment reflected in the total company common equity balance nor the distribution-related income.¹⁸ As discussed above, the total company financial picture drawn by DP&L asks the Commission to underwrite DP&L's financial performance for services and lines of business unrelated to the service which DP&L provides to retail customers (shopping or non-shopping) and beyond the Commission's regulatory jurisdiction. This renders the ROE projections unreasonable and meaningless since DP&L is, in the SSO and ESP context, an EDU that may not provide a competitive service except through a corporately separated entity.¹⁹ DP&L's corporately separated competitive generation business, including the market-based wholesale sales to DPLER and other wholesale customers,²⁰ is a competitive business by operation of Ohio law (Section 4928.05, Revised Code) and must be fully on its own in the competitive market.²¹ The financial integrity picture painted by the Motion assumes wrongly that the Commission can lawfully make DP&L's distribution service customers responsible for underwriting the financial performance of lines of business

¹⁸ In the November 9, 2012 Technical Conference and in discovery responses, DP&L has indicated that it does not maintain financial information regarding the contributions to earnings of each business segment.

¹⁹ Section 4928.17, Revised Code.

²⁰ DP&L's 2011 10-K states that "[a]pproximately 17% of DPL's and 35% of DP&L's electric revenues for the year ended December 31, 2011 were from sales of excess energy and capacity in the wholesale market." 2011 10-K at 66. The scope of DP&L's wholesale business has also been described by DP&L in its October 15, 2012 Motion to Intervene and Memorandum in Support which DP&L filed in the *Duke Capacity Case* (involving Duke's application to substantially increase its compensation for generation capacity service). At page 3, DP&L states that it was "...a winning bidder in Duke's SSO auction..." and "...is currently providing full service requirements for a portion of Duke Energy Ohio's Standard Service Offer load." *Duke Capacity Case*, DP&L's Motion to Intervene at 3 (Oct. 15, 2012). Ironically, DP&L goes on to say that Duke's proposal to secure above-market compensation for generation capacity service (similar to the object of DP&L's ESP II Application which is not narrowly focused on capacity compensation) could harm it because "...the proposal may have a negative impact on the viability and health of the competitive markets both within Duke Energy Ohio's territory and throughout the state." *Id.*

²¹ Section 4928.38, Revised Code. Section 4928.38, Revised Code, precludes the Commission from awarding DP&L any above-market compensation for generation-related service except as may be available through Sections 4928.31 to 4928.40, Revised Code.

which the Commission may not regulate or supervise and which must be on their own in the competitive market.

It is also clear that DP&L is relying on the Commission's AEP-Ohio decision to support its claim that DP&L need not file an application seeking emergency rate relief pursuant to Section 4909.16, Revised Code, to advance its claim that the Commission can authorize non-bypassable charges to prop up total company financial integrity; DP&L asserts that "it should be and is the Commission's regular practice to consider the utility's financial integrity."²² Historically, the Commission has carefully considered the claims of utilities seeking rate relief to avoid financial harm under Section 4909.16, Revised Code. The Commission has held that the ultimate question for the Commission to decide in a financial integrity rate relief case is "whether, absent emergency relief, the public utility will be financially imperiled or its ability to render service will be impaired."²³ "If the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission's inquiry is at an end."²⁴ In this proceeding, DP&L has not offered any evidence demonstrating the nature and extent to which DP&L, the EDU, will be financially imperiled or its ability to render service will be impaired but for collecting from its customers the RSC beyond December 31, 2012.

In 2002, the Commission did undertake a specific inquiry regarding financial integrity implications in light of financial activities by public utilities and their parent affiliate companies. The stated goal of this investigation was "to ensure that the

²² Motion at 11.

²³ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case Nos. 09-453-HT-AEM, *et al.*, Opinion and Order at 6 (Sept. 2, 2009).

²⁴ *Id.*

regulated operations of Ohio Public Utilities are not impacted by adverse financial consequences by parent or affiliate company unregulated operations, and take appropriate corrective action.”²⁵ The Commission said that it would use its statutory powers and take necessary steps to limit the exposure of the regulated entity from adverse consequences of parent or affiliate company unregulated operations.²⁶

Subsequently in 2003, the Commission denied a request of DP&L to issue up to \$279 million of debt securities for the purpose of refinancing a note issued by its parent company, DPL, to insulate DP&L from the financial risks associated with the unregulated parent.²⁷

Then in 2004, the Commission expressed concern about the financial activities of DP&L’s parent as a result of questions about corporate governance, compensation policy, internal controls, potential tax liabilities, downgrading of the debt rating of DP&L’s parent and DP&L, DP&L’s inability to timely file certified financial statements and changes in independent accounting firms.²⁸ As a result, the Commission directed the Staff to undertake an investigation.²⁹

On May 27, 2004, the Commission announced that it would “afford the DPL, Inc. directors and new management team sufficient time to reorganize and develop a strategic business plan that will redirect the companies’ finances and operations. More

²⁵ *In the Matter of the Commission Investigation of Financial Condition of Ohio’s Public Utilities*, Case No. 02-2627-AU-COI, Entry (October 10, 2002).

²⁶ *Id.*

²⁷ *In the Matter of the Commission Investigation of the Financial Condition of The Dayton Power and Light Company*, Case No.04-486-EL-COI, Entry at 1 (April 7, 2004) (hereinafter, “*DP&L Financial Integrity Case*”).

²⁸ *DP&L Financial Integrity Case*, Entry at 2 (April 7, 2004).

²⁹ *DP&L Financial Integrity Case*, Entry at 3 (April 7, 2004).

specifically, the Commission directed DPL and DP&L to “develop and submit to the Commission a comprehensive plan of protection to insulate the regulated utility operations and ratepayers from the untoward impacts of the relationship between DP&L and its parent and/or any non-regulated affiliated companies.” The Commission stated that this “...plan of protection should include specific actions taken to address these concerns, plans of future action, policy changes or additions, and any new practices and procedures undertaken to maintain and improve the financial integrity of the regulated company and ensure quality and reliability of regulated service.”³⁰

On February 4, 2005, DP&L filed the proposed plan of protection in response to the Commission’s directive. At page 5 of DP&L’s proposed plan, DP&L stated:

The structural and process changes discussed in this Protection Plan show that in all aspects of the Company’s operations, improvements have been made to strengthen DP&L’s financial condition. Those improvements, together with DP&L’s adherence to its existing corporate separation requirements and its cost allocation manual, should provide assurance to the Commission that DP&L will not be harmed by any of the unregulated activities of its parent or its affiliates and that it will maintain its consistently excellent service quality.³¹

At page 7 of the proposed protection plan, DP&L stated:

Under S.B. 3, DP&L filed, as part of its transition plan, a corporate separation plan, which was adopted by the Commission in its September 21, 2000 Opinion and Order in Case No. 99-67-EL-ETP, *et al.* The corporate separation plan provides, among other things, that DP&L will keep its books, records and accounts separate from those of its affiliates, as required by Rule 4901:1-20-16(g)(2), Ohio Administrative Code (‘O.A.C.) and that there will be no corss-subsidies between DP&L and its affiliates, as required by Rule 4901:1-20-16(D), O.A.C., and R. C. 4918.02(G). (*sic*)

³⁰ *DP&L Financial Integrity Case*, Entry at 2 (May 27, 2004).

³¹ *DP&L Financial Integrity Case* (Protection Plan at 5)

On May 18, 2011, The AES Corporation, Dolphin Sub Inc., DPL Inc. and DP&L filed an application seeking the Commission's approval of a proposed merger saying that upon consummation of the merger, DP&L's credit rating would remain investment grade.³² DP&L represented that this DP&L credit rating commitment made Staff recommendations regarding "ring fencing" unnecessary.³³

To the extent that it is a regular practice of the Commission to consider a public utility's financial integrity as DP&L now asserts, the written history of this practice, as it relates to DP&L and its affiliates, shows the Commission's strong emphasis on maintaining separation between regulated and unregulated business activities and making sure that the unregulated business ventures of the regulated entity, a parent or affiliate corporation do not negatively affect the financial integrity of the regulated utility or the regulated utility's ability to provide reliable service. In this context, DP&L's demand that the Commission take action to prop up the financial performance of DP&L's regulated and unregulated lines of business stands in stunning conflict with everything the Commission has said and done and everything that DP&L and its affiliates have agreed to do through previous commitments.

Even if DP&L's takings claim could proceed outside of an emergency rate case, and such a claim could proceed on the basis of DP&L's total company ROE projections associated with regulated and unregulated lines of business, DP&L has failed to meet its burden to demonstrate that an order directing it to cease collecting from its customers the

³² *In The Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER (Application at 4). (Hereinafter cited as the "Merger Case").

³³ *Merger Case*, Applicants' Reply Comments, August 18, 2011 at 5-7.

RSC in 2013 would constitute a regulatory taking. It is not a taking because DP&L is not authorized to collect from its customers the RSC in 2013. DP&L's takings argument is meritless.

To support a claim of confiscation, DP&L must demonstrate that the ratemaking result is "so 'unjust' as to be confiscatory,"³⁴ but a review of a rate, standing alone, is not a basis for determining if a confiscation has occurred. Before the Commission may find that rates are confiscatory, it must assess "all relevant costs and expenditures made by [the electric distribution utility]."³⁵ "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end."³⁶

Relying on this well-understood test for determining if utility rates are confiscatory, the Commission has held that it must "consider the total effect of the [EDU's] rates."³⁷ Moreover, there is no legal assurance that the EDU must have an opportunity to earn a profit for its competitive generation function.³⁸ "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."³⁹ Therefore, absent this complete review of DP&L's costs and expenditures, a claim of confiscation cannot be verified.

³⁴ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

³⁵ *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 924 (S.D. Ohio 2004).

³⁶ *Id.* at 921.

³⁷ *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order at 16 (Dec. 8, 2004).

³⁸ *FPC v. Hope Natural Gas Co.*, 320 U.S. 592, 603 (1944).

³⁹ *Market Street Railway Co. v. Railroad Comm'n of California*, 324 U.S. 548, 567 (1945).

Much of DP&L's claimed erosion in its total company financial integrity is the direct result of the success of its unregulated affiliates. DP&L's competitive retail segment's [DPLER and MC Squared, LLC] obtain wholesale supply from DP&L and PJM.⁴⁰ During 2010, DP&L implemented a new wholesale agreement between DP&L and DPLER. Under this agreement, intercompany sales from DP&L to DPLER are based on the market prices for wholesale power.⁴¹ Utilizing market-based purchases from DP&L, DPLER has picked up a supermajority of DP&L's switched load. The effect of DPLER's success in signing up shopping customers is reflected in the total company ROE projections that DP&L is now offering to support its claim that it is entitled to collect above-market, non-bypassable charges from its customers, to prop up its total company financial performance.

The law does not allow DP&L to legitimately advance or sustain a takings claim when the total company ROE declines or goes negative because of market forces. This is particularly true in this case since market forces are working on DP&L's total company ROE largely as a consequence of DPLER's dominance and market share growth. DPLER's success has been, in turn, enabled through the market-priced wholesale supply that DP&L has been making available to DPLER since at least 2010. And DP&L's total company financial projections omit DPLER's profits from the total company ROE equation. DP&L is effectively passing customers from the left hand to the affiliated right hand, but, for purposes of its Motion, DP&L has held its right hand behind its back as if it does not exist.

⁴⁰ 2011 10-K at 141.

⁴¹ *Id.*

Moreover, as stated earlier, even under DP&L's total company ROE theory, DP&L has not demonstrated that the "total impact" of not receiving a Commission order authorizing DP&L to collect the RSC in 2013 would constitute an unlawful takings. There is no takings issue because DP&L does not have authority to collect the RSC in 2013.

Additionally, the ROE projections in the Motion and Declaration of witness Chambers are wrong because the projected ROE impacts are not based on extending the current ESP. As witness Chambers stated in his Declaration, his ROE projections were obtained by modifying the assumptions in his testimony: "To analyze the effect on ROE of removing the RSC from DP&L's rate structure for 2013, I project the income statement and balance sheet. To project the income statement, I make two modifications to the approach used in my testimony in support of the proposed ESP (see Exhibit WJC-II)."⁴² But, the ROE projections in his testimony assume that DP&L will bid out 10% of the SSO load: "As explained by Company Witness Jackson, the as-filed projections are based on forward market pricing and a transition to auction pricing of 10% of load beginning January 2013"⁴³ DP&L's SSO rates provide an above market revenue stream that significantly impacts its ROE. Witness Chambers removal of 10% of this revenue stream and annualizing its effect significantly reduces DP&L's ROE projection.

D. A Hearing Is Not Required.

DP&L claims that a hearing is required to lower a utility's rates. DP&L's claim is a red herring because Joint Movants have not unilaterally requested that DP&L be

⁴² Declaration of William Chambers at 5.

⁴³ Testimony of William Chambers at 31.

required to lower its rates; Joint Movants merely seek to enforce the terms of the ESP I Settlement (that DP&L cease collecting from its customers the RSC in any form in 2013) that DP&L agreed to as part of the Commission-approved ESP I Settlement. And it is important to note that the Joint Motion was made necessary as a result of the unilateral decisions by DP&L to dither while the ESP I clock was ticking towards January 1, 2013.

DP&L's claim is also legally incorrect. The Commission often lowers or eliminates riders without holding a hearing. For example, on December 21, 2010, Columbus Southern Power Company ("AEP-Ohio") filed a motion to extend the Monongahela Litigation Termination Rider ("LTR"). The Commission flatly denied AEP-Ohio's request without holding a hearing.⁴⁴

The Commission also directed AEP-Ohio to cease recovering lost distribution revenue through its energy efficiency peak demand reduction ("EE/PDR") Rider without holding a hearing.⁴⁵ In December of 2010, AEP-Ohio filed a request to extend collection of lost distribution revenue into 2011. The Commission denied AEP-Ohio's request without a hearing, directing AEP-Ohio to not collect 2011 lost distribution revenue through its EE/PDR Rider.⁴⁶

⁴⁴ *In the Matter of the Application of Columbus Southern Power Company to Extend the Monongahela Litigation Termination Rider*, Case No. 10-3104-EL-RDR, Finding and Order at 3 (Feb. 09, 2011).

⁴⁵ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 09-1089-EL-POR, *et al.*, Entry at 3 (Jan. 27, 2011).

⁴⁶ *Id.*, Entry at 3 (Jan. 27, 2011); *id.* Entry at 4 (Mar. 23, 2011).

E. The Commission Must Issue An Order.

While DP&L claims the Commission must hold a hearing to lower its rates, DP&L also asserts that the Commission need not do anything to extend DP&L's ESP.⁴⁷ DP&L is incorrect. Commission precedent indicates that whenever an EDU has withdrawn or terminated an SSO, the Commission has issued an order to determine what terms and conditions of the existing SSO carry forward until a successor SSO is established.⁴⁸ The Commission should issue such an order enforcing the terms and conditions of the ESP I Settlement as approved by the Commission. Those terms and conditions require that the Commission should issue an order finding that the RSC, with a December 31, 2012 expiration date, cannot be extended into a carry-over ESP.

III. CONCLUSION

For the reasons stated herein, the Joint Movants urge the Commission to grant the Joint Motion and reject the improper surreply contained in DP&L's Motion. Due to the procedural schedule set forth in DP&L's ESP proceeding, it is indisputable that there will be a need to have a carry-over ESP. In light of this inevitable event, the Commission must address the fate of the RSC. The Commission should find that the RSC, with a December 31, 2012 expiration date, cannot be extended into a carry-over ESP in any form. Because the Commission's decision will impact the scope of the issues and testimony in DP&L's pending ESP proceeding, the Commission should not delay its decision.

⁴⁷ Motion at 15.

⁴⁸ FirstEnergy Order at 8; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Entry (Feb. 23, 2012).

The relief requested by the Joint Motion is compelled by the RSC-specific language in the ESP I Settlement as the meaning of such language is informed by the ESP I Settlement when it is viewed as a package. Accordingly, the Commission should not authorize DP&L to collect the RSC from its customers beyond 2012 in a carry-over ESP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Joint Memorandum Contra* was served upon the persons listed below via electronic transmission this 23rd day of November, 2012.

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Summary: Memorandum Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.