

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-396-EL-ATA
Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13)	

**INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS
THE DISTRIBUTION MODERNIZATION RIDER
AND MEMORANDUM IN SUPPORT**

[PUBLIC VERSION]

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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Industrial Energy Users-Ohio (“IEU-Ohio”) moves the Public Utilities Commission of Ohio (“Commission”), pursuant to Rule 4901-1-12, Ohio Administrative Code (“O.A.C.”), to dismiss from The Dayton Power and Light Company’s (“DP&L”) amended application to establish an electric security plan (“ESP”) (“Amended Application”) the Distribution Modernization Rider (“DMR”).

The proposed nonbypassable DMR is designed to have DP&L’s captive utility customers pay down the acquisition premium and associated debt that are a result of The AES Corporation’s (“AES”) highly-leveraged takeover of DPL Inc. in 2011. More specifically, DP&L has indicated that of the \$1.25 billion in debt AES originally pushed down to DPL Inc.’s books as part of its highly-leveraged takeover, approximately \$730 million in acquisition debt remains on DPL Inc.’s books. DP&L witness Jackson indicates

in his prefiled direct testimony that DP&L intends to send [REDACTED] of its requested DMR revenue ([REDACTED]) to DPL Inc. to allow DPL Inc. to pay down debt on DPL Inc.'s books. The remainder of the DMR revenue is designed to pay down a portion of DP&L's total company debt attributable to its generation business but that DP&L otherwise claims cannot be transferred to its affiliate when it divests its generation assets.

Under R.C. Chapter 4928, the Commission is without authority to authorize DP&L to implement a charge designed to pay down the acquisition debt of DPL Inc. Furthermore, in the case of the acquisition premium debt at issue here, the Commission has already held that DP&L is precluded from seeking to have its captive utility customers pay down, directly or indirectly, the acquisition premium and associated debt from AES' highly-leveraged takeover of DPL Inc. in 2011. The Commission also lacks the authority to impose a nonbypassable charge to provide DP&L with additional revenue to pay down the portion of its total company debt attributable to its generation business.

As discussed more fully in the attached Memorandum in Support, the Commission should dismiss the DMR and should direct DP&L to revise and refile its supporting testimony to reflect to the dismissal of the DMR.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Through its Amended Application, DP&L seeks authorization of the DMR. As proposed, the DMR would allow DP&L to collect \$145 million a year on a nonbypassable basis for seven years, or \$1.015 billion over the proposed ESP term. DP&L proposes to use [REDACTED] of the DMR revenue it collects ([REDACTED]) to pay down debt at its parent company, DPL Inc. DP&L proposes to use [REDACTED] of the remaining DMR revenue to pay down its own debt ([REDACTED]).

The majority of the debt at DPL Inc. is associated with debt that AES used to finance its takeover of DPL Inc. in 2011. As of December 31, 2015, DPL Inc. had \$1.25 billion in debt on its books, of which \$730 million (58%) was related to AES' acquisition debt.¹

As to DP&L's debt, as part of the Commission's approval of the AES acquisition in 2011, DP&L committed to maintaining DP&L's capital structure at no less than 50% equity

¹ DP&L Response to IGS INT 2-1 (Attached as Attachment A).

and 50% debt. DP&L has argued that the generation asset divestiture will result in noncompliance with this requirement because DP&L will transfer equity with the assets but no debt.² The Commission has granted a temporary waiver of the 50/50 debt to equity capitalization requirement to allow DP&L to effectuate the generation asset transfer. However, because DP&L will not be transferring the portion of its total company debt attributable to the generation assets as part of the divestiture, DP&L must pay down that debt to return to the 50/50 capitalization requirement.

The Commission, however, lacks jurisdiction to authorize DP&L to impose the nonbypassable DMR to pay down debt at DPL Inc. or to pay down generation-related debt at DP&L. Because the Commission cannot authorize the DMR, IEU-Ohio requests that the Commission grant this Motion to Dismiss and dismiss the DMR from DP&L's Amended Application and direct DP&L to refile its testimony to reflect the dismissal of the DMR.

I. BACKGROUND

The financial issues underpinning DP&L's request for the DMR are being driven in large part by the out-of-balance debt load at DPL Inc. As noted above, DPL Inc. carries a significant debt load as a result of the acquisition debt that AES pushed down to DPL Inc. as part of its highly-leveraged takeover of DPL Inc. in 2011. DP&L is essentially DPL Inc.'s sole source of income and therefore the only way for DPL Inc. to satisfy the repayment obligation for the AES acquisition debt is to turn to AES for repayment or look

² *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC, Finding and Order at 17-19 (Sep. 17, 2014) ("Asset Divestiture Case").

to DP&L for dividends.³ In the last ESP case, DP&L proposed the Service Stability Rider (“SSR”), turning to customers to prop up DP&L’s total company revenue so that it could continue issuing dividends to DPL Inc.⁴ Similarly in this case, DP&L, DPL Inc. and AES have asked the Commission to allow it to pay off the acquisition debt with nonbypassable customer charges.

This request is no surprise. Because the AES takeover of DPL Inc. was highly leveraged, the Commission Staff warned the Commission about the possibility of merger-related costs and other negative effects of the merger materializing at DP&L and therefore proposed ring-fencing conditions to help prevent the negative aspects of the transaction from materializing financially at DP&L.⁵

Likewise, IEU-Ohio warned the Commission that “[t]he highly-leveraged transaction will potentially pressure AES to use its control over DPL to assure that DP&L and other DPL subsidiaries generate adequate cash flow to service the newly issued debt and that debt service can be expected to be drawn from the customers of DP&L.”⁶ IEU-

³ See Direct Testimony of R. Jeffrey Malinak at 25 (Oct. 31, 2016) (“the ability of DPL to service its debt and remain a viable firm in the medium to long term will directly depend on the cash flows from DP&L”); *id.* at 26 (revenue from DP&L comprises approximately 96% of DPL Inc.’s total revenue).

⁴ DP&L collected approximately \$293 million through the SSR between January 1, 2014 and August 31, 2016 (\$110 million/year for 32 months). Over the same timeframe, DP&L paid dividends to DPL Inc. totaling approximately \$212 million. DPL Inc./DP&L SEC 10-K/A at 75 (Mar. 16, 2016), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725016000042/dpl10k12312015q410-ka.htm> (DP&L paid dividends of \$50.9 million in 2015 and \$160.8 million in 2014).

⁵ *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, Staff Comments at 4 (July 18, 2011) (“*Merger Case*”). Specifically, Staff recommended that “no merger related costs (long or short term) should be recovered through regulated rates and recommends the Commission include this requirement in any approval of the merger.” *Id.* Staff further recommended that the Commission “incorporate additional ring-fencing provisions. First, Staff recommends that the Commission include a requirement that DP&L maintain a capital structure of at least 45 percent equity. In addition, Staff recommends that DP&L should maintain a retained earnings to total utility plant ratio of at least ten percent. Staff believes these additional measures should allow DP&L to remain viable even if its affiliated companies become financially unstable.” *Id.* at 6.

⁶ *Merger Case*, IEU-Ohio Initial Comments at 7 (July 18, 2011).

Ohio noted that DPL Inc.'s disclosures to the Securities and Exchange Commission ("SEC") as part of the proposed merger included an assumption that its nonbypassable provider of last resort ("POLR") charge (the Rate Stabilization Charge or "RSC," collecting \$76 million/year) would continue after its ESP expired in 2012.⁷ Accordingly, IEU-Ohio urged the Commission to:

impose conditions on the proposed change in control so as to, among other things, ensure that the consumers have full and unencumbered access to CRES suppliers and that the debt service obligations associated with the proposed highly-leveraged transaction are not funded through non-bypassable charges, unduly prejudicial capacity charges that apply to shopping customers or their CRES suppliers or other restrictions on shopping.⁸

The responses in the *Merger Case* made by DP&L, DPL Inc. and AES not only dismissed the concerns expressed by Staff and IEU-Ohio as nothing more than the conjecture of a soothsayer, but they expressly argued to the Commission that the Commission had very limited authority to consider or address either DP&L's or DPL Inc.'s finances.⁹ With short memory, DP&L has now sought two charges (the reversed SSR and the DMR) explicitly designed to address the finances that DP&L previously asserted were beyond the Commission's jurisdiction.

DP&L has also backtracked from additional commitments and statements it made in the *Merger Case* to secure a finding from the Commission that the proposed merger was in the public interest. For example, in the *Merger Case*, AES, DPL Inc. and DP&L committed to maintaining DP&L's credit rating at investment grade.¹⁰ In this case, DP&L

⁷ *Id.* at 6 (July 18, 2011) (*citing* Preliminary Proxy Statement Relating to a Merger, Acquisition or Disposition at 33 ("PREM14 A"). The PREM14 A was filed with the SEC on June 11, 2011 and is available at: <https://www.sec.gov/Archives/edgar/data/787250/000144757211000059/111429.htm>).

⁸ *Merger Case*, IEU-Ohio Initial Comments at 11 (July 18, 2011) (emphasis added).

⁹ *Merger Case*, Applicants' Reply Comments at 6-7 (Aug. 18, 2011).

¹⁰ *Id.* at 6.

asserts that its credit rating may suffer and be downgraded below investment grade if the Commission does not authorize the DMR.¹¹ Instead of living up to their commitment, they are turning to customers to eliminate the negative financial hangover of the AES takeover that DP&L claims could potentially result in a downgrade of its credit rating below investment grade. Furthermore, DP&L's testimony highlights the unfortunate and unique circumstances that the AES acquisition debt is having on DP&L. Of 45 integrated utilities, DP&L is one of only three companies with the lowest investment grade rating.¹²

In the *Merger Case*, DP&L, DPL Inc. and AES asserted that the "grade" assigned by the rating agencies directly reflects those agencies' evaluation of DP&L within the holding company structure."¹³ In this case and despite DP&L's [REDACTED] associated with the electric distribution utility ("EDUA") (a net income of [REDACTED] over the next seven years, and an average return on equity ("ROE") of [REDACTED]), DP&L asserts that the negative financial condition at DPL Inc. could result in DP&L's downgrade below investment grade.¹⁴ In direct contradiction to its prior statement, DP&L also now claims that DP&L's credit rating is not independent from DPL Inc.'s credit rating and that credit rating agencies view DP&L in the context of its corporate family.¹⁵

In the *Merger Case*, AES, DPL Inc. and DP&L committed to maintaining positive retained earnings at DP&L.¹⁶ This condition was imposed upon DP&L in the *Merger Case*

¹¹ Direct Testimony of R. Jeffrey Malinak at 3-4, 24 (Oct. 31, 2016).

¹² Direct Testimony of R. Jeffrey Malinak at 17 (Oct. 31, 2016). DPL Inc. is also only one of three utility holding companies out of 36 below investment grade and is the lowest-rated company. *Id.*

¹³ *Merger Case*, Applicants' Reply Comments at 6 (Aug. 18, 2011).

¹⁴ Direct Testimony of Craig L. Jackson at Ex. CLJ-4 (Oct. 11, 2016); Direct Testimony of R. Jeffrey Malinak at 24 (Oct. 31, 2016) ("... if DPL experiences financial stress, it would have a negative effect on DP&L including, but not limited to, unfavorable changes in DP&L's credit ratings.")

¹⁵ Direct Testimony of R. Jeffrey Malinak at 3-4 (Oct. 31, 2016).

¹⁶ *Merger Case*, Finding and Order at 9 (Nov. 22, 2011).

and reaffirmed by the Commission in the *Asset Divestiture Case*. Between 2012 and 2015, DP&L had a net income of \$393.5 million¹⁷ and paid out dividends totaling \$548.4 million to DPL Inc.¹⁸ All of DP&L's dividends since 2012 have been used exclusively by DPL Inc. to meet interest obligations and pay down its debt.¹⁹ In the second quarter of 2016, DP&L undertook an impairment analysis of its generation assets and determined that projected future market revenue was insufficient to cover the carrying cost of the plants on DP&L's books. Accordingly, DP&L recognized an \$857.1 million impairment expense, and the effect of that impairment was to reduce DP&L's retained earnings balance.²⁰ As of June 30, 2016, DP&L had a negative retained earnings balance of \$61 million.²¹ DP&L neither sought nor obtained a waiver of the requirement to maintain a positive retained earnings balance. Had DP&L paid out less dividends to DPL Inc., its retained earnings balance would have been greater and it could have avoided violating its commitment and the Commission's orders to maintain a positive retained earnings balance.

Without the DMR, DP&L further claims that it may not be in a position to pay normal operating expenses, tax payments, make pension contributions, or make capital

¹⁷ 2015 DPL Inc./DP&L SEC 10-K/A at 72 (Mar. 16, 2016) (DP&L reported net incomes of \$105.5 million in 2015, \$114.1 million in 2014, and \$82.7 million in 2013), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725016000042/dpl10k12312015q410-ka.htm>; 2014 DPL Inc./DP&L SEC 10-K at 158 (Mar. 4, 2014) (DP&L reported a net income of \$91.2 million in 2012), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725014000011/c250-20131231x10k.htm>.

¹⁸ 2015 DPL Inc./DP&L SEC 10-K/A at 75 (Mar. 16, 2016) (DP&L paid dividends of \$50.9 million in 2015, \$160.8 million in 2014, and \$190.8 million in 2013); 2014 DPL Inc./DP&L SEC 10-K at 164 (DP&L paid out dividends of \$145.9 million in 2012).

¹⁹ Direct Testimony of Craig L. Jackson at 11 (Oct. 11, 2016).

²⁰ Q2 2016 DPL Inc./DP&L SEC 10-Q at 39 (Aug. 4, 2016), available at: <https://www.sec.gov/Archives/edgar/data/27430/000078725016000053/dpl10q20160630q2.htm>.

²¹ *Id.* at 41.

investments in its transmission and distributions systems.²² The doom and gloom that percolates throughout DP&L's Amended Application and supporting testimony, however, is contradicted by DP&L's own financial projections. DP&L projects that without the DMR it will achieve a [REDACTED], that its net income will total [REDACTED] over the proposed ESP term,²³ that its lowest ROE in any year of the ESP will be [REDACTED],²⁴ and that the average ROE over the ESP term is [REDACTED].²⁵

Moreover, to the extent that a financial issue did exist at DP&L, it would be the result of its generation business or the drag down from its parent company's financial situation because its distribution and transmission businesses are regulated and have rates in place that provide DP&L with the opportunity to recover its expenses and earn a return for those investments.

Finally, customers have already paid \$1.3 billion in nonbypassable revenue support since restructuring began in Ohio. This nonbypassable revenue collection began with DP&L's receipt of transition revenue authorized as part of Amended Substitute Senate Bill 3 ("SB 3"). DP&L's claim for transition revenue under its electric transition plan ("ETP") was resolved by way of a settlement approved by the Commission.²⁶ Under

²² Direct Testimony of Craig L. Jackson at 17 (Oct. 11, 2016).

²³ Direct Testimony of Craig L. Jackson at Ex. CLJ-4 (Oct. 11, 2016) (sum of line 41).

²⁴ *Id.* The annual ROE was calculated as net income excluding the DMR divided by the projected equity balance but without adding back into equity the asset impairment charge write-down, or Line 41/(Line 46 minus Line 45).

²⁵ *Id.* Mr. Jackson's Ex. CLJ-4 adds \$584 million of equity back into its current and projected equity balance to reverse the effects of its generation asset impairments which has the effect of reducing the ROEs he presents in his testimony. Mr. Malinak also offers a calculation of DP&L's ROE during the ESP term without the DMR and without adding back the equity impairment, calculating that DP&L's ROE would average [REDACTED] during the ESP term. Direct Testimony of R. Jeffrey Malinak at 8 (Oct. 31, 2016).

²⁶ *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under Sections 4928.31 to 4928.40, Revised Code*, Case Nos. 99-1687-EL-ETP, *et al.*, Opinion and Order (Sep. 25, 2000) ("ETP Case").

the Commission-approved settlement, DP&L was authorized to collect approximately \$441 million of transition revenue.²⁷

In 2005, DP&L entered into a settlement that was ultimately approved by the Commission under which DP&L was able to implement the nonbypassable RSC. The RSC allowed DP&L to collect approximately \$76 million per year in nonbypassable revenue support.²⁸ The RSC was extended as part of a Commission-approved settlement in DP&L's first ESP case.²⁹ From 2006 through 2012, DP&L collected \$520 million from customers through the RSC.³⁰ Thus, under the *ETP Case Stipulation*, *RSC Case Stipulation*, and *ESP I Case Stipulation*, DP&L was able to enter into settlements supported by some customer representative parties that allowed DP&L to collect \$991 million in nonbypassable revenue support.

At some point, however, the nonbypassable revenue support must cease. To this end, IEU-Ohio and others filed a motion in 2012 seeking an order terminating the RSC effective December 31, 2012, the last day of DP&L's stipulated ESP I.³¹ DP&L opposed that motion, and the Commission ultimately extended the RSC for all of 2013, providing

²⁷ *Id.*; *ETP Case*, Application Part 4, Testimony of Ralph L. Luciani at 4, Exhibit RLL-6 (Dec. 20, 1999) (estimating stranded cost of \$231 and regulatory asset recovery of \$210 million, for total transition costs of \$441 million).

²⁸ *In the Matter of the Application of the Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (Dec. 28, 2005) ("*RSC Case*"). The RSC was explicitly authorized to provide additional revenue for DP&L's generation business. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 17-26 (RSC was a generation charge); *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, *et al.*, Opinion and Order at 3-5 (June 24, 2009) ("*ESP I Case*").

²⁹ *ESP I Case*, Opinion and Order at 5 (June 24, 2009) ("*ESP I Case*").

³⁰ See Attachment B (DP&L Supplemental Responses to OCC Set 23 INT 402 in Case Nos. 12-426-EL-SSO, *et al.*).

³¹ *ESP I Case*, Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public Utilities Commission of Ohio (Sep. 26, 2012).

another \$76 million in nonbypassable revenue support, while DP&L's second ESP application was litigated and decided.³²

In the *ESP II Case*, DP&L then sought to replace the \$76 million/year RSC nonbypassable revenue support with increased and extended support, requesting \$135 million/year through the SSR. The Commission ultimately authorized DP&L to collect an additional \$330 million of nonbypassable revenue support under the SSR beginning January 1, 2014, and authorized DP&L to collect up to an additional \$45.8 million through the Service Stability Rider-Extension ("SSR-E"). DP&L collected approximately \$293 million under the SSR before the authorization of the charge was struck down by the Court and DP&L ceased collecting the charge. However, with the unlawful SSR eliminated, the Commission unlawfully authorized DP&L to again implement the RSC.³³ Under the reimplementing of the RSC, DP&L is collecting over \$6 million per month.

Through this Motion to Dismiss IEU-Ohio seeks to end the unlawful and unreasonable extension of nonbypassable revenue support DP&L seeks through the DMR. DP&L's nonbypassable riders have already generated approximately \$1.3 billion for DP&L's benefit since Ohio enacted SB 3. All of this money has been funded by DP&L's captive customers, which includes "industrial and commercial customers, who tend to be relatively price sensitive."³⁴ The imposition of another \$1 billion in nonbypassable charges through the DMR on price sensitive businesses is not lawful or reasonable for a variety of reasons. If the Commission holds DP&L, DPL Inc. and AES

³² *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.*, Entry at 4 (Dec. 19, 2012) (hereinafter "*ESP II Case*").

³³ *ESP II Case*, Finding and Order (Aug. 26, 2016); *ESP I Case*, Finding and Order (Aug. 26, 2016); see also *ESP II Case*, Application for Rehearing of IEU-Ohio (Sep. 26, 2016); *ESP I Case*, Application for Rehearing of IEU-Ohio (Sep. 26, 2016).

³⁴ Direct Testimony of R. Jeffrey Malinak at 32 (Oct. 31, 2016).

to their commitments and assertions that they made to secure approval of the AES takeover of DPL Inc., the Commission must dismiss the DMR. If the Commission balances the reasonableness of requiring DP&L's customers to fund \$1.015 billion in additional nonbypassable revenue support against the \$1.3 billion in nonbypassable revenue support already paid by DP&L's customers, the Commission must dismiss the DMR. If the Commission seeks to encourage the retention and expansion of businesses in DP&L's service territory, it must dismiss the DMR. And as discussed below, if the Commission looks at the lawfulness of authorizing the DMR, the Commission must dismiss the DMR.

II. STANDARD OF REVIEW

Although not strictly bound by the Rules of Civil Procedure, R.C. 4903.082 directs the Commission to rely on those rules "wherever practicable." Under the Rules of Civil Procedure, a party may file a motion to dismiss for "failure to state a claim upon which relief can be granted." Civ.R. 12(B)(6).

"The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward." *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5. "In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Id.* (citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, syllabus (1975)). "Furthermore, '[i]n construing a complaint upon a motion to dismiss for failure to state a claim, [the court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.'" *Id.* (quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d

190, 192 (1988)). The Commission has confirmed that motions to dismiss may be filed in Commission proceedings.³⁵

III. **ARGUMENT**

- A. The DMR violates Ohio’s corporate separation requirements because it would provide an undue preference or advantage to its affiliates, is designed to maintain the financial viability of an affiliate, and generally conflicts with the limitations on financial arrangements between affiliates. R.C. 4928.17; Rule 4901:1-37-04(C), O.A.C.**

As part of SB 3, the General Assembly enacted R.C. 4928.17, which prohibits an EDU from providing a noncompetitive retail electric service if either an internal division of the EDU or a fully separated affiliate provides a competitive retail electric service or a nonelectric product or service unless the EDU operates under a corporate separation plan.³⁶ R.C. 4928.17(A)(3) further mandates that any corporate separation plan must “ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service.” Rule 4901:1-37-04, O.A.C., expands on the prohibited actions under the corporate separation requirements and division (C) of the rule specifies the financial arrangements that are explicitly prohibited. The requirements of R.C. 4928.17 and the Commission’s corporate separation rules on financial arrangements are also explicitly incorporated into DP&L’s corporate separation

³⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Opinion and Order, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014).

³⁶ Pursuant to Rule 4901:1-37-01(A), O.A.C.

plan.³⁷ The DMR violates the corporate separation requirements contained in R.C. 4928.17, Rule 4901:1-37-04(C), O.A.C., and in DP&L's corporate separation plan.

The corporate separation rules apply to EDUs and their affiliates. The Commission defines affiliates, for purposes of the corporate separation requirements, as "companies that are related to each other due to common ownership or control."³⁸ The Commission also defines affiliate to include any "internal merchant function of the electric utility whereby the electric utility provides a competitive service."³⁹ Thus, DPL Inc., as an entity that controls DP&L, and DP&L's internal generation business are both treated as affiliates of the EDU for purposes of the corporate separation requirements.⁴⁰

As noted above, R.C. 4928.17 prohibits DP&L from providing an undue advantage or preference to an affiliate, but the DMR is designed to do just that. If approved, the DMR will subsidize DPL Inc. and allow DPL Inc. to pay down the AES acquisition debt related to AES' highly-leveraged takeover of DPL Inc. in 2011. The DMR is uniquely available to support DP&L's affiliate's debt issue and therefore the DMR results in an undue advantage and preference to DPL Inc.

The DMR also explicitly violates division (2) of Rule 4901:1-37-04(C), O.A.C., and at a minimum violates the intent behind divisions (1), (3), (4), and (5) of that Rule. Rule 4901:1-37-04(C), O.A.C., provides:

³⁷ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Amend Its Corporate Separation Plan*, Case No. 13-2442-EL-UNC, Application of DP&L to Amend its Corporate Separation Plan, Exhibit A at 7 (Dec. 30, 2013) ("*Corporate Separation Case*").

³⁸ Rule 4901:1-37-01(A), O.A.C.

³⁹ *Id.*

⁴⁰ In its corporate separation plan, DP&L also identifies DPL Inc. as an affiliate. *Corporate Separation Case*, Application to Amend its Corporate Separation Plan, Exhibit A at 15. ("Organization charts showing how DPL Inc. and its affiliates are organized are attached as Exhibit 1."); *id.* at Exhibit 1.

(C) Financial arrangements.

Unless otherwise approved by the commission, the financial arrangements of an electric utility are subject to the following restrictions:

- (1) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.
- (2) An electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.
- (3) An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.
- (4) An electric utility shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.
- (5) An electric utility shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise with respect to any security of an affiliate.
- (6) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

Throughout the testimony of DP&L witnesses Jackson and Malinak, DP&L describes the purpose of the DMR as primarily designed to maintain DPL Inc. at investment grade.

Mr. Malinak indicates that if DPL Inc. drops below investment grade, [REDACTED], then DPL Inc.'s chance of default increases from [REDACTED].⁴¹

Accordingly, DP&L's pleadings demonstrate that the DMR is designed to maintain the financial viability of DPL Inc., an affiliate of DP&L, in contravention of division (C)(2) of the Rule.

⁴¹ Direct Testimony of R. Jeffrey Malinak at 6 (Oct. 31, 2016).

Division (C)(1) requires DPL Inc.'s debt to be without recourse to DP&L. Without recourse to DP&L means that DP&L cannot be held liable for the debt of DPL Inc.⁴² DP&L's financial analysis is premised, however, on DP&L funding the repayment of its affiliate's debt so that negative financial impacts at DPL Inc. do not trickle down to DP&L. The DMR would effectively make DPL Inc.'s debt with recourse to DP&L.

Division (C)(4) of the Rule prohibits an electric utility from issuing any security to finance the acquisition or ownership of an affiliate. Although the DMR would not require DP&L to issue "security," it would have DP&L fund the acquisition and ownership of DPL Inc. by paying down the acquisition debt at DPL Inc. that AES pushed down to DPL Inc. as part of the 2011 takeover of DPL Inc. by AES—the very purpose prohibited by this division.

The intent behind divisions (C)(3), (5), and (6) of the Rule further confirms that electric utilities may not engage in any type of financial arrangement designed to make the utility directly responsible for the debt of an affiliate. These divisions prohibit an electric utility from making investments in affiliates which would cause the utility to be liable for affiliate debt; prohibit electric utilities from serving as a guarantor, endorser, or surety, or in any other way assuming an obligation or liability of an affiliate; and prohibit electric utilities from pledging its assets for the benefit of an affiliate. These prohibitions clearly delineate the Commission's intent to segregate the debt and repayment obligations of an affiliate from impacting the operations of an electric utility. Despite these regulatory restrictions, DP&L seeks to extract additional retail revenues through the

⁴² See *generally* R.C. 1303.54(E) (explaining effect of "without recourse" language in commercial paper under Ohio's Uniform Commercial Code).

nonbypassable DMR to fund the debt obligations at DPL Inc. The DMR thus conflicts with the intent of these provisions.

In sum, the DMR would extend an unlawful undue preference or advantage to its affiliate and would result in an unlawful financial arrangement that requires DP&L to commit to maintain the financial viability of its affiliate for the prohibited purpose of paying down the debt of an affiliate associated with its acquisition. Accordingly, the DMR violates the corporate separation requirements.

B. The Commission should dismiss the DMR because it does not satisfy any of the provisions of R.C. 4928.143(B)(2) that would permit the charge to be included in an ESP. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788.

An EDU is required to offer a standard service offer (“SSO”) to nonshopping customers that takes the form of a market rate offer (“MRO”) or an ESP.⁴³ As part of an ESP, the Commission may authorize provisions relating to the supply and pricing of electric generation service for nonshopping customers as well as other terms and conditions that fit within one of the nine enumerated provisions of R.C. 4928.143(B)(2). “If a given provision does not fit within one of the categories listed ‘following’ (B)(2),” however, “it is not authorized by statute.”⁴⁴ The DMR is not a provision relating to the supply and pricing of electric service for nonshopping customers and does not fit within any of the provisions under R.C. 4928.143(B)(2). Accordingly, the DMR may not be authorized.

⁴³ R.C. 4928.141.

⁴⁴ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 32.

1. The DMR does not meet the requirements of R.C. 4928.143(B)(2)(d).

To be authorized under R.C. 4928.143(B)(2)(d), the DMR needs to satisfy three requirements. First, it must be a “term[], condition[], or charge[].” Second, it must be related to one of the following: “limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals.” And third, it must “have the effect of stabilizing or providing certainty regarding retail electric service.” The DMR does not satisfy the second or third requirements.

As to the second requirement, the Commission has held that the fact that a charge is nonbypassable does not satisfy the second requirement as all charges are either bypassable or nonbypassable.⁴⁵ The DMR does not satisfy any of the remaining requirements. Other than applying to all customers as a nonbypassable charge, the DMR will not limit or encourage any customer to shop or not shop. The DMR is not related to standby, back-up or supplemental power. The DMR is not related to any aspect of default service. The DMR is not related to any carrying charges, amortization periods, or accounting or deferrals. Accordingly, the DMR does not satisfy the second requirement for a charge to be authorized under R.C. 4928.143(B)(2)(d).

As to the third requirement, the DMR will not have the effect of stabilizing or providing certainty regarding retail electric service, in either a physical or financial sense. Physically, DP&L has filed testimony demonstrating that its distribution reliability meets

⁴⁵ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 44-45 (Oct. 12, 2016).

all of the applicable reliability requirements.⁴⁶ DP&L has not offered any testimony indicating that the physical supply of electricity will be more certain or more stable with the DMR. DP&L also projects that it will have a [REDACTED] net income each year of the proposed ESP, and a net income of [REDACTED] over the term of the ESP after making the necessary ongoing capital and operations and maintenance (“O&M”) investments in its distribution system. DP&L has also proposed a Distribution Investment Rider (“DIR”) that, if approved, would allow DP&L to recoup, on an expedited basis, investments in its distribution system and thus maintain the reliability of the distribution system.⁴⁷ Thus, DP&L’s pleadings cannot support a finding that the DMR will result in a more stable or certain physical delivery of electricity.

DP&L’s Amended Application and prefiled testimony also fails to set forth facts that would support a finding that customers’ bills would be more stable or certain. DP&L has proposed a number of placeholder riders with unknown costs and unknown rates that will vary with true-ups over the term of the proposed ESP [the Regulatory Compliance Rider (“RCR”), Uncollectible Rider (“UEX”), Storm Cost Recovery Rider (“Storm Rider”), and the Clean Energy Rider (“CER”)],⁴⁸ has proposed additional riders that provide for ongoing true-ups and adjustments (*i.e.* Reconciliation Rider or “RR”),⁴⁹ and has requested blanket authorization in the Amended Application for authority to propose any additional charges to address any change in law, rule, or regulatory ruling without the need to file a

⁴⁶ Direct Testimony of Kevin L. Hall at 4 (Oct. 11, 2016).

⁴⁷ DP&L also has a pending distribution rate case in which the Commission will review and address issues related to distribution reliability.

⁴⁸ Amended Application at 6-7 (Oct. 11, 2016).

⁴⁹ *Id.* at 5.

new ESP application.⁵⁰ All of these charges will inject uncertainty and instability in customers' bills. The DMR, as proposed, will be a fixed rate for seven years designed to produce \$145 million annually, or \$1.015 billion over the term of the ESP.⁵¹ The DMR will do nothing to reduce the instability and uncertainty that DP&L's Amended Application intends to force upon customers through a variety of charges with rates that will vary throughout the term of the ESP. The DMR will simply increase customers' bills.

Accordingly, the DMR does not satisfy the requirements of R.C. 4928.143(B)(2)(d).

2. The DMR does not meet the requirements of R.C. 4928.143(B)(2)(h).

R.C. 4928.143(B)(2)(h) authorizes the Commission to include provisions regarding an EDU's distribution service. The provisions must relate to "single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking," or to "distribution infrastructure and modernization incentives for the electric distribution utility." Before a charge under this provision may be authorized, the Commission "shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system." The DMR does not meet these requirements.

As noted above, DP&L proposes to use over █████ of the DMR revenue to pay down acquisition debt on DPL Inc.'s books and to pay down DP&L's generation-related debt. Paying down debt is not among the enumerated items permissible under (B)(2)(h) and is entirely unrelated to distribution service.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 1.

Although DP&L acknowledges that it may use a small portion of the DMR revenue for distribution modernization initiatives, the proposed structure of the DMR is inconsistent with the Commission's requirements for a distribution charge.⁵² As the Commission held in *AEP's ESP I Case*, that distribution charges authorized under R.C. 4928.143(B)(2)(h) must "be based upon the electric utility's prudently incurred costs."⁵³ To do otherwise, the Commission held, would simply provide the EDU with a "blank check," an outcome the Commission concluded was inconsistent with SB 221.⁵⁴ Similarly, in *FirstEnergy's ESP I Case*, the Commission held that a distribution charge under (B)(2)(h) should not be approved "unless it is based on a reasonable, forward-looking modernization program and prudently incurred costs."⁵⁵

DP&L has not filed a forward-looking modernization plan as part of this ESP, or in any other docket. As part of its last ESP decision, the Commission conditioned the extension of the SSR-E on DP&L filing a grid modernization program by July 1, 2014. DP&L did not file a grid modernization plan by July 1, 2014, and has not since filed any such plan.

⁵² *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al*, Opinion and Order at 34-36 (Mar. 18, 2009) ("*AEP ESP I Case*"); *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 Nos. 08-935-EL-SSO, *et al.*, Opinion and Order (Dec. 19, 2008) ("*FE ESP I Case*"); see also *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 37-38, *reconsideration denied*, 139 Ohio St.3d 1408, 2014-Ohio-2245, ¶¶ 37-38 (noting with respect to AEP's ESP 1 Order that "The commission found, consistent with its prior decisions, that a distribution rider established pursuant to R.C. 4928.143(B)(2)(h) should be based on the electric utility's prudently incurred costs.").

⁵³ *AEP ESP I Case*, Opinion and Order at 34 (Mar. 18, 2009).

⁵⁴ *Id.*

⁵⁵ *FE ESP I Case*, Opinion and Order at 41 (Dec. 19, 2008).

Moreover, the DMR is not based on any prudently incurred costs of DP&L. Based on Commission precedent, therefore, there is no authority to authorize the DMR under R.C. 4928.143(B)(2)(h).

3. The DMR does not meet the requirements of the remaining provisions of R.C. 4928.143(B)(2).

The DMR does not satisfy any of the remaining provisions of R.C. 4928.143(B)(2).

Division (a) of R.C. 4928.143(B)(2) authorizes a provision of an ESP for “[a]utomatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.” The DMR is not related to the recovery of any power-related costs of DP&L.

Divisions (b) and (c) of R.C. 4928.143(B)(2) authorize the recovery of costs associated with the construction of an electric generating facility upon a finding that the facility is needed and was sourced through a competitive bidding process among other requirements. The DMR is a non-cost-based revenue supplement unrelated to the construction of any generation facility that would qualify for recovery under these provisions.

Division (e) of R.C. 4928.143(B)(2) authorizes automatic increases or decreases in any component of the SSO price. However, the underlying component of the ESP would have to be independently authorized by the remaining provisions of R.C. 4928.143(B)(2). The DMR is not a current component of the ESP and is not authorized by another other provision.

Division (f) of R.C. 4928.143(B)(2) authorizes an ESP to include provisions related to the securitization of phase-in costs under R.C. 4928.23 to 4928.2318. The DMR is not related to the securitization of any phase-in costs.

Division (g) of R.C. 4928.143(B)(2) authorizes an ESP to include provisions relating to transmission, ancillary, congestion, or any related service required for the SSO. The DMR is not related to any retail electric service or cost, let alone the services identified in this provision.

Division (i) of R.C. 4928.143(B)(2) authorizes an ESP to include provisions related to “economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.” The DMR is related to paying down debt. DP&L has not set forth any claims in its Amended Application or prefiled testimony that the DMR will result in economic development, job retention, or is related to energy efficiency programs. The DMR would actually be counter to economic development and job retention because its load includes price sensitive commercial and industrial customers.⁵⁶ Imposing another \$1 billion plus in nonbypassable revenue support may very well lead to these price sensitive customers limiting their electric usage, hardly an economic development or job retention initiative. Further, DP&L offers nothing to suggest that the DMR is related in any way to energy efficiency programs, and has a separate pending application to implement an energy efficiency and peak demand reduction (“EE/PDR”) plan for 2017-2019.

Accordingly, the DMR is not a provision that may be authorized in an ESP.

⁵⁶ Direct Testimony of R. Jeffrey Malinak at 32 (Oct. 31, 2016).

C. The Commission should dismiss the DMR as it would provide DP&L with an anticompetitive subsidy. R.C. 4928.02(H).

R.C. 4928.02(H) provides that it is the policy of the State to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or a product or service other than retail electric service or vice versa. The DMR would violate this prohibition if authorized.

The DMR is proposed as a nonbypassable rider and therefore would operate as a distribution rider, *i.e.* it would be collected from all customers just as distribution services are. Revenues would then be applied to pay down DPL Inc. debt and DP&L's generation-related debt. Debt repayment is not directly tied to any electric service and thus would be a product or service other than retail electric service. As such, the State policy explicitly prohibits the Commission from authorizing the DMR.

D. The Commission should dismiss the DMR because it would provide DP&L with transition revenue or its equivalent. R.C. 4928.141; R.C. 4928.38.

The DMR will allow DP&L to collect transition revenue or its equivalent. However, Ohio law, as confirmed by two recent Ohio Supreme Court cases, prohibits such an outcome.⁵⁷

As the Court explained in *Columbus Southern*, “[u]tilities had until December 31, 2005 ... to receive generation transition revenue ... [and] were also permitted to receive transition revenue associated with regulatory assets ... until December 31, 2010.”⁵⁸ “After that date, R.C. 4928.38 prohibits the commission from ‘authoriz[ing] the receipt of

⁵⁷ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608; *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490.

⁵⁸ *Columbus Southern*, at ¶ 16.

transition revenues or any equivalent revenues by an electric utility.”⁵⁹ The Court also noted that subsequent legislation enacted in 2008 further “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.”⁶⁰

Turning to the record in the *Columbus Southern* case, the Court looked at the true nature of the challenged Retail Stability Rider (“RSR”) charge to determine if it allowed the collection of transition revenue or its equivalent. The Court found that AEP-Ohio “proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.”⁶¹ To achieve this result, AEP-Ohio requested that the Commission “guarantee recovery of lost revenue” through the RSR charge related to three sources of generation revenue: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching.⁶² “According to [AEP-Ohio’s] witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015.”⁶³

Based on the nature of AEP-Ohio’s RSR, the Court held that the record supported a finding that the Commission unlawfully authorized AEP-Ohio to collect transition revenue or its equivalent.⁶⁴ The Court found that the nature of the RSR served the same purpose as transition revenue: both were designed to aid in transitioning to a competitive

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 17.

⁶¹ *Id.* at ¶ 23.

⁶² *Id.* at ¶ 23-24.

⁶³ *Id.* at ¶ 23.

⁶⁴ *Id.* at ¶ 22.

market.⁶⁵ The Court also noted that transition revenue represented costs that would not be recovered in a competitive market and the RSR provided AEP-Ohio with revenue lost in the competitive market.⁶⁶ “Based on [this] record,” the Court concluded that AEP-Ohio’s RSR “recovers the equivalent of transition revenue”⁶⁷

Like AEP-Ohio’s RSR, DP&L’s SSR permitted DP&L to collect transition revenue or its equivalent. DP&L proposed the SSR for similar reasons as AEP-Ohio: to make up for revenue DP&L was not receiving in the competitive generation market primarily related to “increased [customer] switching, declining wholesale prices, and declining capacity prices.”⁶⁸ The Court reached the same conclusion on DP&L’s SSR as it did with respect to AEP-Ohio’s RSR, holding that “[t]he decision of the Public Utilities Commission [authorizing DP&L’s SSR] is reversed on the authority of [*Columbus Southern*].”⁶⁹

The true nature of the proposed DMR is no different than the RSR and SSR. The DMR is designed to provide above-market revenue to the utility because it cannot otherwise secure sufficient revenue in the competitive generation market to address its financial ambitions.

⁶⁵ *Id.* at ¶ 22-23.

⁶⁶ *Id.* at ¶ 22-23.

⁶⁷ *Id.* at ¶ 25.

⁶⁸ Compare *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 17 (Sept. 4, 2013) (“DP&L ESP II Order”) with *Columbus Southern*, at ¶ 24 (in calculating a revenue requirement for AEP-Ohio’s charge, the Commission focused on three generation-related factors: nonfuel generation revenue, capacity revenues, and customer switching). DP&L also confirmed during the hearing that the SSR charge was driven solely by its generation business as it admitted that its revenue from its other two utility lines of business, transmission and distribution, were adequate and would remain so. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Supreme Court Case No. 2014-1505, First Merit Brief of Appellant Industrial Energy Users-Ohio at 17-18 (*citing* DP&L Ex. 1 at 13 (Supp. at 2); Tr. Vol. I at 118 (Supp. at 73); Tr. Vol. I at 150 (Supp. at 81)).

⁶⁹ *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, ¶ 1.

Furthermore, DP&L claims that it intends to use the non-cost-based DMR revenue to right a situation caused by its generation business.⁷⁰ DP&L's DMR is designed, in part, to provide DP&L a nonbypassable revenue stream, not tied to any cost, to pay down generation-related debt as DP&L transitions to a fully separated utility. Specifically, DP&L proposes to transfer its generation assets to its affiliate, but claims that its affiliate will initially have little to no debt carrying capacity. Accordingly, DP&L claims that it cannot transfer the portion of its total company debt attributable to its generation assets to its affiliate as part of that asset transfer. Because generation-related debt will remain on DP&L's books, but equity will be transfer with the assets, it will not remain in compliance with the 50/50 debt to equity capitalization requirement. To bring itself back into compliance with that requirement, DP&L proposes to use a portion of the DMR revenue to pay down the generation-related debt that will not be transferred with the generation assets.⁷¹

As DP&L's pleadings demonstrate, the true nature of the DMR is no different than the SSR and RSR, which were found to be unlawful transition charges. Because R.C. 4928.38 prohibits the Commission from authorizing DP&L to collect transition revenue or its equivalent, authorization of the DMR is unlawful.

⁷⁰ DP&L also claims that the DMR is driven in part by low wholesale market prices, a claim also relied upon for the SSR, and that its financial integrity analysis supporting the DMR is the same analysis it relied upon to support the SSR. Direct Testimony of Craig L. Jackson at 8 (Oct. 11, 2016); Direct Testimony of R. Jeffrey Malinak at 29-30 (Oct. 31, 2016). The Court determined that the SSR, supported with these claims and analysis, was unlawful because the SSR was a transition charge.

⁷¹ Mr. Jackson indicates that DP&L intends to rely on the nonbypassable revenue stream its customers provide through the proposed DMR, using a portion of that revenue to pay down █████ million of DP&L's total company debt. Of the approximately \$750 million of debt on DP&L's books, \$300 million is related to pollution control bonds (*i.e.* debt explicitly used for generation assets). Direct Testimony of R. Jeffrey Malinak at 34 (Oct. 31, 2016).

IV. CONCLUSION

If approved, the DMR would unlawfully and unreasonably require customers to provide DP&L with an additional \$1.015 billion in nonbypassable revenue support above and beyond the \$1.3 billion in nonbypassable revenue support customers have already provided to DP&L to address debt issues at DPL Inc. and DP&L. The debt issue at DPL Inc. results from AES' highly-leveraged takeover of DPL Inc. in 2011. The debt issue at DP&L is the result of DP&L's claim that it cannot transfer the portion of its total company debt associated with its generation assets as part of its corporate separation plan because its affiliate would have little to no debt carrying capacity (largely as a result of the AES acquisition debt that remains at DPL Inc.). The Commission, however, has no authority to authorize the DMR to address the DPL Inc. acquisition debt or DP&L's generation debt issues. Moreover, DP&L's DMR is a result of a violation of the commitments in the *Merger Case* made by DP&L, DPL Inc. and AES, and the Commission should hold them to their prior commitments.

Accordingly, IEU-Ohio moves the Commission to grant this Motion to Dismiss, to dismiss the DMR from DP&L's Amended Application, and to direct DP&L to refile its testimony to reflect the dismissal of its DMR.

Respectfully submitted,

/s/ Matthew R. Pritchard

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INT-2-1. Witness Malinak states at p. 30 that "DPL Inc. had approximately \$1.25 billion in outstanding debt at the end of 2015, composed of a \$125 million Term Loan, \$330 million in Bonds maturing in 2016 and 2019, \$780 million in Bonds maturing in 2021 and \$16 million in a Capital Trust. DP&L had approximately \$0.76 billion in outstanding debt, including \$445 million in 2003 First Mortgage Bonds (to be refinanced in 2016), \$100 million in 2006 Ohio Air Quality Bonds, \$200 million in Ohio Air Quality VRDNs and an \$18.1 million Purchase Note." Regarding these statements, identify the following:

- a. The date DPL Inc. incurred each debt obligation.
- b. The purpose for DPL Inc. incurring each debt obligation.
- c. The asset(s) securing each debt obligation.
- d. Identify all debt incurred by DPL Inc. as a result of the acquisition of DPL Inc. by the AES Corporation.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 5 (inspection of business records), 7 (not in DP&L's possession or publicly available), 10 (possession of DP&L's unregulated affiliate), 13 (mischaracterization). DP&L further objects because the request is unduly burdensome, and can be performed by IGS. Subject to all general objections, DP&L states that the \$1.25 billion of DPL Inc. debt at the end of 2015 was initially incurred between 2000-2011 to finance capital expenditures and a portion is related to AES' acquisition of the Company (\$1.25 billion was assumed in 2011, of which ~\$520 million has been since repaid). All of DPL Inc.'s debt is unsecured, with the exception of a \$125 million term loan, which is secured by a mortgage on the assets of DPL Inc.'s unregulated subsidiary (AES Ohio) and a pledge of its capital shares in DP&L (where such pledge is subject to a cap). For a further response, please see DP&L-SSO 0006133 - DP&L-SSO 0007605.

Witness Responsible: Craig L. Jackson

INT-402. Please identify on an annual basis, since the RSC was implemented, how much POLR revenues have been collected, and from whom.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 7 (available on PUCO website), and 9 (vague or undefined); in addition, this interrogatory calls for a legal conclusion. Subject to all general objections, DP&L states that the annual RSC revenues are identified in the chart below. 2006 and 2007 RSC revenues are not available by tariff class and are provided as annual figures.

RSC Revenues by Tariff Class					
	2008	2009	2010	2011	2012
Residential	\$21,419,830	\$20,697,119	\$21,943,746	\$21,549,556	\$21,058,422
Residential Heating	\$8,954,787	\$8,719,967	\$9,007,397	\$8,973,292	\$8,494,397
Secondary	\$24,245,082	\$23,142,634	\$23,308,264	\$23,086,170	\$22,860,814
Primary	\$13,596,151	\$12,867,885	\$13,012,084	\$12,972,414	\$13,136,153
Primary-Substation	\$3,705,148	\$2,796,710	\$2,593,116	\$2,517,606	\$2,605,569
High Voltage	\$3,931,946	\$3,622,288	\$3,938,383	\$4,086,122	\$4,170,279
POL	\$92,856	\$91,480	\$90,063	\$88,217	\$86,416
School	\$433,803	\$398,978	\$393,531	\$359,223	\$331,185
Street Lighting	<u>\$147,798</u>	<u>\$148,002</u>	<u>\$147,988</u>	<u>\$148,080</u>	<u>\$146,338</u>
Total	\$76,527,400	\$72,485,063	\$74,434,574	\$73,780,680	\$72,889,573

2006: \$72,135,383

2007: \$78,357,391

WITNESS RESPONSIBLE: Dona Seger-Lawson.

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 *Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 21st day of November 2016, *via* electronic transmission.

/s/ Matthew R. Pritchard

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