

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan)))	Case No. 16-0395-EL-SSO
In the Matter of the Application of the Dayton Power and Light Company for Approval of Revised Tariffs)))	Case No. 16-0396-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. 16-0397-EL-AAM

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Since 2014, The Dayton Power and Light Company (“DP&L”) has collected approximately \$248 million from its customers under its Service Stability Rider (“SSR”) to subsidize losses from its uneconomic, unregulated power plants.¹ That huge customer-funded subsidy is apparently not enough. DP&L is back seeking a Service Stability Rider Extension (“SSR-E”). DP&L seeks to take even more money from its customers to cover its generation losses (lower profits) due to competition. The Public Utilities Commission of Ohio (“PUCO”) should just say no. The Ohio Supreme Court held just recently that the PUCO erred when it approved a similar rider for AEP Ohio, where AEP Ohio’s justifications for the rider were the same asserted by DP&L here.²

² See *In re Application of Columbus Southern Power Co.*, 2016 Ohio 1608 (2016).

DP&L seeks to charge consumers through a so-called SSR-E up to \$45.8 million to further subsidize its uneconomic power plants. It does so with a motion that is woefully deficient, from both a procedural and an evidentiary perspective. Further, DP&L's request does not even meet the minimal requirements established by the PUCO for imposing the SSR-E charge on customers. On behalf of the approximately 456,000 residential customers of DP&L, the Office of the Ohio Consumers' Counsel ("OCC") recommends that the PUCO deny DP&L's request.

I. INTRODUCTION

On September 4, 2013, the PUCO approved DP&L's second Electric Security Plan ("ESP").³ The PUCO authorized DP&L to charge customers to subsidize its uneconomic operations through a Service Stability Rider ("SSR") until December 31, 2016.⁴ To account for the possibility that DP&L could not overcome its financial difficulties once the initial customer-funded subsidy ended, the PUCO said that DP&L could seek additional customer-funded subsidies in the form of a charge called the SSR-E.

Initially set at zero, the SSR-E would allow DP&L to charge customers yet more money to offset the declining capacity and lower wholesale prices and the increased customer shopping that has caused DP&L to be less profitable.⁵ In other words, the need for the SSR-E (and the underlying SSR) is driven by DP&L's intent to counter the

³ See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Opinion and Order, Case No. 12-426-EL-SSO (Sept. 4, 2013) ("DP&L ESP II Order").

⁴ DP&L ESP II Order at 26; Entry Nunc Pro Tunc at 2, Case No. 12-426-EL-SSO (Sept. 6, 2013). OCC and others appealed the PUCO Orders. See *In re: DP&L*, S.Ct. 2014-5015.

⁵ DP&L ESP II Order at 17.

competitive forces of the electric generation market through regulatory “relief.” And it intends to do so on consumers’ backs by charging them more money.

In the DP&L ESP II Order, the PUCO established specific conditions that DP&L must meet in order to seek additional subsidies from customers under the SSR-E. Yet DP&L has filed a motion in this unrelated docket seeking authority to charge customers “unless and until the Reliable Electricity Rider (“RER”) is authorized and implemented.”⁶ The motion is “supported” by testimony that is not sworn, subject to cross-examination, or admissible. Make no mistake: DP&L wants to charge customers \$45.8 million more based on a procedurally deficient motion based on unsworn, uncross-examined, inadmissible testimony *before* a hearing on (and regardless of the decision in) its current ESP application. “The Commission should grant DP&L’s motion for approval of the SSR-E, unless and until the RER is approved in this case.”⁷ The PUCO should reject DP&L’s efforts to make an end-run around the procedural and evidentiary rules.

Further, DP&L has not met the conditions precedent established in DP&L ESP II Order. The five conditions precedent to DP&L charging customers under the SSR-E are:

1. show that the SSR-E is necessary to maintain the financial integrity of the utility;
2. file an application for a distribution rate case no later than July 1, 2014;
3. file an application to divest its generation assets by December 31, 2013;
4. file an application to modernize its electric distribution infrastructure through implementation of a smart grid plan and advanced metering infrastructure (“AMI”) by July 2, 2014; and

⁶ See DP&L Motion to Implement the SSR Extension Rider at 1.

⁷ DP&L Memorandum in Support of Motion to Implement SSR-E at 6.

5. file with the PUCO a billing system modernization plan approved by PUCO Staff by December 31, 2014, that includes, at a minimum, rate-ready billing, percentage off price-to-compare (“PTC”) pricing and the ability to support AMI.⁸

Allowing DP&L to charge customers an additional \$45.8 million when it failed to meet these conditions would set a dangerous legal precedent. It would open the door to widespread defiance of PUCO Orders to the detriment of consumers. It is nothing less than an unlawful collateral attack on the PUCO's DP&L ESP II Order.⁹

For these reasons, as explained more fully below, the PUCO should deny DP&L's motion.

II. RECOMMENDATIONS

A. DP&L's motion should be rejected as a matter of law based on recent Ohio Supreme Court precedent.

The PUCO cannot grant DP&L's motion based on the Ohio Supreme Court's decision in *In re Application of Columbus Southern Power Co.*¹⁰ There, the Supreme Court reviewed various PUCO findings in AEP Ohio's ESP II case – including the finding regarding AEP Ohio's Retail Stability Rider (“RSR”). RSR was a nonbypassable rider designed to maintain AEP Ohio's financial integrity and ensure customer certainty regarding retail electric service.¹¹ The Court pointed out that R.C. 4928.38 bars “the receipt of transition revenues *or any equivalent revenues* by any electric utility” after

⁸ DP&L ESP II Order at 27-28, Case No. 12-426-EL-SSO (Sept. 4, 2013).

⁹ See, e.g., *In the Matter of the Commission's Review of Customer Rate Impacts from Ohio Power Company's Transition to Market Based Rates*, Finding and Order, Case No. 13-1530-EL-UNC (March 19, 2014) (rejecting argument that was a collateral attack on previous PUCO order).

¹⁰ 2016 Ohio 1608 (2016).

¹¹ See, e.g., *id.* at P. 8.

2010.¹² Based on that statutory bar to collecting transition revenues, the Court held that the PUCO erred in approving RSR because it allowed AEP Ohio to collect transition or equivalent revenues. In doing so, the Court rejected the two reasons the PUCO offered to support its belief that RSR was legal: 1) AEP Ohio did not expressly seek “transition revenues”, and 2) anything above PJM auction capacity prices cannot be labeled as transition costs.¹³

The SSR and SSR-E are nonbypassable and are designed to maintain DP&L’s financial integrity and ensure customer certainty regarding retail electric service.¹⁴ Like it did in AEP Ohio’s RSR case, the PUCO rejected arguments that SSR (and SSR-E) allowed DP&L to collect transition revenues because DP&L did not expressly seek transition revenues.¹⁵ Were there any doubt that what DP&L is proposing here is exactly what the Ohio Supreme Court invalidated in *In re Application of Columbus Southern Power Co.*, it must be put to rest by the PUCO’s own DP&L ESP II Order. There the PUCO found that its decision approving SSR (and SSR-E) was consistent with the decision “in the AEP ESP II Case, in which [it] determined that AEP Ohio’s proposed RSR did not allow for the collection of inappropriate transition revenues or stranded costs.”¹⁶

¹² Id. at P. 21 (italics in original).

¹³ See id. at PP. 20-37.

¹⁴ See DP&L Memorandum in Support of Motion to Implement SSR-E at 2; DP&L ESP II Order at 17-22.

¹⁵ DP&L ESP II Order at 22.

¹⁶ Id. Also, Staff itself testified that the PUCO had granted “similar charges” (charges similar to SSR and SSR-E) to other utilities, citing to AEP Ohio’s ESP II Case. See id. at 20-21.

The PUCO should deny DP&L's motion on the authority of *In re Application of Columbus Southern Power Co.*¹⁷

B. DP&L's motion should be rejected because it is procedurally improper and is based on unsworn, uncross-examined, inadmissible testimony.

The SSR was approved in DP&L's ESP II case – still an open docket.¹⁸ The SSR-E, and the conditions precedent to charging customers under it, was established in DP&L's ESP II case.¹⁹ So charging customers under the SSR-E has no place in this newly filed, unrelated, pending ESP (DP&L's third).²⁰ The matter should not be considered in this docket.

Further, DP&L wants the PUCO to approve \$45.8 million in charges based on testimony that is unsworn. The testimony has not been and, according to DP&L, will not be, subject to cross-examination. The testimony is obviously out-of-hearing statements offered to prove the truth of the matters asserted.²¹ Not to worry, according to DP&L. "The Commission should grant DP&L's motion for approval of the SSR-E, unless and until the RER is approved in this case."²² The PUCO should not completely disregard evidentiary rules or matters of fundamental fairness, such as allowing parties to cross-

¹⁷ The PUCO should also order DP&L to stop collecting under SSR at least until a decision in *In re: DP&L*, S.Ct. No. 14-1505.

¹⁸ Case No. 12-426-EL-SSO.

¹⁹ *Id.*

²⁰ Case No. 16-0395-EL-SSO.

²¹ See Oh. R. Ev. 802.

²² DP&L Memorandum in Support of Motion to Implement SSR-E at 6.

examine witnesses, as DP&L is inviting it to do here.²³ Nor should it allow DP&L's attempted "end-run" around the Ohio Administrative Code.²⁴

DP&L's motion should be rejected.

C. DP&L has not shown that additional revenues need to be collected from customers so that it can maintain its financial integrity.

The PUCO explicitly stated that when considering whether the SSR-E is necessary to maintain DP&L's financial integrity, it will consider any dividends paid by DP&L to parent companies, such as DPL, Inc., and "all other relevant financial information," including Operation and Maintenance expense savings and capital expenditure reductions.²⁵ The PUCO appeared to be responding to intervenor arguments that dividends should not be paid out of the stability revenues and DP&L should undertake expense and capital expenditure reductions before turning to customers to bail

²³ See, e.g., *In the Matter of the Application of General Telephone Company of Ohio for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 84-1026-TP-AIR, Entry (June 28, 1985) (denying admission into evidence exhibit that was hearsay and not subject to cross-examination); *In the Matter of the Complaint of Gabriela Kaplan v. The Cleveland Electric Illuminating Company*, Case No. 96-663-EL-CSS, Opinion and Order (June 19, 1997) (exhibit excluded as hearsay where not subject to cross-examination); *In the Matter of the Petition of Dale R. Sharkey, et al. v. The Ohio Bell Telephone Co.*, Case No. 87-118-TP-PEX, Entry on Rehearing (May 24, 1998) (finding that Attorney Examiner properly excluded statements where declarants were not present at hearing or subject to cross-examination; "[t]he statements clearly constitute hearsay"). Importantly, asserted "safeguards" present in PUCO proceedings against improper weighing of evidence – a hearing, cross-examination of those pre-filing testimony, PUCO expertise – are not present with DP&L's motion. See, e.g., *In the Matter of the Complaint of Pro Se Commercial Properties v. The Cleveland Electric Illuminating Company*, Case No. 07-1306-EL-CSS, Entry on Rehearing (November 5, 2008) (explaining that concerns with hearsay are not as apparent at PUCO proceedings given hearing, cross-examination, and PUCO expertise); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power 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 No. 11-346-EL-SSO, Opinion and Order (August 8, 2012) (denying motion to strike hearsay only because the hearsay concerned subject matters and information subjected to extensive cross-examination during hearing). There will be no hearing and there will be no cross-examination of those pre-filing testimony. And though the PUCO has expertise, it cannot be meaningfully or effectively applied without the benefit of a hearing and cross-examination to the factual matters raised in DP&L's motion and testimony.

²⁴ See, e.g., O.A.C. 4901-1-29 (requiring that expert testimony be filed before offered, affirming that simply filing testimony is insufficient and that cross-examination is contemplated).

²⁵ DP&L ESP II Order at 27.

it out.²⁶ DP&L has failed to show that additional revenues are needed (for its operations) to maintain its financial integrity.

DP&L bases its claims for additional revenue largely on the testimony of Witness Malinak. But DP&L Witness Malinak's testimony misses the mark. It focuses only on a portion of DP&L's finances – the financial and projected financial conditions of the coal-fired generation assets, which are to be divested soon. It fails to consider the transmission and distribution operations of DP&L.²⁷ And it looks at DPL, Inc.'s (as opposed to DP&L's) financial needs, which are not relevant to any discussion of the SSR-E. DP&L Witness Malinak's direct pre-filed testimony has no specific information regarding the financial condition of DP&L's regulated transmission and distribution activities.

Further, DP&L Witness Malinak's testimony also presents no information regarding the financial condition of DP&L *after the conclusion of the distribution rate case*. Yet that is the very information the PUCO insisted upon seeing before it would consider the SSR-E. That is the reason the PUCO required the rate case filing well in advance of any filing for SSR-E.

The PUCO said that DP&L must file its application for a distribution rate case by July 1, 2014. "The commission will then consider the impact of any adjustment in rates resulting from the distribution rate case in determining the amount of the SSR-E. The Commission believes that conducting a distribution rate case before authorizing the SSR-

²⁶ Id. at 22, 24.

²⁷ See DP&L ESP III, Direct Testimony of R. Jeffrey Malinak at 1, Case No. 16-395-EL-SSO ("I analyze 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. (also "Company") the parent company of The Dayton Power & Light Company ("DP&L").").

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.”²⁸ But as discussed below, DP&L's late distribution rate case filing makes it impossible for the PUCO to determine the impact of any PUCO approved rate adjustments from the distribution filing on DP&L's financial condition.

Apart from any improvement in DP&L's financial position that may result from DP&L's late filed distribution rate case, DP&L's past financial condition has been strong. Table 1 shows, among other things, DP&L's dividend payments, return on equity and net income for 2011 through 2015.²⁹

²⁸ DP&L ESP II Order at 27.

²⁹ 2015 DPL Inc. & DP&L U.S. SEC Form 10-K at 38, 133 accessible at <http://www.sec.gov/Archives/edgar/data/27430/000078725016000035/dpl10k12312015q4.htm>, and 2011-2014 DP&L FERC Form 1 at 121 accessible at <http://www.puco.ohio.gov/emplibrary/files/docketing/AnnualReports/2013/Electric%20Distribution%20&%20Transmission%20Companies%5CDayton%20Power%20and%20Light%20Company%202013%20FERC%201%20SUPP.pdf>; see also *In the Matter of the Continuation of the Rate, Freeze and Extension of the Market, Development Period for the Monongahela Power Company*, Tr. VI at 120-121, Case No. 04-880-EL-UNC, (October 12, 2004) (taking administrative notice of Allegheny Energy's 2003 U.S. SEC Form 10-K).

Table 1: DP&L Financial Condition 2011-2015							
Year	Common Stock Dividends	Net Income Attributable to Common Stock Shareholder	Common Shareholder s' Equity	Return on Equity	Long-term Debts Exclude Current Maturity	Operating Income	Capital Expenditure
2015	\$50	\$105.5	\$1,212.7	8.70%	\$318	\$177.8	\$127
2014	\$159	\$114.1	\$1,143.4	9.98%	\$877	\$188.8	\$114.2
2013	\$190	\$82.7	\$1,204	6.87%	\$876.9	\$139.9	\$122.1
2012	\$145	\$90.3	\$1,299.1	6.95%	\$332.7	\$185	n/a
2011	\$220	\$192.3	\$1,357.9	14.16%	\$903	\$319.9	n/a

*\$ in millions of dollars.

The strength of DP&L's finances has not hindered the significant, yearly dividend payments that DP&L has made to its parent, DP&L Inc. DP&L admits that it has made or will make dividend payments totaling \$75 million to DP&L, Inc. in 2015 and 2016.³⁰ It also expects to receive equity contributions from DPL, Inc. totaling \$213 million in 2017 and 2018.³¹ DP&L conveniently does *not* disclose that (as shown in Table 1) it has paid out \$714 million in dividends to its parent, DPL, Inc., from 2011 to 2014. This fact alone – but certainly coupled with the additional information in Table 1 – demonstrates that DP&L does not have a financial need for the SSR-E.

³⁰ See DP&L Memorandum in Support of Motion to Implement SSR-E at 5 (DP&L states that these dividend payments were or will be used to meet debt obligations and retire debt at DPL, Inc.).

³¹ See DP&L Memorandum in Support of Motion to Implement SSR-E at 5 (DP&L states that these monies will allow DP&L to achieve a 50/50 debt-to-equity ratio as ordered by the PUCO).

DP&L's bond ratings (shown in Table 2) have also been stable in recent years. This is another reason that additional revenues need not be collected from customers under the SSR-E. DP&L is financially stable with no need for an SSR-E.³²

<u>Table 2: DP&L Bond Rating</u>			
<u>Rating Agency</u>	<u>Bond Rating</u>	<u>Outlook</u>	<u>Effective date</u>
Fitch Ratings	BB+	Stable	September 2014
Moody's	Baa3	Stable	October 2015
Standard & Poor's	BB	Stable	May 2014

DP&L has not demonstrated that its financial condition will be negatively impacted in the near future. This is consistent with the rating agencies' bond ratings, which do not indicate any change to DP&L's debt serviceability.

Additionally, the financial condition of DP&L could be enhanced at the conclusion of its pending base distribution rate case.³³ The new base distribution rates are likely to be implemented in early 2017 – precisely when DP&L requests the authority to charge under the SSR-E. This is the very reason that the PUCO required DP&L to file its application for a rate increase by July 1, 2014. Such a filing would have enabled the PUCO to assess whether additional SSR-E revenues are needed on top of any distribution revenues derived from the utilities' distribution rate case. By not timely filing a distribution case, DP&L has deprived the PUCO and intervenors of the clear and reliable data necessary to analyze DP&L's financial integrity. And that is the data that the PUCO

³² Fiscal Year 2015 DPL Inc. and DP&L U.S. SEC Form 10-K at 58 accessible at <http://www.sec.gov/Archives/edgar/data/27430/000078725016000035/dpl10k12312015q4.htm>; see also *In the Matter of the Continuation of the Rate*, supra fn. 11.

³³ *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates*, PUCO Case No. 15-1830-EL-AIR et al.

found would “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.”³⁴

DP&L has also failed to demonstrate that it has undertaken O&M expense savings. OCC and others had argued in DP&L's ESP proceeding that DP&L should be required to undertake O&M savings and reduce capital expenditures before turning to customers for more money.³⁵ At that time, DP&L had identified potential O&M savings for the years 2014 through 2016. The potential O&M savings were used to reduce the SSR granted to DP&L.³⁶

But now the savings assumed in 2016 appear to have disappeared. Instead, the savings DP&L identified in its ESP proceeding are relegated to being “assumed O&M cost savings items that have not yet been identified.”³⁷ In other words, any O&M expenses DP&L claims it will save in 2016 and beyond are “assumed” and “unidentified.” DP&L appears to have abandoned the savings it identified in its ESP. This is convenient for DP&L because it allows it to ask for more money from customers now. DP&L should be required to produce verifiable facts and figures demonstrating cost savings measures before it is granted authority to charge consumers \$45.8 million for a rider designed to “ensure DP&L's financial integrity.”³⁸

DP&L claims poverty – that it needs the SSR-E to maintain its financial integrity. DP&L has made similar arguments in the past, while earning phenomenal returns of 20%

³⁴ DP&L ESP II Order at 27.

³⁵ Id. at 22-23.

³⁶ DP&L ESP II Order at 25.

³⁷ DP&L Motion to Implement SSR-E, Ex. 2 at 4.

³⁸ DP&L Memorandum in Support of Motion to Implement SSR-E at 2.

or more in 7 of the 10 years from 2001 to 2010.³⁹ The real poverty is in DP&L's service territory. The poverty rate in Dayton, Ohio is 35.3%.⁴⁰ The electric disconnection rate for customers in Dayton, Ohio is 6.7%.⁴¹ DP&L should be required to tighten its own belt before the PUCO authorizes it to collect more money from its customers. DP&L's motion should be denied.

D. DP&L has not satisfied the second condition of fully exhausting other opportunities for rate relief before charging consumers for the SSR-E.

As a condition precedent to implementing the SSR-E, DP&L “*must* file an application for a distribution rate case . . . no later than July 1, 2014.”⁴² As DP&L concedes, DP&L filed a distribution rate case on November 30, 2015 – 518 days after the PUCO’s mandatory deadline.⁴³ DP&L provides no explanation for why it did not file. DP&L’s failure to file, alone, is more than sufficient grounds for the PUCO to deny DP&L’s motion.

What DP&L does attempt to explain is why the PUCO should excuse it from complying with the PUCO Order. DP&L falls far short of the mark. The PUCO specified the second condition because it believes DP&L should exhaust all opportunities for rate relief, in order to ensure its financial integrity, before seeking a customer bail out under the SSR-E.⁴⁴ Accordingly, the PUCO stated that conducting a distribution rate case

³⁹ See Case No. 12-426-EL-SSO, Direct Testimony of IEU Witness Joseph G. Bowser at Exh. JGB-4.

⁴⁰ The Ohio Poverty Report (February 2016).

⁴¹ See Case No. 15-0882-GE-UNC, Report (June 30, 2015).

⁴² DP&L ESP II Order at 27 (emphasis added).

⁴³ In DP&L's brief filed at the Ohio Supreme Court it complained that it “needs to do an extraordinary amount of work to prepare a distribution rate case for filing,” and “that work is time consuming.” S.Ct. 2014-5015 DP&L Merit Brief at 44-45 (Jan. 20, 2015). It also complained that the PUCO's Order required it “to do a substantial amount of work on other matters” and it “would have been impossible for DP&L to file a distribution rate case by July 1, 2014.” Id.

⁴⁴ See DP&L Motion to Implement SSR-E, Ex. 2 at 4.

before authorizing the SSR-E will provide the PUCO and parties the opportunity to evaluate whether DP&L's financial integrity is at risk and, thus, whether customers should be charged under the SSR-E.⁴⁵ Astonishingly, DP&L claims that the PUCO and all other parties should be able to make such a calculation during the pendency of its distribution rate case by reading its pre-filed direct testimony and any other information that parties happen to request through the ongoing discovery process.⁴⁶ DP&L apparently assumes that the PUCO and all parties agree that every dollar it is requesting in its application is justified.

DP&L's failure to file a timely distribution rate case is fatal to its request for consumer-funded financial assistance. The PUCO ordered DP&L to file its distribution rate case application by July 1, 2014. This was required so that the PUCO and parties would have "increased certainty necessary to evaluate whether DP&L's financial integrity is at risk and whether the SSR-E is necessary."⁴⁷ The PUCO explicitly stated that the purpose of this condition was so it could "consider the impact of any adjustment in rate resulting from the distribution rate case in determining the amount of the SSR-E."⁴⁸ DP&L's 518-day-overdue filing has denied the PUCO, and all other parties, this opportunity. Relying on DP&L's pre-filed direct testimony and facts gathered in still-ongoing discovery are no remedy. DP&L's filing on its face does not provide "increased certainty necessary to evaluate whether DP&L's financial integrity is at risk and whether the SSR-E is necessary."⁴⁹

⁴⁵ See DP&L Motion to Implement SSR-E, Ex. 2 at 4.

⁴⁶ See *id.*

⁴⁷ DP&L ESP II Order at 27.

⁴⁸ DP&L ESP II Order at 27.

⁴⁹ DP&L ESP II Order at 27.

DP&L failed to file an application for a distribution rate case by July 1, 2014, instead choosing to file such an application 518 days after the PUCO's mandatory deadline. This error makes it impossible for the PUCO to adequately evaluate DP&L's request. There can therefore be but one conclusion: DP&L has failed to satisfy the PUCO's second condition precedent to charge under the SSR-E. DP&L's motion should be denied.

E. DP&L has not satisfied the fourth condition precedent to file an application to modernize its electric distribution system for consumers.

A condition precedent to DP&L charging under the SSR-E is filing an application by July 2, 2014 to modernize its electric distribution infrastructure through implementation and deployment of smart grid technologies and AMI.⁵⁰ DP&L failed to do this. Its motion should therefore be denied.

F. DP&L has not satisfied the fifth condition precedent to modernize its billing system for consumers.

As a condition precedent to charging consumers under the SSR-E, the PUCO ordered that DP&L "must establish and begin implementation of a plan to modernize its billing system."⁵¹ The PUCO ordered that, "at a minimum[,] . . . the billing system modernization should include rate-ready billing, percentage off price-to-compare (PTC) pricing, and the ability to support AMI."⁵² DP&L was to file "with the Commission a billing system modernization plan approved by Staff by December 31, 2014[.]"⁵³

⁵⁰ DP&L ESP II Order at 28.

⁵¹ DP&L ESP II Order at 28.

⁵² DP&L ESP II Order at 28.

⁵³ DP&L ESP II Order at 28.

In its instant motion DP&L states that its billing system can perform rate-ready billing and percentage off PTC pricing. DP&L does not state that its billing system has the ability to support AMI as the PUCO required. In fact, as stated above, DP&L freely admits that it is still “considering” whether it will even implement AMI at all.⁵⁴ Therefore, DP&L is, again, not in compliance with the PUCO directives. Its motion should be denied.

G. Substantial compliance with the PUCO’s conditions precedent is not sufficient for PUCO approval.

Admitting that it has not complied with the conditions precedent in the DP&L ESP II Order, DP&L asserts that “substantial compliance” is sufficient to comply with PUCO orders.⁵⁵ DP&L cites four cases in support of its theory. But none of the four cases have facts that are close to those at issue here. Instead, the cases confirm that DP&L has not complied or substantially complied with the DP&L ESP II Order.

In the Duke AMRP case,⁵⁶ the PUCO analyzed whether Duke was in compliance with the requirements of an approved stipulation in order to adjust its Accelerated Main Replacement Program Rider. The stipulation required Duke to make a pre-filing notice to relevant parties “by November of each year” and to subsequently file an “application and an update of year-end actual data by the following February 28 of each year.”⁵⁷

Duke made its pre-filing notice on November 27, 2009, and filed its application on February 26, 2010. But in a later, unopposed motion seeking a finding that its notice was in compliance with the stipulation, Duke explained that the notice it mailed to some

⁵⁴ DP&L Memorandum in Support of Motion to Implement SSR-E at 6.

⁵⁵ DP&L Memorandum in Support of Motion to Implement SSR-E at 3-6.

⁵⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates, et al.*, Case No. 09-1849-GA-RDR (“March 5, 2010 Entry”) (“Duke AMRP”).

⁵⁷ March 5, 2010 Entry at 1.

of the relevant parties had a “clerical error that caused some of the information in the first two sections [of a three section letter] to be incorrect.”⁵⁸ Duke promptly mailed a corrected notice on December 11, 2009.⁵⁹ The PUCO granted Duke’s motion because: (1) Duke’s motion was unopposed; (2) Duke made a “timely correction of the clerical error upon discovery”; and (3) “the length of time between the correction of the error and the filing of the application [February 26, 2010]” was still sufficient notice to the relevant parties.⁶⁰

The Duke AMRP case is plainly inapposite here. First, Duke’s mistake in the AMRP case was a trivial clerical error concerning provisions of a stipulation that had little or no impact on the outcome of the proceeding. DP&L’s mistakes here are not irrelevant clerical oversights. They are fatal errors that go to the heart of the PUCO’s determination on this motion. Second, DP&L’s motion to implement the SSR-E is opposed. Third, in not satisfying the PUCO’s five conditions precedent, DP&L has made no “corrections,” let alone timely ones, to correct its noncompliance. Fourth, because it has taken no corrective actions, DP&L has deprived the PUCO and parties of extremely pertinent information that is crucial to determining whether DP&L’s financial integrity is at risk and whether the SSR-E is necessary. It is impossible for DP&L to comply with these requirements now.

⁵⁸ March 5, 2010 Entry at 2.

⁵⁹ March 5, 2010 Entry at 2.

⁶⁰ March 5, 2010 Entry at 2.

DP&L cites to two cases involving audits of National Gas & Oil Corporation's⁶¹ ("National") and Eastern Natural Gas Company's⁶² ("Eastern") purchase gas adjustment clauses and related matters. In these cases, the auditors found that National and Eastern acted reasonably and prudently in purchasing their gas.⁶³ In *National*, the auditor made recommendations that National "agreed to institute this recommendation as a part of the stipulation."⁶⁴ The PUCO requested that in National's next management/performance audit GCR proceeding, the auditor review National's commitments "[i]n order to confirm that National complied with the recommendations and the stipulation."⁶⁵

Here, instead of an audit, the PUCO ordered DP&L to file an application to implement SSR-E (and a distribution rate case, before that) so that the PUCO itself could examine whether DP&L had complied with the conditions in the DP&L ESP II Order. DP&L must comply with the conditions. Then – and *only* then – will DP&L be in substantial compliance with the ESP II Order. DP&L is lightyears away from complying with the PUCO's requirements.

In *Eastern*, the PUCO held that "[w]ith the implementation of the recommendations contained in this Opinion and Order, Eastern will have substantially complied" with the relevant orders.⁶⁶ Eastern was not in substantial compliance until it

⁶¹ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of National Gas & Oil Corporation and Related Matters*, Pub. Util. Comm. 90-16-GA-GCR, 1991 Ohio PUC LEXIS 129 ("Jan. 31, 1991 Opinion and Order").

⁶² *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of E. Natural Gas Co. and Related Matters*, Pub. Util. Comm. 89-29-GA-GCR, 1990 Ohio PUC LEXIS 504 ("May 17, 1990 Opinion and Order").

⁶³ Indeed, the only error found in Eastern's audit was a \$69.00 error in one recording in Eastern's book cost of gas. May 17, 1990 Opinion and Order at *4-5.

⁶⁴ Jan. 31, 1991 Opinion and Order at *34.

⁶⁵ Jan. 31, 1991 Opinion and Order at *34.

⁶⁶ May 17, 1990 Opinion and Order at *7 (emphasis added).

implemented the recommendations spelled out in the PUCO's Opinion and Order. There is no difference here: DP&L is not in compliance or substantial compliance with the PUCO's ESP II Order regarding charging under the SSR-E until it demonstrates that it has satisfied the five conditions precedent noted in that Order.⁶⁷ It has not done so, and cannot do so.

DP&L cites to a case from 1986, *CCTC*,⁶⁸ in which the PUCO authorized the Columbus Cellular Telephone Company ("CCTC") to furnish cellular mobile telephone service to the Columbus Metropolitan Area. The grant of authority was contingent on CCTC filing its interconnection agreement with landline telephone companies at the PUCO and receiving PUCO approval before commencing its operations.⁶⁹

CCTC filed the agreement on July 10, 1986, asking that the PUCO approve it with an effective date of July 11, 1986.⁷⁰ CCTC explained that negotiating the agreement took longer than expected because it could not reach an agreement for Type 2 interconnection and had to reach agreement for only Type 1 interconnection.⁷¹ Further, CCTC incorporated all of the relevant contract provisions that the PUCO required.⁷² The PUCO approved the agreement (effective July 11, 1986) because CCTC was in

⁶⁷ Sept. 4, 2013 Opinion and Order at *5-6.

⁶⁸ *In the Matter of the Application of the Columbus Cellular Telephone Company for a Certificate of Public Convenience and Necessity to Provide Cellular Telecommunication Services in the Columbus Metropolitan Statistical Area and Vicinity*, Case No. 85-797 RC-ACE, 1986 Ohio PUC LEXIS 763, Opinion and Order ("July 22, 1986 Opinion and Order").

⁶⁹ July 22, 1986 Order at *1.

⁷⁰ July 22, 1986 Order at *1.

⁷¹ July 22, 1986 Order at *1 - *2.

⁷² July 22, 1986 Order at *2.

“substantial compliance” with the PUCO requirement that CCTC file the agreement before commencing service and CCTC acted in good faith.⁷³

Here, DP&L has not implemented the requirements spelled out by the PUCO in the DP&L ESP II Order. DP&L has not provided any explanation for its complete inaction on numerous requirements or how this inaction constitutes good faith. No matter what arguments DP&L produces in its Reply, it cannot overcome its complete abdication of the DP&L ESP II Order conditions. The reality is that DP&L has not come close to actually complying with the PUCO’s five mandatory conditions to implement the SSR-E. DP&L’s motion must be denied.

III. CONCLUSION

The PUCO should protect Ohio consumers and the public interest from DP&L’s unwarranted charges. The Ohio Supreme Court did so regarding AEP Ohio’s RSR and, based on that authority, the PUCO is compelled to do so here. DP&L’s motion is woefully deficient, both procedurally and as an evidentiary matter. DP&L has failed to comply with the conditions identified by the PUCO for charging consumers under SSR-E. DP&L has even failed to show (because it cannot show) the *need* to charge consumers. The PUCO should stand by its DP&L ESP II Order and deny DP&L’s Motion.

⁷³ July 22, 1986 Opinion and Order at *2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra Dayton Power & Light's Motion to Implement the SSR Extension was served upon the persons listed below via electronic transmission this 29th day of April, 2016.

/s/William Michael

William Michael

Assistant Consumers' Counsel

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