BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	)))	Case No. 16-395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case No. 16-396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	))))	Case No. 16-397-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO IMPLEMENT THE SSR EXTENSION RIDER

PUBLIC VERSION

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In the orders authorizing the current Electric Security Plan ("ESP") for the Dayton Power and Light Company ("DP&L"),[1] the Public Utilities Commission of Ohio ("Commission") authorized a non-bypassable rider, the Service Stability Rider-Extension ("SSR-E"). The Commission, however, initially set the rate to zero and directed that DP&L could seek to increase the SSR-E only if it demonstrated that it needed additional revenue to maintain its financial integrity between the termination of the Service Stability Rider ("SSR") on December 31, 2016 and the end of the ESP on May 31, 2017 and met several other conditions.[2]

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[1] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* PUCO Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept. 4, 2013), Entry Nunc Pro Tunc (Sept. 6, 2013), and Second Entry on Rehearing (Mar. 19, 2014) ("*ESP II Case*" and collectively "ESP II Orders" as the context requires).

[2] *ESP II Case*, Opinion and Order at 26-28 & Entry Nunc Pro Tunc at 2.

In a motion filed on March 30, 2016, DP&L seeks authorization of an increase in the SSR-E rate. DP&L alleges that the increase is necessary to maintain its financial integrity and that it has substantially complied with the conditions set out in the ESP II Orders.[3]

The Motion, the materials supporting the Motion, and the Commission's docket, however, demonstrate that DP&L's claims are unsupported. Moreover, any increase in the SSR-E rate would be unlawful under Ohio and federal law.[4]

Accordingly, the Commission should deny DP&L's motion with prejudice.

I. BACKGROUND

In the *ESP II Case*, DP&L proposed the non-bypassable SSR to collect an annual amount of $137 million for the entire five-year term of its proposed ESP.[5] DP&L claimed the rider was required for its "financial integrity."[6] DP&L alleged that the concerns with its financial well-being were "being driven principally by three factors: increased switching, declining wholesale prices, and declining capacity prices."[7] DP&L further argued that it would not be able to refinance its debt, which included as collateral the generation assets, without additional financial support.[8]

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[3] Motion of the Dayton Power and Light Company to Implement the SSR Extension Rider (Mar. 30, 2016) ("DP&L Motion").

[4] As discussed in this memorandum, the Commission can summarily dismiss the Motion because DP&L has not complied with the Commission's orders regarding an application for an increase in the SSR-E. If the Commission does not dismiss the Motion summarily, however, it should set the matter for hearing as required by R.C. 4903.09. Under that section, "[i]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[5] *ESP II Case*, Opinion and Order at 25.

[6] *Id.*, Opinion and Order at 22.

[7] *Id.*, Opinion and Order at 17.

[8] *Id.*, Opinion and Order at 12-13

In the Orders modifying and approving DP&L's ESP II application, the Commission shortened the term of the ESP to three years and five months and reduced the magnitude of the requested SSR from $137 million to $110 million, annually.[9] The Commission also found that DP&L's projections nearing the end of the approved ESP were not sufficiently reliable, and therefore ordered that the SSR terminate on December 31, 2016, five months before the end of the ESP.[10]

The Commission also authorized the SSR-E.[11] The rider was set to zero and would remain at that rate at least until January 1, 2017.[12] The Commission further directed DP&L to file an application no later than 275 days prior to December 31, 2016 if it sought authorization to increase the SSR-E rate. Any increase in revenue through the SSR-E is not to exceed $45.8 million.[13]

If DP&L sought to increase the rate of the SSR-E, the Commission required DP&L to satisfy several conditions. Most importantly, DP&L must "show the SSR-E is necessary to maintain the Company's financial integrity."[14] In reviewing any claim of financial need for the SSR-E, the Commission provided that it would consider any dividends paid by DP&L, whether DP&L has achieved any operations and maintenance ("O&M") expense savings, and whether DP&L has exhausted all other opportunities for rate relief.[15] As part of exhausting "all other opportunities for rate relief," the Commission required DP&L to

[9] *Id.*, Opinion and Order at 15; *ESP II Case*, Entry Nunc Pro Tunc at 2.

[10] *Id.*, Entry Nunc Pro Tunc at 2.

[11] *Id.*, Opinion and Order at 26-28.

[12] *Id.*, Entry Nunc Pro Tunc at 2.

[13] *Id*.

[14] *Id.*, Opinion and Order at 27.

[15] *Id.*

file a distribution rate case no later than July 1, 2014.[16] The Commission indicated that "conducting a distribution rate case before authorizing the SSR-E will provide the Commission and parties with the increased certainty necessary to evaluate whether DP&L's financial integrity is at risk and whether the SSR-E is necessary."[17]

As further conditions to an authorization of an increase in the SSR-E rate, the Commission also required DP&L to file by December 31, 2013 an application to divest its generation assets, to file by July 1, 2014 an application to modernize infrastructure through smart grid and advanced meter infrastructure ("AMI") initiatives, and to file by December 31, 2014 an application to modernize its billing system.[18]

Since the Commission outlined the conditions that DP&L would be required to satisfy to increase the SSR-E rate, DP&L has filed two of the required applications, and one of those was filed late.

While DP&L has filed an application to increase its distribution rates and alleges that rates should be increased $65 million, DP&L did not file the application to increase its distribution rates by July 1, 2014. That application was filed over a year late on November 30, 2015.[19] The case remains pending before the Commission, the Commission Staff has not yet issued its staff report, and DP&L is currently responding to a motion to compel discovery filed by the Office of the Ohio Consumers' Counsel.[20]

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *In the Matter of the Application of the Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case Nos. 15-1830-EL-AIR, *et al.,* Application (Nov. 30, 2015) ("*DP&L Distribution Rate Case*").

[20] *Id*., Motion to Compel Responses to Discovery (Public Version) and Memorandum in Support by the Office of the Ohio Consumers' Counsel (Mar. 22, 2016). In a recent motion filed in this case and the *DP&L Distribution Rate Case*, DP&L proposed a procedural schedule that was based on the Staff Report being

DP&L also filed an application to divest its generation assets by December 31, 2013, but that application was largely a placeholder until DP&L developed an actual divesture plan.[21] Subsequently, on February 25, 2014, and May 23, 2014, DP&L filed a Supplemental Application and an Amended Supplemental Application to divest its generation assets. The terms and conditions of the separation of the generation assets remain ambiguous; in the application for the next ESP (this case), DP&L states only that an unregulated affiliate will continue to operate two of the plants owned by DP&L currently and that the affiliate will serve as a non-operating co-owner of the remaining plants.[22]

To date, DP&L has not filed an application to modernize infrastructure through smart grid and AMI initiatives or an application to modernize its billing system.

DP&L filed the Motion to increase the SSR-E rate on March 30, 2016. In the Motion, DP&L makes two general claims. First, it asserts the SSR-E will be needed if the Commission does not approve DP&L's request for a new stability rider, the RER, in its pending ESP case by January 1, 2017.[23] Second, it alleges that it has substantially complied with the additional conditions set out in the Commission's ESP II Orders.[24] DP&L does not indicate the level of the increase it is seeking or provide any proposed tariff sheets or other documentation of the effect of its proposed increase on total customer bills.

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issued in July 2016 and is seeking to have the ESP case heard before the Commission takes up for hearing the *DP&L Distribution Rate Case*. *Id*., Motion of Applicant The Dayton Power and Light Company for Case Management Order to Establish Deadlines and to Coordinate Cases (Apr. 15, 2016).

[21] *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, Application of the Dayton Power and Light Company to Transfer or Sell its Generation Assets (Dec. 30, 2013).

[22] Application, Direct Testimony of Craig L. Jackson at 9 (Feb. 22, 2016).

[23] DP&L Motion at 2.

[24] *Id*.

II. ARGUMENT

As noted above, DP&L is required to demonstrate that it needs an increase in the SSR-E to maintain its "financial integrity." The DP&L Motion and the supporting materials, however, do not support a finding that DP&L needs the unspecified additional revenue or the steps DP&L has taken to reduce the need for an additional revenue infusion. Moreover, DP&L has not completed the other requirements the Commission imposed as conditions to an increase in the SSR-E rate. Accordingly, DP&L has not met the conditions for an increase in the SSR-E that the Commission set out in the ESP II Orders.

Further, the authorization of an increase is not authorized by Chapter 4905 or Chapter 4928. Moreover, an authorization of an increase would result in unlawful transition revenue or its equivalent and violations of corporate separation requirements. Finally, the authorization is also preempted by federal law. Thus, the grant of DP&L's Motion would violate state and federal law.

A. DP&L has not satisfied the conditions the Commission ordered DP&L to demonstrate if it sought an increase in the SSR-E

1. DP&L fails to present the Commission with any analysis specific to DP&L

Throughout the ESP II Orders and in the subsequent entries on rehearing in the *ESP II Case,* the Commission states that DP&L is required to present a financial analysis specific to DP&L that demonstrates that DP&L requires an additional infusion of revenue to maintain its "financial integrity." "When considering whether the SSR-E is necessary to maintain the financial integrity of *the Company*," the Commission stated that it "will consider any dividends paid to parent companies, as well as all other relevant financial information, including O&M savings undertaken and any capital expenditure reductions

made by DP&L."[25] The Commission also noted that the "SSR-E conditions will ensure … that the financial integrity of *DP&L* will be maintained without granting *DP&L* significantly excessive earnings."[26] The Commission further directed "*DP&L* [to] exhaust all other opportunities" for improving DP&L's financial health, including the filing of a distribution rate case.[27]

In its Memorandum in Support, DP&L asserts, "there is a financial need for the SSR-E, absent the SSR or the RER."[28] In support of that claim, the Memorandum in Support cites the testimony of Mr. Jackson attached to the Motion and the prefiled testimony of Mr. Malinak filed on February 22, 2016 in support of the ESP application.

According to the testimony of Mr. Jackson attached to the Motion, he is relying on the analysis of Mr. Malinak to support the claim that an increase in the SSR-E is necessary to sustain DP&L's financial integrity: "The testimony of R. Jeffrey Malinak, filed in this proceeding on February 22, 2016, demonstrates that DP&L's financial integrity would be threatened in 2017 without a stability charge."[29] Thus, the testimony of Mr. Malinak is the source for DP&L's claim that DP&L faces financial need for the SSR-E increase.

On its face, however, Mr. Malinak's testimony does not demonstrate any financial need on the part of DP&L for the SSR-E or any specific magnitude of increase in SSR-E

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[25] *ESP II Case*, Opinion and Order at 27 (emphasis added).

[26] *Id.* (emphasis added).

[27] *Id.* (emphasis added).

[28] Memorandum in Support of the Motion of the Dayton Power and Light Company to Implement the SSR Extension Rider at 5 (Mar. 30, 2016) ("Memorandum in Support").

[29] DP&L Motion, Attached Direct Testimony of Craig L. Jackson in Support of DP&L's Motion for Approval of the SSR-E at 3 (Mar. 30, 2016).

rates. Rather than addressing the financial integrity of DP&L over the remaining months of the current ESP, Mr. Malinak explains that his testimony "analyze[s] the financial condition and integrity of both *the coal-fired generating assets* that would be covered under the Reliable Electricity Rider ("RER") and *DPL Inc.* …, the parent company of The Dayton Power and Light Company ("DP&L")."[30] For this analysis, Mr. Malinak states he has [redacted][31] [redacted][32] According to Mr. Malinak, DPL Inc.'s financial integrity is much improved if the Commission approves an additional infusion of ratepayer-provided revenue through the RER from 2017 to 2026.[33] Thus, his testimony focuses on the financial integrity of DPL Inc., not DP&L.

Mr. Malinak's analysis of the financial integrity of the "coal-fired generating assets" also does not provide any basis for a finding of financial need at DP&L to justify an increase in the SSR-E. DP&L has stated the generating assets will be divested from

[30] Direct Testimony of R. Jeffrey Malinak at 1 (Feb. 22, 2016) (emphasis added). The other topic in his testimony covered the ESP v. MRO test and is not relevant to this Motion.

[31] Direct Testimony of R. Jeffrey Malinak at 3 (Feb. 22, 2016).

[32] *Id*. at 12-56.

[33] *Id*. at 62 ("With the RER in place from 2017 through 2026, the financial condition of the coal generating assets and by extension, the financial integrity of DPL Inc. would be maintained.")

DP&L to an unregulated generation affiliate at some point before January 1, 2017.[34] The SSR-E cannot have an effective date prior to January 1, 2017, and DP&L is not seeking an effective date that would overlap its ownership of the assets.[35] Thus, during the period of time that DP&L is seeking to bill and collect some as yet undisclosed amount under the SSR-E, the assets should have no impact on DP&L's financial health.

Additionally, Mr. Malinak's analysis addresses the period of 2017 through 2026 and does not contain anything specific to the January to May 2017 timeframe.[36] As noted by the Commission in the ESP II Orders, the future proceeding it required for the SSR-E required DP&L to "provide more clear and reliable data *for the later months of the ESP*, which should alleviate concerns raised by intervenors and Staff."[37]

DP&L is relying on Mr. Malinak's testimony to support its claim that an increase in the SSR-E rate is necessary to maintain DP&L's financial integrity, but Mr. Malinak's testimony expressly does not address the need for additional revenue by DP&L during the remaining term of the ESP.

2. DP&L fails to provide the Commission with all of the specific relevant financial information that the Commission indicated was necessary for its consideration of any claim of financial need by DP&L

In the ESP II Orders, the Commission also indicated that any claim of financial need would be reviewed in the light of "dividends paid to parent companies, as well as all

[34] Direct Testimony of Craig L. Jackson at 9 (Feb. 22, 2016).

[35] *ESP II Case*, Entry Nunc Pro Tunc at 2.

[36] *See, e.g.*, Direct Testimony of R. Jeffrey Malinak at 10 (projecting value of RER proposal over the period of "2017 to 2026"); at 36 ("financial projections are based on the dispatching model for period from 2017 to 2026 … "); and Exhibit RJM-9.

[37] *ESP II Case*, Opinion and Order at 27; *ESP II Case*, Entry Nunc Pro Tunc at 2 (ESP will end on May 31, 2017).

other relevant financial information, including O&M savings undertaken and any capital expenditure reductions made by DP&L."[38] DP&L has not presented all the relevant financial information and what it has presented confirms that DP&L is not experiencing any financial emergency.

In the Motion, for example, DP&L states that it "has made or will make dividend payments totaling $75 million to DPL Inc." in 2015 and 2016.[39] DP&L left out of its Motion that DP&L in 2013 and 2014 reported a net income of $84 million and $115 million and made dividend payments to DPL Inc. totaling $190 million and $159 million, respectively.[40] DP&L's finances certainly do not give the appearance of a company facing any cash flow problems that might give rise to a claim of a financial emergency.[41]

Beyond the lack of any apparent cash flow problems, DP&L ignores the specific requirement that it detail the O&M savings it has achieved or will achieve over the remainder of its ESP. DP&L's discussion of O&M savings is included in the testimony of Mr. Jackson attached to DP&L's Motion. In that testimony, Mr. Jackson indicates that DPL Inc. is projecting O&M savings "yet to be identified" averaging $10.3 million over the

[38] *Id*.

[39] DP&L Motion at 5. In the testimony of Craig L. Jackson attached to the Motion, DP&L indicates that in 2015 it paid dividends totaling $50 million to DPL Inc. and expects to pay dividends totaling $25 million in 2016 to DPL Inc. DP&L Motion, Attached Direct Testimony of Craig L. Jackson at 3.

[40] In its annual report to the Securities and Exchange Commission, DP&L discloses that it "declares and pays dividends on its common shares to its parent DPL from time to time as declared by the DP&L board. Dividends on common shares in the amount of $50.0 million, $159.0 million and $190.0 million were declared and paid in the years ended December 31, 2015, 2014 and 2013, respectively." Annual Report for Fiscal Year Ended December 31, 2015 (Form 10-K) at 36, viewed at https://www.last10k.com/sec-filings/0000027430.

[41] The Commission has previously indicated that it relies on a cash flow type of analysis when it reviews claims by utilities that they are facing financial emergencies. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case Nos. 09-453-HT-AEM, *et al*., Opinion and Order at 13, 25 (Sep. 2, 2009).

period of 2017 to 2026.[42] Thus, DP&L has ignored the requirement to demonstrate what efforts it is taking to reduce O&M expenses under the current ESP as required by the Commission's order.

While the Commission also required DP&L to address capital reduction expenditures if it sought to increase the SSR-E,[43] the Motion, attached testimony, and incorporated testimony do not address the relevant capital expenditure levels.

In considering the financial need of DP&L for additional revenue, the Commission should not ignore this omission because DP&L previously overstated its projected expenses in the *ESP II Case*.[44] The Commission specifically took into account the additional O&M savings opportunities uncovered by intervenors through discovery when it reduced DP&L's requested SSR revenue requirement from $137.5 million/year to $110 million/year.[45] The Commission then required DP&L to provide information about its implementation of the O&M savings if DP&L sought to increase the SSR-E rate. Despite the express requirement that DP&L provide information about its efforts to reduce O&M expenses, DP&L has ignored that requirement and instead provided an irrelevant estimate of projected savings from 2017 to 2026 that is not supported in any way in the testimony DP&L has filed in support of the Motion.

Finally, DP&L has not alleged or demonstrated that it has exhausted all other opportunities for rate relief prior to seeking the SSR-E. In this context, the Commission

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[42] DP&L Motion, Attached Direct Testimony of Craig L. Jackson at 4. Included in the yet to be identified average number is an assumed O&M savings level specific to DP&L averaging $4.9 million over this same period. *Id*.

[43] *ESP II Case*, Opinion and Order at 27.

[44] *See ESP II Case*, Opinion and Order at 22-25.

[45] *Id.* at 25.

specifically required DP&L to file an application to increase distribution rates by July 1, 2014. DP&L filed its application to increase its distribution rates by $65 million approximately 17 months late, submitting its rate increase request on November 30, 2015. That case remains pending, DP&L is alleged to have engaged in dilatory discovery practices, and the Staff Report, which is the next necessary step in the rate case process, has not been issued.[46] DP&L should not be rewarded for its tardiness by claiming that it substantially complied when the Commission imposed a requirement to file a rate case so that it was assured that DP&L had exhausted all other alternatives to an increase in the SSR-E rate.

3. DP&L fails to identify the amount of additional revenue that is necessary to maintain its financial integrity

In the ESP II Orders, the Commission stated that "[a]t least 275 days prior to the termination of the SSR on December 31, 201[6], DP&L *may seek approval of an increase* in the SSR-E in an amount not to exceed $[45.8] million for the [period of January to April 2017]."[47] The Commission continued, "[i]f DP&L seeks to implement the SSR-E, DP&L must show that the SSR-E is also 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 … ."[48]

Although the Commission directed DP&L to identify the amount it is requesting when it seeks an increase in the SSR-E, DP&L requests only authority to implement the

[46] As noted above, DP&L is currently seeking a hearing schedule that does not anticipate a Staff Report until July 2016.

[47] *ESP II Case,* Opinion and Order at 26 (emphasis added); *ESP II Case*, Entry Nunc Pro Tunc at 2 (bracketed information reflects revisions the Commission made to its order in its Entry Nunc Pro Tunc). DP&L filed its Motion 276 days before the expiration of the SSR.

[48] *ESP II Case*, Opinion and Order at 28 (emphasis added).

rider[49] and approval of the rider.[50] Nowhere in its Motion, attached testimony, or incorporated testimony does DP&L state the amount of the increase in the SSR-E that it is seeking. Once again, DP&L has ignored the express terms of the Commission's orders.[51]

4. DP&L has not satisfied the additional conditions the Commission required DP&L to undertake before the Commission would authorize an increase in the SSR-E

In addition to demonstrating that DP&L requires additional revenue to maintain its financial integrity, the Commission required DP&L (1) to file by December 31, 2013 an application to divest its generation assets, (2) to file by July 1, 2014 an application to increase distribution rates, (3) to file by July 1, 2014 an application to modernize infrastructure through smart grid and AMI, and (4) to file by December 31, 2014 an application to modernize its billing system.[52] DP&L claims it substantially complied with all of these requirements, but the Commission's docket reveals that claim is false.

Of the four deadlines, DP&L has met one. On December 30, 2013, DP&L filed an application to divest its generation assets.[53] Substantively, however, the application contained almost no details regarding DP&L's plan to divest its generation assets[54] and

[49] DP&L Motion at 1.

[50] *Id*. at 6.

[51] Because DP&L has not requested a rate increase for the SSR-E in excess of zero, the Commission should, consistent with the Court's precedent, refuse to grant DP&L an increase in SSR-E rates. In a different context, the Court has found that the Commission may not authorize relief which was not specified in an application and noticed to the public. *Assn. of Realtors v. Pub. Util. Comm.*, 60 Ohio St. 2d 172, 398 N.E. 2d 784 (1979).

[52] *ESP II Case*, Opinion and Order at 27-28.

[53] *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, Application (Dec. 30, 2013).

[54] *Id.* at 1-2 ("DP&L is exploring its options related to the separation including issues and obstacles related to potentially transferring the assets to an affiliate as early as 2014.").

was subsequently updated twice before the Commission took action on the application.[55] Related details of DP&L's plan to address changes in capital structure were filed with the Commission on November 30, 2015, when DP&L submitted testimony in support of its Distribution Rate Case[56] and on February 22, 2016, when DP&L submitted testimony in support of its proposed ESP in this case.[57] Thus, DP&L's efforts to comply with this requirement, on time, were perfunctory and incomplete.

Of the four required applications, DP&L has filed two: the application to divest generation assets and the *DP&L Distribution Rate Case* application. Although the *DP&L Distribution Rate Case* was filed 17 months late, DP&L offers no reason as to its tardiness, and as discussed above, DP&L's tardiness presents the Commission with a situation where it is being asked to authorize DP&L to increase the SSR-E rate before exhausting its other opportunities to obtain rate relief.

DP&L has not filed an application to modernize its infrastructure through Smart Grid and AMI initiatives. In its Motion, DP&L acknowledges it is still "actively considering" the issue.[58] DP&L offers nothing further concerning its failure to file the required application by July 1, 2014.

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[55] In its Amended Supplemental Application, DP&L continued to state that it had not resolved the process it would undertake to divest the generation assets, offering that it was still considering two "tracks." *Id*., Amended Supplemental Application of The Dayton Power and Light Company to Transfer or Sell its Generation Assets at 2 (May 23, 2014). The method by which DP&L would divest the generation assets remained open under the Commission decision which created an additional condition for DP&L to provide the fair market value of the assets if it elected to sell them to an unaffiliated company. *Id*., Finding and Order at 9 (Sept. 17, 2014).

[56] *DP&L Distribution Rate Case,* Direct Testimony of Jeffrey K. MacKay at 6 (Nov. 30, 2015).

[57] Direct Testimony of R. Jeffrey Malinak at 59 & 63 (Feb. 22, 2016).

[58] DP&L Motion, Attached Direct Testimony of Sharon Schroder at 5.

DP&L has also failed to file the required application to modernize its billing system. Although DP&L makes several claims about the capabilities of its billing system, DP&L offers no reason for its failure to file the required application.

In summary, DP&L has not complied with the conditions the Commission imposed on DP&L before it could seek to increase the SSR-E. DP&L is required to demonstrate that it has a financial need; DP&L does not provide any demonstration that an increase is necessary to address its needs. DP&L was required to make several applications before seeking an increase; it has made two. One, the application related to generation divestiture was so "content-free" that DP&L was required to supplement the application. The second, the distribution rate case, was filed so late that the delay has effectively frustrated any attempt to determine whether DP&L has a financial need that would justify an increase in the SSR-E. Because DP&L has failed to comply with the conditions the Commission ordered, its Motion must be denied.

B. The Commission lacks authority to provide DP&L an increase in revenue through the SSR-E

In its Motion, DP&L asserts that an increase in the SSR- E rate is necessary because DP&L's financial integrity will be at risk when the SSR expires.[59] Based on the "proof" offered by DP&L in support of that claim, however, the Commission is barred by Ohio and federal law and Commission rules from authorizing an increase in the SSR-E.

1. Ohio law prohibits an order increasing the SSR-E rate

a. DP&L's motion and supporting materials fail to demonstrate the facts and circumstances that support authorization of an increase in the rider under R.C. 4928.143(B)(2)(d)

[59] Memorandum in Support at 1.

As the Commission has recognized, its authority to regulate retail generation services is limited. "Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is competitive and therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code."[60] R.C. 4928.05(A)(1) limits the Commission retail generation ratemaking authority to R.C. 4928.141 to 4928.144.[61]

DP&L's current standard service offer is an ESP that is authorized under R.C. 4928.143.[62] The Commission may authorize only those terms and conditions of an ESP as provided by R.C. 4928.143(B). "By its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[63]

In its Motion, DP&L has not indicated what division of R.C. 4928.143(B) it is relying upon for authorization of the increase. That omission may be due to the fact that the Commission itself has not indicated what provision it was relying on when it authorized the SSR-E with an initial rate of zero.[64] Based on its application for rehearing in the *ESP*

[60] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16 (Jan. 11, 2012) (*"Sporn"*).

[61] *Id*. at 17.

[62] *ESP II Case*, Opinion and Order at 52.

[63] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011).

[64] Although the Commission authorized the SSR under R.C. 4928.143(B)(2)(d), it did not state the specific statutory provision that authorizes the SSR-E. *ESP II Case*, Opinion and Order at 21-22 & 26-28.

II Case, however, DP&L believes that the Commission authorized the rider under R.C. 4928.143(B)(2)(d).[65]

If DP&L is seeking authorization of the increase in the SSR-E under R.C. 4928.143(B)(2)(d), it has the burden of demonstrating that the increase satisfies the requirements of that division.[66] That division provides that the Commission may include as a term of an ESP "charges relating to 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, as would have the effect of stabilizing or providing certainty regarding retail electric service."

DP&L fails to satisfy the requirement to demonstrate that the increase in the SSR-E will have the effect of stabilizing or providing certainty regarding retail electric service. In the supporting testimony of Mr. Jackson, Ms. Schroder, or Mr. Malinak, [redacted]

[65] In its Application for Rehearing, DP&L complained that R.C. 4928.143(B)(2)(d) did not authorize the conditions the Commission imposed on DP&L if it sought an increase in the SSR-E above. When it rejected DP&L's assignments of error, however, the Commission again did not state what division it was relying upon to authorize the SSR-E. *Id*., Second Entry on Rehearing at 12-14.

[66] R.C. 4928.143(C)(1).

[redacted][67] This absence of evidence will not support a finding that the increase in the SSR-E will have the effect of stabilizing and providing certainty regarding electric service.[68]

b. The authorization of an increase in the SSR-E would result in a violation of R.C. 4928.38 that prohibits the billing and collection of transition revenue or its equivalent after the market development period has ended

Under the provisions of Ohio law restructuring the regulation of retail electric generation service, an electric distribution utility ("EDU") has a single opportunity to secure transition revenue. Within 90 days of the effective date of Amended Substitute Senate Bill 3 ("SB3"), an EDU was required to file its transition plan.[69] As part of its transition plan, the EDU could request transition revenue.[70] Transition revenue was based on a determination of transition costs. Before authorizing collection of any transition revenue, the Commission had to find that the costs were "prudently incurred," "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state," "*the costs [were] unrecoverable in a competitive market,*" and the electric distribution utility "would otherwise be entitled an opportunity to recover the costs."[71] The period during which an EDU could collect transition charges to recover transition revenue was limited by two dates. The Market

[67] Direct Testimony of R. Jeffrey Malinak at 5, 13.

[68] In a similar situation, the Commission has required the EDU to make a detailed demonstration of the need for a generation-related rider and rejected requests for authorization when the proof did not support a claim that the rider would have the effect of stabilizing rates. *See In the Matter of Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al*., Opinion and Order at 42-48 (Apr. 2, 2015).

[69] R.C. 4928.31(A).

[70] *Id.*

[71] R.C. 4928.39 (emphasis added).

Development Period ("MDP") ended no later than December 31, 2005. A longer period for recovery of regulatory assets that were separately identified as part of the total allowable amount of transition costs ended no later than December 31, 2010.

Following the collection of transition revenue authorized under a transition plan, the competitive generation business is required to operate fully on its own in the competitive market,[72] and the Commission "shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility."[73] The Court has recently confirmed that the Commission is prohibited from authorizing a utility to collect transition revenue or its equivalent after December 2010.[74]

In this Motion, DP&L is seeking transition revenue or its equivalent. Although the Motion labels the increase in terms of "financial integrity,"[75] [redacted][76] [redacted][77] [redacted]

[72] R.C. 4928.38.

[73] *Id*. Further, "[a] standard service offer under section … 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to tend under the utility's rate plan." R.C. 4928.141(A).[73]

[74] *In re Application of Columbus S. Power Co.* Slip Opinion 2016-Ohio-1608 at ¶ 21 ("R.C. 4928.38 bars 'the receipt of transition revenue or any equivalent revenues by an electric utility' after 2010.").

[75] "DP&L asks to have the RER implemented when the SSR expires; however, if the RER is not approved by the time the SSR expires, then the SSR-E will be necessary to ensure DP&L's financial integrity and, thus, its ability to provide safe, stable, and reliable retail electric service." DP&L Motion at 1-2.

[76] Direct Testimony of R. Jeffrey Malinak at 12-63.

[77] Direct Testimony of R. Jeffrey Malinak at 53-54 and Exhibit RJM-9.

[redacted]

The Court held that a similar rider collected by AEP-Ohio amounted to transition revenue or its equivalent and was therefore prohibited under R.C. 4928.38. In that case, AEP-Ohio had proposed the Retail Stability Rider ("RSR") to ensure AEP-Ohio "was not financially harmed" and to "achieve a certain rate of return on its generation assets."[78] The magnitude of the RSR was determined, in part, based on the available capacity revenue AEP-Ohio expected to receive in the market.[79]

[redacted]

In sum, the SSR-E revenue covers "costs" not recoverable in the market, that revenue would be by definition transition revenue or its equivalent, and the analysis DP&L is relying upon to justify the RER and SSR-E is the functional equivalent of the analysis and justification that the Court rejected when it concluded that a similar rider produced unlawful transition revenue or its equivalent. The time during which transition revenue or its equivalent may be authorized and collected has expired and therefore authorization of any increase in the SSR-E would violate R.C. 4928.38.

c. The authorization of an increase in the SSR-E would result in a violation of R.C. 4928.02(H) that prohibits the authorization of an anticompetitive subsidy and the

[78] *In re Application of Columbus S. Power Co.* Slip Opinion 2016-Ohio-1608 at ¶ 23.

[79] *Id.* at ¶ 24.

recovery of any generation-related costs through distribution or transmission rates

R.C. 4928.06 requires the Commission to effectuate the state polices contained in R.C. 4928.02, and the Commission has found that an EDU's standard service offer must comply with those policies.[80] 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. Additionally, R.C. 4928.02(H) prohibits the recovery of any generation-related costs through distribution or transmission rates. As the Commission has previously found, "[a]pproval of such a charge would effectively allow [an EDU] to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of [R.C. 4928.02(H)]."[81]

The increase in the SSR-E, like the SSR and the proposed RER, would provide DP&L, DPL Inc., and the unregulated generation affiliate a revenue infusion in addition to market revenue available in wholesale markets. Competitors will not similarly benefit from the increase in the SSR-E. Because authorizing an increase in the SSR-E rates would uniquely provide DP&L's affiliates an above-market revenue stream that is not available

[80] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case Nos. 08-936-EL-SSO, *et al*., Opinion and Order at 13-14 (Nov. 25, 2008); *see also Elyria Foundry v. Public Util. Comm.*, 114 Ohio St.3d 305 (2007); *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (Oct. 24, 2007).

[81] *Sporn*, Finding and Order at 19.

to competitors of DP&L's unregulated generation affiliate, the increase would be anticompetitive. Further, allowing DP&L to impose the SSR-E increase on a non-bypassable basis would allow DP&L to recover competitive generation-related costs through its noncompetitive distribution rates. Thus, granting the Motion would violate R.C. 4928.02(H).

d. The authorization of an increase in the SSR-E would result in a violation of R.C. 4928.17 and Commission rules prohibiting a commitment of funds to maintain the financial viability of an affiliate

R.C. 4928.17 requires that an EDU separate its generation and other non-regulated businesses from its regulated distribution and transmission businesses. Further, R.C. 4928.17(A)(2) provides that an EDU is prohibited from "extend[ing] 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."[82] Additionally, the Commission has adopted rules restricting financial arrangements between an EDU and an affiliate that require the EDU to commit funds to maintain the financial viability of the affiliate.[83]

DP&L's Motion seeks a result that will violate the letter and spirit of the corporate separation requirements. In the Motion, DP&L seeks an increase in the SSR-E on the same basis that supports its proposed RER if the Commission has not already authorized the RER.[84] As noted previously, DP&L is relying on the testimony of Mr. Malinak concerning the need for the RER to support its Motion to increase the SSR-E charges.

[82] *See, also,* Rule 4901:1-37-04(D)(10)(c), OAC.

[83] Rule 4901:1-37-04(C), OAC.

[84] DP&L Motion at 1-2.

Mr. Malinak's testimony states that DP&L has proposed the RER to provide the generation assets transferred to the unregulated affiliate with sufficient revenue to maintain the financial integrity of DPL.[85] Mr. Malinak "use[s] the term 'financial integrity' to refer more specifically to an assessment of the likelihood of default or bankruptcy."[86] Based on the materials provided by DP&L, therefore, the Commission can reasonably conclude that the SSR-E and RER serve the same purpose of maintaining the expected returns of the unregulated generation affiliate and DPL Inc. so that the risk of financial default is reduced.

By propping up the financial returns of the unregulated generation affiliate and DPL Inc., however, the Commission would be authorizing a violation of R.C. 4928.17 and its rules implementing that section. Authorization would extend an undue preference or advantage to the unregulated generation affiliate by providing it with out-of-market revenue. Further, DP&L is seeking authorization of the SSR-E increase to support the financial viability of DPL Inc. Accordingly, the authorization would violate the letter and the spirit of the corporate separation requirements.

2. The Commission lacks jurisdiction to increase the wholesale compensation of DP&L, DPL Inc., and the unregulated generation affiliate

The services of a public utility subject to the Commission's jurisdiction are established through the definitional sections in Chapters 4905 and 4928 of the Revised Code. R.C. 4905.02 provides that a "'public utility' includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing,

[85] Direct Testimony of R. Jeffrey Malinak at 62-63.

[86] *Id*. at 12.

defined in section 4905.03 of the Revised Code." R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission's jurisdiction:

> As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:
>
> ...
>
> (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.

The same definition extends to the Commission's jurisdiction under Chapter 4928 to EDUs.[87] This definition specifically limits the Commission's jurisdiction over electric light companies, including EDUs, to instances in which a retail service is being provided, *i.e.* electricity is being supplied "to consumers." By definition, therefore, the jurisdiction of the Commission does not extend to wholesale generation-related electric services.

In the testimony from the ESP application incorporated as support for the Motion, Mr. Malinak concludes that [redacted][88] As a stop-gap to the wholesale revenue shortfall, DP&L seeks to increase its revenue by increasing the SSR-E rate. The substance of the increase, therefore, would increase the wholesale compensation of the unregulated generation affiliate in an amount in excess of that produced under the federally authorized tariffs. Because the Motion seeks to increase compensation for wholesale sales of electricity and not electric services to

[87] *See, e.g.,* R.C. 4928.01(A)(6) & (7) & 4928.05(A) (defining the Commission's jurisdiction to supervise and regulate competitive and noncompetitive retail electric service supplied by an electric utility).

[88] Direct Testimony of R. Jeffrey Malinak at 50, Exhibit RJM-9.

consumers, the relief sought exceeds the Commission's authority that is limited to the business of supplying electricity to consumers within this state.

C. The Commission is preempted by the Federal Power Act from increasing the wholesale compensation of DP&L, DPL Inc., and the unregulated generation affiliate

Under the Supremacy Clause of the United States Constitution,[89] federal law preempts state legislation and regulating authority (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; (2) if it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; and (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.[90]

In *Hughes v. Talen Energy Marketing* LLC, 578 U.S. __, __ (2016), the United States Supreme Court confirmed the exclusivity of FERC's authority to establish wholesale energy prices under the Federal Power Act ("FPA"). In *Hughes*, the Maryland Public Service Commission ("Maryland Commission") had required the incumbent utilities to enter into a 20 year pricing contract with a company ("generator") proposing to construct a new generation plant in the state.[91] The contract guaranteed that the generator would receive the contract price for capacity and not the wholesale price.[92]

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[89] U.S. Const., Art. VI.

[90] *Marketing Research Services, Inc. v. Pub. Util. Comm'n of Ohio*, 34 Ohio St.3d 52, 55 (1987).

[91] *Hughes*, 578 U.S., at __ (2016) (slip op., at 7).

[92] *Id.*

That is, if the wholesale price "falls below the price guaranteed in the contract" the utilities paid the generator the difference, and then "pass the costs of these required payments along to Maryland consumers in the form of higher retail prices."[93] If the wholesale capacity price "exceeds the price guaranteed in the contract" the generator was required to pay the utilities the difference and the utilities would "then pass the savings along to consumers in the form of lower retail prices."[94]

The Court found that the contract "guarantees the [generator] a rate distinct from the clearing price [in the PJM capacity auction] for its interstate sales of capacity to PJM" and thus concluded that the Maryland Commission had "set[] an interstate wholesale rate."[95] The Court further explained that "however legitimate" a State's objective might be, States could not "exercise their traditional authority over retail rates, or … in-state generation" as a means to disregard the wholesale rates established by FERC.[96] "The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result."[97]

If the Commission approves the filing to increase the SSR-E to authorize DP&L to increase its compensation, DP&L and its affiliates would be guaranteed a recovery of wholesale generation-related revenue in excess of the revenue available through the FERC approved market prices. Also, like the Maryland Commission, the Commission would be authorizing DP&L and its affiliates to shift the revenue responsibility of the

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[93] *Id.*

[94] *Id.*

[95] *Id.* (slip op., at 12).

[96] *Id.* (slip op., at 13-14).

[97] *Id.* (slip op., at 12) (c*iting FERC v. EPSA*, 577 U.S. __, __ (2016) (slip op., at 26)).

shortfall to retail customers from DP&L's sole shareholder. The SSR-E, if authorized, would operate as the same sort of mechanism the U.S. Supreme Court held was preempted in *Hughes*. Because wholesale electricity compensation is within the exclusive jurisdiction of FERC, however, the Commission is preempted from authorizing that increase.

III. CONCLUSION

DP&L has not satisfied the conditions for authorization of an increase in the SSR-E. Moreover, the Commission lacks authority to increase the SSR-E rates to allow DP&L to provide above-market compensation to subsidize its affiliate's generation assets and is preempted by federal law from doing so. Accordingly, the Commission should deny DP&L's Motion.

Respectfully submitted,

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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 Memorandum Contra the Motion of the Dayton Power and Light Company to Implement the SSR Extension Rider* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record April 29, 2016, *via* electronic transmission.

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