BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of The Dayton Power & Light Company To Establish a Standard Service Offer In The Form of an Electric Security Plan | ) ) ) ) ) | Case No. 08-1094-EL-SSO |
| In the Matter of the Application of The Dayton Power & Light Company For Approval of Revised Tariffs | ) ) ) ) | Case No. 08-1095-EL-ATA |
| In the Matter of the Application of The Dayton Power & Light Company For Approval of Certain Accounting Authority | ) ) ) ) | Case No. 08-1096-EL-AAM |
| In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules | ) ) ) | Case No. 08-1097-EL-UNC |

**COMMENTS OF HONDA OF AMERICA MFG., INC. AND THE CITY OF DAYTON REGARDING DAYTON POWER & LIGHT COMPANY'S PROPOSED TARIFFS**

## I. INTRODUCTION

In Dayton Power & Light's ("DP&L") Notice of Withdrawal filed in this proceeding, Case No. 16-395-EL-SSO et al. ("ESP III"), DP&L claims the Commission and all concerned parties are required to provide it with $76 million/year forever, regardless of whether that charge is factually or legal justified. DP&L is mistaken.[1] Honda of America Mfg., Inc. and the City of Dayton ("Joint Movants") hereby provide their comments in accordance with the Commission's scheduling Entry explaining the error of DP&L's position.

[1] Dayton has opposed DP&L's purported attempt to withdraw from ESP III. Dayton is filing these comments in order to comply with the Commission's direction and as such these comments should not be deemed to be a waiver of Dayton's arguments in opposition to DP&L's right to withdraw from ESP III at this point.

Most importantly, DP&L fails to acknowledge that it may not read R.C. 4928.143(C)(2) in isolation. Instead, this statute must be read in conjunction with the rest of the Revised Code. Relevant here, Ohio's statutory scheme does not permit DP&L to receive an unjustified $76 million/year forever so long as it refuses to agree to a replacement Standard Service Offer ("SSO") which expires before DP&L withdraws. Instead, Ohio law balances DP&L's right to withdraw with tests under R.C. 4928.143(E) to ensure the ESP is more favorable in the aggregate than an MRO and R.C. 4905.22 to ensure rates are just and reasonable. When applying those standards here it becomes clear that while DP&L may have the right to withdraw from ESP III, that does not mean that the riders from ESP I can continue indefinitely without Commission review.

DP&L's proposed tariffs fail to acknowledge a changed legal landscape. Since the Commission's August 26, 2016 Order reinstating some of the tariffs from Case No. 08-1094-EL-SSO ("ESP I") the Ohio Supreme Court has clearly held that financial stability charges like Rider RSC are improper. As was recently recognized by the Commission,[2] this mandatory authority has significantly changed the legal landscape and should result in a modification to the Commission's previous decision to allow a continuation of Rider RSC.

DP&L also fails to acknowledge a changed factual situation. DP&L no longer owns generation and so some provisions of ESP I (like the RSC and Environmental Investment Rider) are simply inapplicable. Most relevant here, DP&L may not credibly claim that Rider RSC somehow compensates DP&L for providing POLR service or is otherwise justified by specific costs when such costs are now included in another rider. Currently customers compensate

[2] *See* November 21, 2019 Order in ESP III at pp. 43-46.

wholesale market participants for bearing POLR risk through the competitive auction process. Similarly, when DP&L withdrew from ESP II and the Commission authorized DP&L to revert to Rider RSC under R.C. 4928.143(C)(2)(b), DP&L already had submitted ESP III. As such, the Commission could have reasonably expected that Rider RSC would only be in effect for a short period. Here DP&L has failed to even propose a replacement standard service offer, and therefore the riders approved here would be in effect for potentially more than a year if ESP III serves as a guide.

Leaving aside for a moment the flaws in DP&L's legal position, DP&L is not permitted to withdraw from ESP III but cherry pick the provisions from ESP III it finds most favorable. DP&L's proposed tariffs do not simply revert to the ESP I tariffs, or even ESP I tariffs as modified by the Commission after the ESP II termination. Instead DP&L has proposed that major ESP III riders like the Distribution Investment Rider remain in effect. Those riders provide a financial benefit to DP&L but originated in ESP III. While the Commission may have authorized a few mandatory changes to ESP I when ESP II was terminated to reflect intervening competitive auctions, there is no justification for DP&L to keep these significant provisions from ESP III when the provisions benefitting customers have been left behind. If DP&L would like those provisions to continue, then it should either not withdraw from ESP III or include them in a new proposed ESP IV.

Finally, if Rider RSC is approved then the economic development provisions in ESP III must be continued. The Amended Stipulation specifically agreed that the provisions of Section X of the Amended Stipulation shall remain in effect until the DMR expired or when "equivalent economic stability charge intended to provide financial stability to DP&L or DPL Inc., whether proposed in this case or another future proceeding, expires."[3] DP&L has repeatedly claimed that Rider RSC is not an unlawful transition charge because it is a "stability charge" authorized by 4928.143(B)(2)(d). If that is true, and Rider RSC is approved to remain in effect until a new standard service offer is approved, then Rider RSC would qualify as a equivalent economic stability charge and grounds to continue the provisions in Section X of ESP III Amended Stipulation.

DP&L has not established any negative impact on customers if it is not provided with an unwarranted $76 million per year in stability funds. DP&L has not established that borrowing costs would increase in any meaningful way if Rider RSC is not reinstated. DP&L has also not established that even if DPL Inc. sought bankruptcy protection that it would have any impact on customers whatsoever. As Rider RSC is no longer warranted under the changed financial and legal framework, and DP&L has not established any negative outcome for customers if Rider RSC is not approved, DP&L's proposed tariffs should be rejected. If DP&L believes that it has facts which support a financial integrity rider, it can pursue those facts in its next ESP proceeding.

## II. ARGUMENT

### A. The Commission is required to conduct a four-year review of ESP I.

ESP I was approved on June 24, 2009. Thereafter, on December 19, 2012, the Commission extended ESP I until it authorized a subsequent SSO. That subsequent SSO was not approved until September 4, 2013 in ESP II. As such, ESP I was in effect for more than 4 years and 2 months before ESP II was approved.

[3] Amended Stipulation p. 27.

On June 20, 2016, the Supreme Court of Ohio reversed the Commission's decision in ESP II.[4] The Commission approved DP&L's proposal to revert to ESP I rates, with modifications, on August 26, 2016. ESP I rates remained in effect from August 26, 2016 until ESP III was approved on October 20, 2017 (another 1 year and 1 month).

In total ESP I rates were in effect for more than 5 years and 3 months before DP&L's most recent request to revert to them, which would cause them to extend even further. R.C. 4928.143(E) states that if an ESP has a term which exceeds 3 years then the Commission is required to conduct an ESP v. MRO test and a SEET review:

> (E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.

Applying this standard, the duty of the Commission is clear. DP&L is proposing to revert to ESP I rates. Those rates are not in effect forever. Instead, under R.C. 4928.143(E) the Commission must examine them after 3 years. If the Commission permits DP&L to withdraw

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[4] *In re The Dayton Power and Light Co.*, 2016-Ohio-3490 (June 20, 2016).

from ESP III and revert to ESP I rates, then the Commission is immediately required to conduct these two statutory tests. Indeed, this review is long past due.

Under the ESP v. MRO test in R.C. 4928.143(E), Rider RSC would not appear on the MRO side of the ESP v. MRO test. There is no authority which would suggest Rider RSC would be approved in a new MRO since it is unjustified from a cost perspective and under Ohio law. Thus, the Commission must examine whether DP&L passes the forward-looking ESP v. MRO test with Rider RSC only on the ESP side of the test.

Similarly, it would be surprising if Rider RSC could survive a prospective SEET test. DP&L was able to survive recent SEET tests only because DMR was expressly excluded from those tests. In contrast, there is no Commission order excluding Rider RSC from the SEET. Thus, if DP&L is permitted to proceed as proposed, the Commission must determine whether DP&L would receive a return on equity that is significantly in excess of a reasonable rate of return.

In light of the seemingly obvious result when the Commission conducts the required 4-year review, the Commission is justified in conducting this analysis immediately and rejecting DP&L's attempt to revert to ESP I based on the anticipated results of the normal 4-year review.

Alternatively, the Commission could provide a process for DP&L and all other parties to this proceeding to examine the required R.C. 4928.143(E) tests in detail while allowing DP&L to collect Rider RSC subject to refund. That process could involve a procedural schedule allowing for evidence, briefing, and a reasonable period for discovery. During that period customers could be protected by making the major riders at issue (specifically Rider RSC) subject to refund until the Commission rules. This would be a similar process to what the Commission recently implemented in conjunction with Rider DMR and would protect both customers and DP&L from a negative outcome while this issue was fully explored by all parties.

### B. The Commission's order under R.C. 4928.143(C)(2)(b) should include only those provisions, terms and conditions that are lawful for inclusion in an ESP.

R.C. 4905.22 requires that all charges be just and reasonable.

> All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

Joint Movants anticipate that DP&L will claim that Rider RSC is just and reasonable because it was previously approved by the Commission in 2009 and was allowed to go back into effect in 2016. However, the factual and legal situation has changed since that time, and so the Commission should not authorize Rider RSC to go back into effect based on past precedent. Under the factual and legal framework in place today, Rider RSC is no longer just and reasonable and should not be approved by the Commission.

#### 1. Changed factual situation prevents approval as POLR charge.

In the August 26, 2016 Order the Commission found that Rider RSC "was authorized to pay DP&L for costs associated with its provider of last resort ("POLR") obligations."[5] The Commission found that even though Rider RSC had expired by its own terms and was a POLR charge, nevertheless DP&L could continue to collect Rider RSC because it retained the long-term obligation to serve as the provider of last resort under R.C. 4928.141.[6] At the time, DP&L had not yet divested its generation assets and could colorably argue that Rider RSC was

[5] *Id*., p. 2.

[6] *Id*., p. 9.

somehow related to POLR service. That is no longer the case because DP&L has divested all of its generation assets that could be used to provide POLR service. As such, Rider RSC cannot be justified as a POLR charge, and, instead, POLR service is being provided (and separately paid for by customers) through the competitive bidding process.

The Commission also did not attempt in 2016 to justify how Rider RSC remotely related to the costs actually incurred by DP&L to provide POLR service, an error which caused the Ohio Supreme Court to overturn a previous POLR charge granted to AEP Ohio.[7]

It is also important to note DP&L's changed financial situation. DP&L has received hundreds of millions of dollars in Service Stability Rider and Distribution Modernization Rider charges. None of those funds have been refunded to customers like the Joint Movants despite being found to be improper under Ohio law. This massive customer investment in DP&L should be taken into account when the Commission determines whether there is a factual predicate to retain Rider RSC without making it subject to refund.

2. **Changed legal landscape prevents approval as stability charge.**

The Commission recently found the legal landscape has changed significantly since 2009 when Rider RSC was approved. As the Commission recently discussed at length, the Commission has relied upon various provisions of R.C. 4928.143(B)(2) as authority for nonbypassable financial stability riders, and "[i]n each of these cases, the Supreme Court reversed the Commission."[8] In light of this new authority, which arose after the Commission's 2009 approval of Rider RSC, and more since the August of 2016 decision to allow Rider RSC to

[7] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 512 (2011) (holding that a POLR charge which was not related to the costs of providing POLR service was improper under Ohio law).

[8] ESP III November 21, 2019 Supplemental Opinion & Order, p. 43.

remain in place temporarily, it is clear that the Commission is no longer bound by its prior decision to renew Rider RSC.

DP&L has previously claimed Rider RSC was a "lawful stability charge."[9] Indeed, DP&L's entire argument when it withdrew from ESP II was that Rider RSC could be approved while ESP III was pending because it was a valid stability charge, presumably under R.C. 4928.143(B)(2)(d).[10] However, after the 2016 decision by the Commission to allow Rider RSC to continue, the Supreme Court has repeatedly rejected financial integrity charges as unlawful and not authorized by R.C. 4928.143(B)(2)(d) or (B)(2)(h).[11]

Regardless of whether DP&L supports Rider RSC as a POLR charge (which is not based on the costs of providing POLR service) or a financial stability charge (which is not authorized by R.C. 4928.143), the end result is clear. The legal landscape has changed, and Rider RSC may no longer be approved in the way it was in 2016. Rider RSC is a legacy **rate** which is not just and reasonable or connected to any cost of service being provided by DP&L that is authorized under R.C. 4928.143(B)(2). As the Commission found in its August 26, 2016 Order in ESP I in conjunction with the EIR,[12] it would be inappropriate to continue a rider which is no longer justified based on cost principles.

The Commission should also take into account what happened when the Commission last permitted Rider RSC to go into effect until a new Standard Service Offer was approved. That

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[9] *See, e.g.*, Reply of the Dayton Power and Light Company In Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates, Case No. 08-1094, filed August 18, 2016.

[10] *Id*.

[11] *See* ESP III November 21, 2019 Supplemental Opinion & Order, pp. 43-46 (collecting cases).

[12] The Commission has recognized that not all riders should be continued simply because they were part of ESP I. For example, the EIR was originally authorized to allow DP&L to recover for environmental plant adjustments. In the August 26, 2016 Order, the Commission found that Rider EIR should not be recovered from customers when DP&L withdrew from ESP I even though it was a charge in ESP I. ESP I, August 26, 2016 Order, p. 9.

decision was appealed by several parties. The Supreme Court did not ever reach the merits of that appeal because on December 12, 2018 it *sua sponte* dismissed the appeal as moot because ESP III had been approved. This procedural framework leaves customers with effectively no way to ever challenge DP&L's improper reliance on ESP I rates. Since R.C. 4928.143(C)(2) requires a timely replacement SSO, then customers are never given the opportunity to present these issues to the Ohio Supreme Court for a determination and are left without any remedy. At the very least, the Commission should take the Supreme Court's mootness decision into account when deciding whether to allow a nonrefundable Rider RSC to go back into effect.

### C. DP&L's proposed tariffs improperly propose to retain provisions from ESP III instead of reverting to ESP I.

While the Commission previously correctly acknowledged that some adjustments are needed (DP&L no longer has fuel costs or provides generation and as such those rates should not be put into effect since they have been replace by the competitive bidding process), there are other riders which DP&L has apparently proposed to continue which should not remain in effect.

Specifically, it appears that DP&L is proposing to improperly continue the Distribution Investment Rider, Storm Cost Recovery Rider, and Regulatory Compliance Rider. Each of those riders was either created or materially modified by ESP III, and as such should be removed unless DP&L elects to remain in ESP III.

Of note, it is not completely clear that DP&L is proposing these riders should continue. There are some riders which appear in DP&L's table of contents but not in the supplemental tariffs themselves. For example, the Reconciliation Rider (Tariff D-40) has expressly been identified by DP&L as a rider which would not continue but remains in the Index.[13] To the extent DP&L does not intend these riders to continue it should make that clear in the index.

It is also unclear what provisions of ESP I DP&L suggest go into effect. For example, DP&L proposes that Rider RSC go into in effect despite an express termination date for that Rider in both the ESP I Stipulation and Commission orders. However, DP&L has not proposed that economic development riders included that the ESP I Stipulation be continued.[14] It is inequitable for DP&L to claim that provisions with a sunset date which benefit DP&L should be continued while similar provisions which benefit other ESP I signatory parties should be terminated due to their expiration dates. Once again, if DP&L is permitted to revert to ESP I then it should not be permitted to cherry-pick which provisions it will keep from that stipulation.

Finally, DP&L may argue that the tariffs identified below from ESP III are distribution related and therefore should remain in effect. This argument lacks merit because these riders were included in ESP III as opposed to DP&L's most recent distribution case for a reason. The riders were evaluated and approved under an ESP framework and if DP&L is withdrawing from ESP III it cannot claim that major riders like the DIR are somehow grandfathered in under a distribution case framework when they were created in an ESP.

1. **Distribution Investment Rider (D36)[15]**

The DIR was created in ESP III to recover incremental distribution capital investments recorded in Account 101 Plant In Service related to FERC Plant Accounts 360-374. DP&L should not be able to retain this significant benefit of ESP III while customers are denied their

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[13] *See* DP&L Proposed Tariffs filed November 26, 2019, p.2.

[14] *See* ESP I, Stipulation filed February 24, 2009, pp. 12-17.

[15] Amended Stipulation, p. 6.

benefits and purportedly forced to pay for an unjustified Rider RSC solely because it was part of ESP I. Accordingly, the DIR should be removed from customer bills and DP&L should be ordered to recover for any currently unrecovered qualifying costs through its next distribution rate case.

### 2. Storm Cost Recovery Rider (D30)[16]

The Storm Cost Recovery Rider creates a lengthy new process for DP&L to recover for storm damage costs. Similar to the DIR, it is inappropriate for DP&L to seek to keep the provisions of ESP III which provide accelerated cost recovery for DP&L while simultaneously eliminating the provisions which benefit customers.

### 3. Regulatory Compliance Rider (D31)[17]

The Regulatory Compliance Rider authorizes DP&L to recover not more than $1.5 million in implementation costs associated with certain competitive enhancements. Once again, regardless of whether DP&L expended these funds or not it should not be able to keep a cost recovery mechanism created in ESP III while simultaneously denying customers the benefits associated with ESP III. DP&L has chosen to withdraw from that ESP and as such has forfeit the right to recover those funds.

## D. If Rider RSC is approved over Dayton's objection, then the ESP III provisions which are tied to a replacement financial stability rider should be continued as well.

The Amended Stipulation includes several provisions which survive until the DMR expires or "or when an equivalent economic stability charge intended to provide financial

[16] Amended Stipulation, p. 18.

[17] Amended Stipulation, p. 24.

stability to DP&L or DPL Inc., whether proposed in this case or another future proceeding, expires."[18]

As discussed above, DP&L's own briefs have made clear that Rider RSC is a financial stability rider.[19] Indeed, as DP&L is no longer providing POLR service and Rider RSC is not in any way related to DP&L's cost of providing POLR service, Rider RSC cannot credibly be called anything other than a charge intended to provide financial stability to DP&L. Therefore, if Rider RSC is approved to continue over Joint Movants objection then, at minimum, the provisions in the Amended Stipulation which are contingent on a stability charge should continue.

DP&L may argue that by withdrawing from ESP III it has mooted this obligation of the Amended Stipulation. However, DP&L agreed that these provisions would continue if a stability charge was included in a future proceeding, and this proceeding qualifies as that future proceeding.

### E. DP&L has failed to establish any harm to customers if Rider RSC is not approved.

Joint Movants anticipate that DP&L may argue that it will be significantly harmed if Rider RSC is not reinstated. However, DP&L has provided no evidence that there will be any impact to DP&L (as opposed to DPL Inc. and its merger-related debt load) whatsoever.

DP&L has not established that borrowing costs would increase in any meaningful way if Rider RSC is not reinstated. Indeed, in light of DP&L's recent debt refinancing activities it is uncertain whether there will be any change in short term borrowing costs whatsoever. Even if

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[18] *See* Amended Stipulation, pp. 27-36.

[19] *See, e.g.*, Reply of the Dayton Power and Light Company In Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates, Case No. 08-1094, filed August 18, 2016.

we assume there will be a longer-term change in borrowing costs and a future credit downgrade, DP&L has not established that the change in borrowing costs exceeds the $76 million RSC financial stability charge.

DP&L has also not established that even if DPL Inc. sought bankruptcy protection that it would have any impact on customers whatsoever. DP&L's financial metrics are fine, and recent national and Ohio experience (such as the FirstEnergy Solutions Bankruptcy) has shown that even a bankruptcy filing by a regulated entity does not necessarily mean that there will be any material impact on customers.

As Rider RSC is no longer warranted under the changed financial and legal framework, and DP&L has not established any negative outcome for customers if Rider RSC is not approved, DP&L's proposed tariffs should be rejected. If DP&L believes that it has facts which support a financial integrity rider, it can pursue those facts in its next ESP proceeding. Customers should not be forced to make $76 million/year in annual payments until DP&L meets this minimum standard.

## III. CONCLUSION

WHEREFORE, Joint Movants respectfully request that the Commission, in issuing any order implementing DP&L's proposed tariffs, specifically consider and adopt its foregoing comments and concerns.

Respectfully submitted,

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ATTORNEYS FOR HONDA AND CITY OF DAYTON

## 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 4th day of December, 2019. 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 Honda and City of Dayton

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Summary: Comments Regarding Dayton Power & Light Company's Proposed Tariffs electronically filed by Mr. Trevor  Alexander on behalf of City of Dayton and Honda of America Mfg., Inc.