

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company to)	Case No. 15-361-EL-RDR
Update its Transmission Cost Recovery)	
Rider–Non-Bypassable)	

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
Samuel C. Randazzo (Reg. No. 0016386)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
(willing to accept service by e-mail)
mpritchard@mwncmh.com
(willing to accept service by e-mail)
sam@mwncmh.com
(willing to accept service by e-mail)

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Attorneys for Industrial Energy Users-Ohio

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On March 16, 2015, The Dayton Power and Light Company (“DP&L”) filed an application to update its Transmission Cost Recovery Rider-Non-Bypassable (“TCRR-N”). In addition to updating its proposed charges, DP&L requested that the Public Utilities Commission of Ohio (“Commission”) authorize two adjustments to the TCRR-N. First, DP&L requested authority to include in the TCRR-N any Operating Reserves costs that are assigned to DP&L, solely as a transmission owner.¹ Second, DP&L sought authority to transfer to the TCRR-N a potential future under-recovery balance that may exist for the Transmission Cost Recovery Rider–Bypassable (“TCRR-B”) as of January 1, 2016, and any future adjustments to TCRR-B costs incurred prior to January 1, 2016.²

The proposed change of the TCRR-N to include Operating Reserves assigned to DP&L as a transmission owner is unlawful and unreasonable because DP&L does not incur those costs. Moreover, the requested authorization of the recovery in the TCRR-N of Operating Reserves costs assigned to load will result in double billing. Accordingly,

¹ Application at 2.

² *Id.* at 3.

the Commission should reject DP&L's proposed change to include Operating Reserves in the TCRR-N.

Likewise, the proposed change of the TCRR-N to recover a potential TCRR-B under-recovery should be rejected. The Commission has already addressed and rejected similar requests from DP&L to increase transmission charges of shopping customers by transferring under-recovery balances of the TCRR-B to the TCRR-N. DP&L offers no reason why the Commission should not follow its prior precedent. Additionally, DP&L's proposal to shift bypassable transmission charges to all customers through a nonbypassable charge would violate the requirements of R.C. 4928.02.

At a more fundamental level, DP&L's application should be rejected because the authorization of the rider and the proposed amendments are preempted by the Federal Power Act ("FPA"). Under the FPA, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction of the rates and regulation of interstate transmission services in states such as Ohio that have unbundled retail electric service. Authorization of the TCRR-N invades a field within the exclusive jurisdiction of FERC. Moreover, the TCRR-N frustrates and practically prevents a retail customer from contracting with the regional transmission operator ("RTO") directly for transmission service, and the rate design of the rider conflicts with federally-approved tariffs available to retail customers. Because the continued authorization and the amendment of the TCRR-N invades a field of regulation within the exclusive jurisdiction of FERC and authorization would conflict with policy outcomes FERC has initiated in Order 888 and the PJM Interconnection, L.L.C.'s ("PJM") tariffs implementing that order, the authorization of the TCRR-N is preempted by federal law. As part of its orders in this

case, therefore, the Commission should reverse its authorization of the TCRR-N and direct DP&L to file new transmission tariffs that comply with federal and state law.

I. **BACKGROUND**

In DP&L's last electric security plan ("ESP") case, the Commission granted DP&L authority to restructure how transmission service is procured on behalf of customers in DP&L's certified distribution service area.³ DP&L was granted authority, beginning January 1, 2014, to procure what was labeled as non-market-based transmission service on behalf of all customers in DP&L's certified distribution service area and recover the costs of those services through a nonbypassable rider, the TCRR-N. DP&L presented testimony identifying the specific PJM transmission and ancillary costs that it deemed were non-market-based.⁴ Notably, DP&L did not identify Operating Reserves costs as non-market-based.⁵

Currently, DP&L collects revenue from standard service offer ("SSO") customers through the bypassable TCRR-B to cover the market-based transmission charges, including Operating Reserves costs, billed by PJM to DP&L, to the extent that those costs may be assigned to it.⁶ Market-based transmission services are also included as part of DP&L's SSO auction product. Beginning January 1, 2016, DP&L's SSO will be at 100% auction and, therefore, from that date forward the auction winners will be

³ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 36 (Sept. 4, 2013) ("ESP Case" or "ESP Order" where appropriate).

⁴ See *ESP Case*, Testimony of Claire Hale at 4-5 (DP&L Ex. 11).

⁵ *Id.* (listing the PJM costs that DP&L believed were non-market-based and omitting Operating Reserves from the list).

⁶ See discussion below.

responsible for providing all of the market-based transmission services to SSO customers. The price for market-based transmission service provided to SSO customers is reflected in the SSO auction clearing price.

II. **ARGUMENT**

A. DP&L's request to include in the TCRR-N Operating Reserves costs assigned to DP&L, solely as a transmission owner, should be rejected because transmission owners are not assigned any Operating Reserves costs

In its application, DP&L proposes to include Operating Reserves costs assigned to DP&L, solely as a transmission owner, in the TCRR-N beginning June 1, 2015. Other than its blanket request, DP&L does not provide any further detail or explanation on the magnitude of the charges it seeks to transfer or the exact nature of the charges. On this ground alone, the Commission should find that DP&L has failed to demonstrate that its request is reasonable.⁷

Further, there is no need for the Commission to address the amendment DP&L is requesting because, as a transmission owner, DP&L is not assigned any Operating Reserves costs by PJM.⁸ The various categories of Operating Reserves costs are assigned to Market Participants, Transmission Customers, and Network Customers

⁷ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4918.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 62 (Feb. 25, 2015) ("AEP-Ohio ESP III Order") (Commission denies request for authorization of placeholder for cost recovery when an electric distribution utility ("EDU") fails to demonstrate it will incur costs or their magnitude).

⁸ PJM Open Access Transmission Tariff ("OATT") at 536-537, 1871, 1875, 1877, 1883, available at: <http://pjm.com/documents/agreements.aspx>.

based upon the load served by such an entity.⁹ Thus, there is no justification for an amendment of the TCRR-N to include costs not assigned by PJM to DP&L.

Because DP&L failed to include any detail or supporting analysis regarding this request and because transmission owners are not currently assessed any Operating Reserves charges, the Commission should reject DP&L's request to include in the TCRR-N Operating Reserves costs assigned to DP&L solely in its role as a transmission owner.

B. To the extent DP&L is requesting to include in the TCRR-N Operating Reserves costs assigned to load, DP&L's request should be rejected because it would violate R.C. 4928.02 and would likely result in customers being double-billed for these costs

As noted above, PJM assigns Operating Reserves costs to Market Participants, Network Customers, and Transmission Customers based upon the individual customer's "load" or based upon the "load" served by such an entity. To the extent DP&L's application requests authority to transfer Operating Reserves costs to the TCRR-N that are assessed to load, the Commission should deny DP&L's request because it would result in unjust and unreasonable prices for both nonshopping and shopping customers.

Operating Reserves is a market-based transmission service that may be included in DP&L's TCRR-B and DP&L's SSO auction product.¹⁰ For the portion of the SSO served by the SSO auction winners, the auction winners are responsible for providing Operating Reserves service and the cost of providing this service is embedded in the

⁹ *Id.* Or in the case of a customer receiving transmission service directly from PJM, based on the customer's individual load.

¹⁰ See *supra* at 2-3.

SSO auction clearing price. To date, 60% of the tranches for DP&L's SSO supply have been secured through the end of DP&L's current ESP. Thus, a substantial portion of the SSO price already has embedded in it the cost of Operating Reserves.

Similarly, competitive retail electric service ("CRES") providers supply shopping customers with Operating Reserves service. The price shopping customers pay for this service is reflected in the terms, conditions, and price embedded in shopping customers' contracts with the CRES providers. DP&L requests a very compressed implementation timeframe (June 1, 2015) and there is no evidence that CRES providers would be able to reflect the change (price reduction) in fixed price contracts before June 1, 2015. Thus, for shopping customers on fixed price contracts, the cost of Operating Reserves will be embedded in CRES contracts.

If the Commission grants the amendment DP&L seeks, DP&L will be authorized to include recovery of Operating Reserves costs through the TCRR-N, while customers will be required to also pay the SSO auction winner for Operating Reserves costs through the auction clearing price or their CRES provider pursuant to the negotiated contract terms. Thus, the amendment of the TCRR-N to include Operating Reserve costs will likely result in double-recovery of those costs. Although the potential double-recovery of Operating Reserves costs may result from the proposed amendment, DP&L has not recommended any means to prevent the double-recovery.

R.C. 4928.02(A) requires the Commission to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. Double-recovery of costs is not a reasonable outcome that the

Commission should authorize.¹¹ Because DP&L's proposal may result in prices for retail electric service that are unjust and unreasonable, the Commission should reject DP&L's proposal.

C. Commission precedent and R.C. 4928.02 support rejection of DP&L's proposal to transfer bypassable market-based costs to the TCRR-N

For the third time, DP&L also seeks authority to transfer to a nonbypassable rider a potential future under-recovery balance that may exist for the TCRR-B as of January 1, 2016, and any future adjustments to TCRR-B costs incurred prior to January 1, 2016.¹² Twice before, the Commission has rejected DP&L's requests to transfer bypassable costs from the TCRR-B to a nonbypassable rider. The Commission should reject DP&L's request in this case also.

In the *ESP Case*, the Commission denied DP&L's request to transfer TCRR-B costs to the nonbypassable Reconciliation Rider if the TCRR-B under-recovery exceeded 10% of the rider's revenue requirement.¹³ In DP&L's first application to update the TCRR-N, the Commission again denied DP&L's request to transfer a TCRR-B under-recovery to a nonbypassable rider, this time the TCRR-N.¹⁴ Based on

¹¹ The Commission has recognized that double-recovery of transmission costs due to authorization of nonbypassable recovery of transmission charges may trigger the need for Commission intervention. AEP-Ohio ESP III Order at 86. The Commission also identified double-recovery of generation-related costs as an issue requiring Commission intervention. In an Ohio Power Company case, the Commission indicated that it would address double-recovery of generation-related costs in fuel proceedings. *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer*, Case No. 12-3254-EL-UNC, Opinion and Order at 16 and Concurring Opinion (Nov. 13, 2013).

¹² Application at 3.

¹³ ESP Order at 35-36. The Commission did not state the reason for denying DP&L's request to recover bypassable transmission costs through the Reconciliation Rider, noting only that DP&L would be required to file a proposal at the end of the ESP term for appropriate collection. *Id.* at 36.

¹⁴ *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider-Non-Bypassable*, Case Nos. 14-358-EL-RDR, *et al.*, Finding and Order at 4 (May 28, 2014) (hereinafter "2014 TCRR-N Order"). The Commission noted that it had reached the same

these prior decisions, the Commission should again reject DP&L's proposal to transfer to shopping customers costs associated with serving SSO customers.

DP&L does not provide a reasoned basis for the Commission to take a position permitting DP&L to shift the under-recovery of bypassable costs to the nonbypassable TCRR-N. In support of its amendment, DP&L argues that it will no longer supply market-based transmission service to SSO customers beginning January 1, 2016 and alleges that the TCRR-B will be completely phased out at that time.¹⁵ Thus, DP&L claims that it "must propose a means to collect the remaining TCRR-B balance beginning January 1, 2016" as well as any "future adjustments" directed by PJM.¹⁶ DP&L argues that "[c]ollection of the December 31, 2015 TCRR-B balance through the TCRR-N is the most reasonable method" to accomplish this.¹⁷ DP&L's argument, however, ignores that DP&L may continue the TCRR-B beyond January 1, 2016 to collect any outstanding under-recovery because DP&L's current ESP does not end until May 31, 2017. Therefore, the most reasonable method to recover any bypassable market-based transmission costs that remain under-recovered as of January 1, 2016 would be to extend the TCRR-B into 2016 to conduct a final true-up of the costs DP&L is authorized to collect with the bypassable rider.

DP&L also claims that collection of the TCRR-B under-recovery balance through the nonbypassable TCRR-N would be consistent with how other riders are treated in relation to the nonbypassable Reconciliation Rider if an under-recovery exceeds 10% of

conclusion regarding the recovery of bypassable transmission costs in excess of 10% of base costs in the ESP case. *Id.*

¹⁵ Application at 3.

¹⁶ *Id.*

¹⁷ *Id.*

the rider's base case.¹⁸ This argument, however, ignores the fact that the Commission has twice rejected DP&L's proposal to do this with the bypassable TCRR-B, as noted above.

DP&L further argues that the Commission left open the possibility that the final true-up of the TCRR-B could occur on a nonbypassable basis. In support, DP&L quotes from the ESP Order:

DP&L should file with the Commission a proposal at the end of the ESP term for appropriate collection of any uncollected TCRR balance, including whether the uncollected TCRR balance should be collected through a bypassable or nonbypassable TCRR true-up rider.¹⁹

This quote, however, was addressing the final true-up of the TCRR before it was bifurcated into the TCRR-B and TCRR-N. The final true-up of the TCRR has already occurred.²⁰

DP&L's request to transfer bypassable market-based transmission charges to the TCRR-N also violates the state policies in R.C. 4928.02(A) through (C). These policies require the Commission to ensure customers receive unbundled and reasonably priced retail electric service by providing customers effective choices so that customers may elect the supplier, price, terms, conditions, and quality options that meet their respective needs. Transferring bypassable market-based transmission charges to customers who are shopping and not receiving market-based transmission service from DP&L results in shopping customers paying a bundled and unreasonable price for such service and

¹⁸ *Id.*

¹⁹ *Id.* at 3 (quoting ESP Order at 36).

²⁰ *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider-Bypassable*, Case No. 14-661-EL-RDR, TCRR-B Reconciliation Summary (Feb. 17, 2015).

deprives shopping customers effective choice over supplier, price, terms, conditions, and quality options of competitive market-based retail electric service.

Because DP&L's proposal to transfer a bypassable market-based TCRR-B under-recovery to the TCRR-N violates Commission precedent and R.C. 4928.02, the Commission should reject it.

D. The Commission's authorization of the TCRR-N is preempted and void because DP&L's TCRR-N tariff conflicts with FERC-approved transmission tariffs and frustrates federal policies

At a more fundamental level, DP&L's application should be rejected because its continued authorization and amendment of a rider is preempted by the FPA. Accordingly, the Commission should direct DP&L to modify its tariffs to allow retail customers to directly secure all transmission and ancillary services directly from PJM and to modify how certain costs are billed to customers.

Preemption may be express or implied.²¹ Implied federal preemption may occur in two ways. Congress may have intended to occupy the field; state legislation in the same field is preempted whether the state law is consistent or inconsistent.²² Federal law may also preempt state law or regulation if it conflicts with the federal law. "[W]here there is a conflict between a retail tariff and a wholesale tariff, the latter must prevail"²³

Initially, the Commission is preempted from authorizing a transmission-related tariff other than to flow through the federally-authorized costs incurred by the EDU because FERC has exclusive jurisdiction over unbundled retail transmission service.

²¹ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. at ___, Slip Op. at 2 (U.S. Sup. Ct. Apr. 21, 2015).

²² *Id.*

²³ *Nine Mile Point Nuclear Station, LLC*, 110 FERC ¶ 61033 at para. 16 (Jan. 21, 2005); *see also Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (citing *Nantahala*, 476 U.S. 953, 962 (1986)).

Under Section 201 of the FPA, FERC has jurisdiction over transmission-related services.²⁴ Because FERC has exclusive authority over transmission services in interstate commerce, state action in the same field is preempted.²⁵

Under Order 888, FERC ordered functional unbundling of wholesale generation and transmission services. FERC also imposed a similar open access requirement on unbundled retail transmission service in interstate commerce.²⁶ If a state has unbundled its retail electric service, then FERC may require the utility to transmit a competitor's electricity over its lines on the same terms that the utility applies to its own energy transmission.²⁷

Under FERC's supervision and regulation, PJM is the RTO that controls the transmission system that covers DP&L's service area. PJM's OATT governs the terms, conditions, and requirements under which a Transmission Customer may receive transmission service from PJM. Under the OATT, a Transmission Customer is any Eligible Customer that meets certain contracting requirements.²⁸ An Eligible Customer includes "[a]ny retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider or a Transmission Owner offer the transmission service, or pursuant to a voluntary offer of such service by a Transmission Owner, is an Eligible Customer under the Tariff."²⁹ By definition, therefore, the PJM

²⁴ Federal Power Act § 201(B)(1), 16 U.S.C. § 824(b)((1).

²⁵ *Id.*

²⁶ *New York v. FERC*, 535 U.S. 1 (2002).

²⁷ *Id.*

²⁸ PJM OATT, Section 1.45, available at: <http://pjm.com/documents/agreements.aspx>.

²⁹ *Id.*, Section 1.11.

OATT provides that retail customers may secure transmission service directly under the federally-approved tariff rates if a state has unbundled retail electric services.

Under R.C. Chapter 4928, Ohio requires EDUs to unbundle their electric services and to transfer the control of transmission facilities to a qualifying transmission entity.³⁰ Because Ohio has unbundled retail electric service, the PJM tariff preempts any provision of Ohio law or a Commission order that attempts to regulate a customer's right to contract directly with PJM for transmission service. No conflict between federal and state law is required; the Commission simply may not regulate the rates and terms of retail transmission service that may be secured under the PJM tariff.³¹ Based on field preemption, therefore, the Commission's attempt to regulate the terms and conditions of retail transmission service is preempted.

In this instance, moreover, a Commission order amending and continuing the authorization of the TCRR-N is preempted because it would conflict with the federal law. Conflict preemption arises when compliance with both state and federal law is impossible or where the state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.³² Continuing the authorization and further amendment of the TCRR-N is void because it triggers conflict preemption in two ways.

In Order 888, FERC adopted rules requiring unbundling to remedy discrimination in the provision of wholesale electric service so as to facilitate competitive wholesale

³⁰ R.C. 4928.12; R.C. 4928.35.

³¹ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. ___, Slip Op. at 2 (U.S. Sup. Ct. Apr. 21, 2015).

³² *Id.*

markets.³³ As noted above, these rules permit a retail customer to contract directly with PJM for transmission service. In the ESP Order, the Commission interfered with the operation of the FERC-approved tariff that permits the customer to contract directly with PJM for transmission service. The Commission approved a nonbypassable rider to collect PJM charges related to what has been termed non-market-based transmission service provided to all of its customers.³⁴ Because the TCRR-N is nonbypassable, the Commission required retail customers to obtain non-market-based transmission service from DP&L unless the customers accept being billed twice for the same transmission services (a result the Commission should accept as unreasonable on its face).³⁵ As a practical consequence of the authorization of the TCRR-N, therefore, customers cannot exercise the option of contracting for transmission services with PJM as permitted under the federal tariff. Because exercising the option of contracting under the PJM tariff is rendered impossible the Commission's existing order, and any additional order authorizing the continuation of the TCRR-N on the same terms and conditions, conflicts with federal law and is void.

Further, the manner in which DP&L bills the demand portion of the TCRR-N rate frustrates and conflicts with the cost allocation methodology endorsed by FERC.³⁶ The PJM tariff allocates Network Integration Transmission Service ("NITS") costs (which are

³³ *New York v. FERC*, 535 U.S. at 26-27.

³⁴ ESP Order at 36.

³⁵ See Application at Schedule A-1, Sheet No. T-8, page 1 of 4 (TCRR-N is applicable to all distribution customers).

³⁶ FERC has previously stated that "[a]ccess charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation" in order to "encourage load response during periods when generation or transmission are in short supply and prices are rising." *Occidental Chemical Corp. v. PJM*, 102 FERC ¶ 61,275 at ¶ 14, 16 (2003).

the majority of the costs to be collected through the TCRR-N) through each customer's peak load contribution to the single highest peak load in each transmission pricing zone (the "1 CP" or network services peak load "NSPL" methodology). The PJM rate design advances the goal of encouraging customers to manage their peak loads and thereby assists PJM in managing system reliability.³⁷

Although DP&L assigns NITS costs to customer classes based upon the 1 CP/NSPL methodology, it does not bill customers based upon each customer's individual NSPL.³⁸ Instead, DP&L bills customers based upon the customers' monthly billing demands. For a DP&L customer receiving service at primary or secondary voltage, for example, monthly billing demand is calculated as the greatest 30-minute period of demand during one of the following: (1) 75% of a customer's monthly off-peak usage defined as between 8:00 p.m. and 8:00 a.m.; (2) 100% of a customer's monthly on-peak demand defined as between 8:00 a.m. and 8:00 p.m.; and (3) 75% of the greatest off-peak or on-peak demand during the months of June, July, August, December, January, or February during the past 11-month period prior to the current billing month.³⁹ DP&L's monthly billing demand methodology is detached from a customer's actual usage during a system peak and therefore does not send customers an appropriate price signal to reduce usage during system peaks. Accordingly, DP&L's monthly billing demand methodology frustrates and conflicts with the FERC-approved tariffs.

³⁷ *AEP-Ohio ESP III Case*, Direct Testimony of Kevin M. Murray (IEU-Ohio Ex. 1B) at 32 (May 6, 2014) (PJM allocation of NITS costs provides a transparent price signal).

³⁸ Application at Schedule B-1; Application at Schedule A-1, Sheet No. T-8, page 3 of 4.

³⁹ Application at Schedule A-1, Sheet No. T-8 page 3 of 4; DP&L Electric Distribution Service Tariff Sheet Nos. D.19 & D.20.

Because the TCRR-N tariff invades a field within the exclusive jurisdiction of FERC and conflicts with PJM's FERC-approved tariffs, the Commission's authorization of the TCRR-N is preempted. Accordingly, the Commission should reject DP&L's request to amend the current TCRR-N and direct DP&L to modify the TCRR-N tariffs to allow retail customers to directly secure transmission service from PJM.

III. **CONCLUSION**

The Commission should reject DP&L's proposal to include Operating Reserves in the TCRR-N and to conduct the final true-up of the TCRR-B through the TCRR-N because these proposals are unlawful and unreasonable. The Commission also should direct DP&L to modify the TCRR-N tariffs to allow retail customers to directly secure transmission service from PJM.

Respectfully submitted,

/s/ Matthew R. Pritchard

Frank P. Darr (Reg. No. 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. No. 0088070)

Samuel C. Randazzo (Reg. No. 0016386)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

sam@mwncmh.com

(willing to accept service by e-mail)

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 27th day of April 2015, via electronic transmission.

/s/ Matthew R. Pritchard

Matthew R. Pritchard

Judi L. Sobecki (Reg. No. 0067186)
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@aes.com

ATTORNEY FOR THE DAYTON POWER AND LIGHT COMPANY

William L. Wright
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
william.wright@puc.state.oh.us

ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Bryce A. McKenney
Gregory Price
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
bryce.mckenney@puc.state.oh.us
greg.price@puc.state.oh.us

ATTORNEY EXAMINERS

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