BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power & Light Company For Approval of Its Electric Security Plan	))))	Case No. 16-0395-EL-SSO
In the Matter of the Application of The Dayton Power & Light Company For Approval of Revised Tariffs	))))	Case No. 16-0396-EL-ATA
In the Matter of the Application of The Dayton Power & Light Company For Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	)))	Case No. 16-0397-EL-AAM

CITY OF DAYTON AND HONDA OF AMERICA MFG., INC. MEMORANDUM IN OPPOSITION TO DP&L MOTION TO IMPLEMENT THE SSR EXTENSION RIDER

I. INTRODUCTION

In order for the Commission to expect compliance with its orders, parties must be confident in their reliance on the enforcement of those orders. Since the Dayton Power & Light Company ("DP&L") failed to comply with four express preconditions for the SSR Extension Rider ("SSR-E"), the SSR-E should not be authorized by the Commission.

DP&L's Motion to Implement the SSR-E (the "Motion") admits that DP&L has not complied with the conditions established by the Commission to grant the SSR-E. DP&L claims that its failure to comply with those conditions should be ignored because it has "substantially complied" with the requirements set by the Commission. This is incorrect as a matter of both law and fact. Commission precedent does not allow DP&L to simply ignore elements of past Commission orders it does not wish to comply with, or to comply with Commission orders on timelines DP&L chooses. More importantly, factually this is not a situation where DP&L has

made a clerical error or missed a deadline by a few days. For several of the elements established by the Commission DP&L has made no effort at compliance whatsoever.

In light of DP&L's failure to comply with the requirements established by the Commission, DP&L's Motion should be denied.

II. DP&L FAILED TO COMPLY WITH THE ESP ORDER

A. DP&L Has Not Established Financial Need.

The Commission required that DP&L show that the SSR-E is "necessary to maintain the financial integrity of the Company, and that the amount requested is the necessary amount to maintain DP&L's financial integrity. . ."[1] This was an essential requirement from the Commission's perspective because the SSR was only approved due to the Commission's findings regarding DP&L's projected performance. In rejecting intervenor arguments that the SSR was an unlawful transition charge and was unnecessary, the Commission found that "the SSR is the minimum amount necessary to maintain [DP&L's] financial integrity. . ."[2] As the SSR was only authorized due to DP&L's allegedly imperiled financial condition, the Commission wisely made the SSR-E expressly contingent on DP&L establishing that it was still financially imperiled.

DP&L claims that DPL Inc.'s financial condition is at risk due to the performance of its generation assets, and does not address the financial condition of DP&L in any significant detail.[3] While reasonable minds can disagree about the conclusions regarding DPL Inc., there can be no dispute that DP&L has not met the standards established by the Commission to make

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[1] Case No. 12-426-EL-SSO, Opinion and Order dated September 4, 2013 ("ESP Order"), p. 27.

[2] ESP Order, p. 22. *See also*, ESP Order, p. 25 (finding amount of SSR charge was minimum amount necessary to maintain financial integrity.)

[3] Motion, p. 5.

this determination since it failed to present the evidence requested about DP&L. For example, DP&L's financial integrity claim is largely dependent on the impact of DP&L's poorly performing generation assets on DPL, Inc.[4] The SSR-E was designed by the Commission to go into effect after the generation assets were transferred by DP&L on or before December 31, 2016.[5] Accordingly, DP&L's projections of DPL Inc. revenue which continue to assume an impact from those generation assets are improper because they still include the generation assets which the Commission expressly ordered be transferred away from DP&L by December 31, 2016.

Similarly, DP&L has not established that the SSR-E is the minimum amount necessary to maintain DP&L's financial integrity. The Commission made clear that the SSR should only be established in the minimum amount necessary to maintain DP&L's financial integrity.[6] The Commission applied this same requirement to the SSR-E, saying that "DP&L must show . . . that the amount requested is the necessary amount to maintain DP&L's financial integrity."[7] DP&L has offered no testimony or analysis showing that the SSR-E is the minimum amount needed to maintain financial integrity. Instead DP&L merely assumes it needs the maximum amount authorized by the Commission. In light of DP&L's failure to address this topic DP&L's projections are simply not sufficient.

As DP&L presented evidence regarding DPL Inc. instead of DP&L and failed to present evidence that the amount of the SSR-E is the minimum necessary to ensure DP&L's financial

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[4] Motion, p. 5.

[5] ESP Order, p. 27.

[6] ESP Order, p. 22. *See also*, ESP Order, p. 25 (finding amount of SSR charge was minimum amount necessary to maintain financial integrity.)

[7] ESP Order, p. 27.

integrity, there can be no reasonable dispute that DP&L has failed to provide the evidence required by the ESP Order prior to approval of the SSR-E.

B. DP&L Did Not File An Application To Increase Distribution Rates By July 1, 2014.

The Commission made the SSR-E expressly contingent on DP&L filing a distribution case by July 1, 2014. DP&L did not meet this requirement and did not file its distribution case until October 30, 2015.[8] As discussed above, DP&L's delay in filing its distribution rate case is significant. The Commission expressly directed that "DP&L should exhaust its opportunities for rate relief in order to ensure its financial integrity."[9] DP&L's delay of more than a year in filing its distribution case shows that DP&L did not exhaust such opportunities.

DP&L, through the testimony of witness Schroder, claims that DP&L's late filing of the distribution rate case is not important because DP&L needs both the increased revenue from the distribution case and from SSR-E in order to ensure its financial integrity.[10] This argument is based on the premise that witness Malinak demonstrated that both revenue sources are needed to maintain DP&L's financial integrity. However, that is not what witness Malinak examined. Witness Malinak's testimony is focused on the financial integrity of DPL Inc., DP&L's parent entity. Witness Malinak never finds that DP&L, the regulated utility, needs both the SSR-E and distribution revenues at minimum to ensure financial stability. Contrary to DP&L witness Schroder's testimony, this error was significant because Witness Malinak's testimony focuses on the financial integrity of DPL Inc., not DP&L (the entity which will enjoy the benefit of the additional distribution revenue if a distribution case had been filed).

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[8] Case No. 15-1830-EL-AIR

[9] ESP Order, p. 27.

[10] Schroder Direct, p. 4.

As DP&L failed to file a distribution rate case within the period established in the ESP Order, its Motion should be denied.

C. DP&L Did Not File An Appropriate Application To Implement Smart Grid And Advanced Metering Infrastructure By July 1, 2014.

The ESP Order conditioned SSR-E revenue on DP&L filing an application by July 1, 2014 to modernize its distribution infrastructure by implementing a smart grid program, advanced metering infrastructure ("AMI"), and any other programs which DP&L believes would promote the policy of the state to enhance the competitive retail market.[11] DP&L admits that it failed to comply with this portion of the ESP Order by July 1, 2014.[12] In fact, DP&L has still not met that requirement, and instead says it is still "actively considering" this Commission requirement. [13]

While DP&L may have been "actively considering" implementing smart grid programs for the last few years, that is not the standard created by the Commission in the ESP Order. The Commission very clearly required DP&L to file an application to implement smart grid and AMI as a condition to receiving SSR-E revenue. The Commission had good reason for doing that, relying on R.C. § 4928.02(D)'s policy of incentivizing competitive retail service. DP&L chose not to file such an application, and accordingly has not met the requirements imposed by the Commission to receive SSR-E revenue.

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[11] ESP Order, p. 28.

[12] Schroder Direct, p. 5.

[13] Schroder Direct, p. 5.

D. DP&L Did Not Modernize Its Billing System In Accordance With The Commission's Directive.

The ESP Order required DP&L to modernize its billing system.[14] At minimum, that modernization was required to include the ability to support AMI.[15] Though DP&L claims it has met some of the requirements imposed by the Commission, DP&L does not allege that its billing system has the ability to support AMI. Upgrading the billing system to support AMI was an express requirement of the ESP Order to facilitate competition in Ohio.[16] As DP&L has once again failed to meet this express requirement of the ESP Order, its Motion should be denied.

E. Since DP&L Failed To Comply With Four Express Preconditions For SSR-E, DP&L's Motion Should Be Denied.

While some parties may take issue with the question of whether or not DP&L has established an ongoing financial need for the SSR-E, the Commission need not reach that issue to reject DP&L's Motion. DP&L has by its own admission failed to comply with several elements of the ESP Order. These failures to comply are not clerical or minor, they evidence a strategic decision by DP&L not to comply with the requirements established by the Commission for SSR-E.

The best evidence of DP&L's strategic choice not to follow the requirements established by the Commission can be seen in the nature of the tasks DP&L did not perform. First, the Commission identified the type of evidence that DP&L was obligated to provide to establish the need for, and amount of, SSR-E. DP&L chose not to provide that evidence and instead provided evidence from its parent entity. Second, DP&L did not file an application to increase

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[14] ESP Order, p. 28.

[15] ESP Order, p. 28.

[16] ESP Order, p. 28.

distribution rates within the deadline established by the Commission. Third, DP&L still has not filed an application to implement smart grid and AMI. Fourth, DP&L has not modernized its billing system to support AMI. Each of these tasks share a common theme. They were each solely within DP&L's control and they were each not pursued by DP&L within the timelines established by the Commission for the SSR-E.

The Commission gave clear instructions to DP&L and the parties to this proceeding in the ESP Order. The Commission outlined exactly what it required DP&L to do in order to receive the SSR-E. DP&L did not comply with the Commission's requirements. Therefore, if the Commissions orders are to have any meaning in the future the Commission should deny DP&L's Motion.

III. DP&L HAS NOT "SUBSTANTIALLY COMPLIED" WITH THE ESP ORDER

It is undisputed that DP&L has failed to comply with all of these elements. Therefore, the question becomes whether the SSR-E should be granted when DP&L has admittedly failed to comply with the standard created by the Commission. The cases cited by DP&L arguing that "substantial compliance" is sufficient are not factually analogous. Instead, Commission precedent shows that failures to comply like DP&L's are not typically waived by the Commission.

The primary case cited by DP&L is In the Matter of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates, et al., Case No. 09-1849-GA-RDR, et al. (March 5, 2010 Entry, p. 2). That case involved Duke providing public notice of a filing as required by a prior Commission order. Duke provided notice to local municipalities in November of 2009 of its filing. In December of 2009 Duke identified a clerical error in the November 2009 notice. Duke remedied that clerical error by providing another notice to the relevant mayors and legislative authorities with the corrected information about the filing. The Attorney Examiner found

substantial compliance with the Commission's prior order. The Attorney Examiner made this finding because: (1) no party opposed Duke's motion for a finding of substantial compliance; (2) Duke's non-compliance with the prior order was a "clerical error;" and (3) Duke remedied its error in a timely fashion.[17]

This case is not analogous to DP&L's Motion. DP&L's Motion is opposed. DP&L is not seeking to correct a "clerical error." As discussed in detail below, DP&L has strategically chosen not to comply with the substantive conditions imposed by the Commission related to SSR-E. Finally, in the Duke proceeding Duke corrected the clerical error almost immediately after it was made. To date, DP&L has still not complied with the conditions established by the Commission. As DP&L's Motion meets none of the criteria relied on in this unopposed portion of the Duke Entry, DP&L's reliance on this Entry is misplaced.

The other cases cited by DP&L are similarly flawed, and were seemingly cited solely because they used the words "substantial compliance." DP&L has cited no substantive provisions of those orders which the applicants had not complied with which are in any way similar to the substantive provisions which DP&L has not satisfied. In fact, DP&L has cited nothing in those orders other than the word "substantial" which indicates the applicants had failed to meet some criteria. Accordingly, those cases should not be given any weight by the Commission.

Contrary to DP&L's claim that "substantial compliance" is common, the Commission has often rejected applications which fail to comply with Commission directives. For example, in *In the Matter of the Application of The Ohio Bell Telephone Company dba AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier*

[17] Id., p. 2.

1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Pub. Util. Comm. 07-1312-TP-BLS, 2008 Ohio PUC LEXIS 293 (May 14, 2008 Opinion and Order, pp. 27-28), the Commission rejected a proposal not consistent with prior Commission holdings. Specifically, the Commission found that AT&T's proposal should be rejected because "AT&T should have been aware of its burden of proof in its current proceeding when it decided to rely on the same type of data" as it had in prior cases.[18] In light of that finding, the Commission denied AT&T's application for its failure to meet all the competitive market test criteria set forth in the Opinion and Order.

Similarly, the Commission has often rejected applications for failure to comply with certification standards established by the commission. For example, in *In the Matter of the Application of Telecom Consulting, Inc. for Certification as a Competitive Retail Electric Broker/Aggregator in Ohio*, Pub. Util. Comm. 15-446-EL-AGG, 2015 Ohio PUC LEXIS 524 (June 17, 2015 Opinion and Order, p. 2), the Commission rejected the Telecom Consulting, Inc. application for failure to provide documents required by Commission rules. If the Commission requires compliance from parties who may lack sophistication when first applying to be a CRES provider, then assuredly the Commission should apply those same standards to a large sophisticated utility like DP&L.

Established Commission precedent shows that the Commission applies its rules uniformly. For example, in *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Pub.

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[18] Id., p. 28.

Util. Comm. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 226 (February 23, 2011 Opinion and Order, p. 75), Duke sought approval of a market rate offer ("MRO"). The Commission rejected Duke's proposal, finding that Duke's filing was not an application within the meaning of R.C. § 4928.142 for its failure to comply with substantive standards for MRO's under Ohio law.

As shown through this authority, the relevant test to be applied is simple. If DP&L's application were flawed for clerical reasons, or if DP&L had missed deadlines for only a few days and then corrected its mistake, then DP&L's "substantial compliance" argument may have merit. That is not the case here. DP&L has strategically chosen not to comply with the Commission's criteria for implementing the SSR-E. Therefore, the doctrine of "substantial compliance" does not apply and DP&L's Motion should be rejected.

IV. CONCLUSION

WHEREFORE, the City of Dayton and Honda respectfully request that the Commission deny Dayton's Motion.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF DAYTON AND HONDA

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 29th day of April, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
One of the Attorneys for the City of Dayton and Honda

Summary: Memorandum In Opposition to DP&L Motion To Implement Rider SSR-E electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Honda of America Mfg., Inc. and City of Dayton