

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) **Case No. 08-1094-EL-SSO**
Approval of its Electric Security Plan.)

In the Matter of the Application of The)
Dayton Power and Light Company for) **Case No. 08-1095-EL-ATA**
Approval of Revised Tariffs.)

In the Matter of the Application of The)
Dayton Power and Light Company for)
Approval of Certain Accounting) **Case No. 08-1096-EL-AAM**
Authority Pursuant to Ohio Rev. Code)
Section 4905.13.)

In the Matter of the Application of The)
Dayton Power and Light Company for) **Case No. 08-1097-EL-UNC**
Approval of its Amended Corporate)
Separation Plan.)

**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING AND
MEMORANDUM IN SUPPORT**

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JANUARY 17, 2020

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Table of Contents

I.	Introduction.....	1
II.	Argument.....	2
	A. The Commission Erred by Not Continuing the Economic Development Provisions from ESP III	2
	1. The Order is unlawful and unreasonable and violates R.C. 4903.09 due to the Commission’s failure to explain why the Commission believes the RSC is not an equivalent economic stability charge.....	2
	2. The Order is unlawful and unreasonable and against the manifest weight of the evidence as a result of the Commission’s conclusion that the RSC is not a successor financial stability charge.	5
	3. The Order is unlawful and unreasonable because the Commission concluded it was precluded from considering whether the economic development provisions from ESP III should continue.....	6
	4. The Order is unlawful and unreasonable because it modified the ESP III stipulation without providing a substantively lawful and reasonable explanation for the change in course.....	9
	B. The Commission Erred by Reinstating the RSC.....	10
	1. The Order is unlawful and unreasonable because the Commission failed to respect its precedent which requires the Commission to consider whether a charge being reinstated can prospectively be justified at a non-zero rate.....	10
	2. The Order is unlawful and unreasonable because it implements the RSC that is no longer a cost-based nonbypassable charge.....	12
	C. The RSC Does Not Satisfy the Requirements for a POLR Charge	13
	1. The Order is unlawful and unreasonable because it authorizes a POLR charge that is not based on actual incurred costs.	13
	2. The order is unlawful and unreasonable because it authorized a POLR charge unrelated to DP&L’s actual POLR risks.....	14
	3. The Order is unlawful and unreasonable because it authorized a POLR charge that is not avoidable by shopping customers that agree to return to the SSO at market-based rates.	15
III.	Conclusion.....	16

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**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING**

Industrial Energy Users-Ohio ("IEU-Ohio") submits this Application for Rehearing of the December 18, 2019 Second Finding and Order ("Order") of the Public Utilities Commission of Ohio ("Commission"). Specifically, IEU-Ohio alleges that the Order is unlawful and unreasonable in the following respects:

A. The Commission Erred by Not Continuing the Economic Development Provisions from ESP III

1. The Order is unlawful and unreasonable and violates R.C. 4903.09 due to the Commission's failure to explain why the Commission believes the Retail Stability Charge ("RSC") is not an equivalent economic stability charge.
2. The Order is unlawful, unreasonable and against the manifest weight of the evidence as a result of the Commission's conclusion that the RSC is not an equivalent economic stability charge.

3. The Order is unlawful and unreasonable because the Commission concluded it was prohibited from considering whether the economic development provisions from ESP III should continue.
4. The Order is unlawful and unreasonable because it declined to continue provisions from the ESP III Stipulation without providing a substantively lawful and reasonable explanation for the change in course.

B. The Commission Erred by Reinstating the RSC

5. The Order is unlawful and unreasonable because the Commission failed to respect its precedent which requires the Commission to consider whether a charge being reinstated can prospectively be justified at a non-zero rate.
6. The Order is unlawful and unreasonable because it implemented the RSC despite it no longer being a cost-based nonbypassable charge.

C. The RSC Does Not Satisfy the Requirements for a POLR Charge

7. The Order is unlawful and unreasonable because it authorized a POLR charge that is not based on actually incurred costs.
8. The Order is unlawful and unreasonable because it authorized a POLR charge unrelated to DP&L's actual POLR risks.
9. The Order is unlawful and unreasonable because it authorized a POLR charge that is not avoidable by shopping customers that agree to return to the SSO at market-based rates.

To correct these errors in the Order, the Commission should grant rehearing and modify the Order consistent with IEU-Ohio's arguments herein. Specifically, the Commission should grant rehearing and authorize the continuance of the economic development provisions enumerated in Sections IV and V of the ESP III Stipulation, or in the alternative, do one of the following: (1) terminate the RSC; (2) set the RSC rate to zero; or (3) make the RSC bypassable by shopping customers that agree to return to the SSO at market-based rates.

Dated: January 17, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

IEU-Ohio's challenge here focuses on the real-world effect of the Commission's decision to abandon the economic development provisions contained in the ESP III Stipulation.¹ That Stipulation contemplated the continuation of the economic development provisions after the lifespan of the Distribution Modernization Rider ("DMR"). There was no hiding the issue; it was clearly provided for in the Stipulation and authorized by the Commission. The Commission, however, has treated these very critical provisions of a settlement package as an afterthought, dedicating two sentences of the order to the

¹ *In re Application of DP&L for Approval of its Electric Security Plan* ("ESP III"), Case No. 16-395-EL-SSO, Amended Stipulation and Recommendation at 38-39 (Mar. 14, 2017) ("ESP III Stipulation").

summary rejection of the extension of these material provisions.² The economic development provisions warrant more attention, and the law requires it.

Instead of IEU-Ohio receiving the benefit of the bargain in the ESP III case, the Commission has thrown out terms of a Stipulation under a legal theory contradicted by prior and recent decisions. The Commission is not handcuffed from considering whether the economic development provisions should continue. Moreover, in the absence of the benefit of the bargain from the ESP III case, IEU-Ohio was returned to a litigation position it had sought to set aside to reach a mutually workable result for IEU-Ohio, DP&L, and the greater public interest. As discussed in more detail below, a Rate Stabilization Charge (“RSC”) that is not coupled with the economic development provisions yields and unjust and unreasonable result. The Commission should grant this application for rehearing.

II. ARGUMENT

A. The Commission Erred by Not Continuing the Economic Development Provisions from ESP III

1. The Order is unlawful and unreasonable and violates R.C. 4903.09 due to the Commission’s failure to explain why the Commission believes the RSC is not an equivalent economic stability charge.

Although required to provide its rationale for reaching its legal conclusions the Commission fell short in the Order. Specifically, the Commission concluded, without analysis, that the RSC was not a successor financial integrity charge.³ The Commission

² *In re Application of DP&L for Approval of its Electric Security Plan (“ESP I”)*, Case No. 08-1094-EL-SSO, Second Finding and Order ¶ 40 (Dec. 18, 2019) (“Order”).

³ *Id.*

is required to do more and should therefore grant rehearing and provide the required analysis.

R.C. 4903.09 requires the Commission to “file findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The purpose of this statutory requirement is to “provide the court with sufficient details to enable it to determine how the commission reached its decision.”⁴ To comply with this standard the Commission must do more than “summarily conclud[e]” that a party’s position is incorrect, it must explain “*how*” it reached that determination.⁵ The Commission’s failure to comply with the standard and explain a material matter brought to its attention on rehearing is reversible error.⁶

In its November 27, 2019 Entry in this docket, the Commission solicited comments from interested parties on the impact of DP&L’s proposed withdrawal from ESP III, and on the resulting proposed tariffs, which intended to reinstate the RSC from ESP I.⁷ In its comments, IEU-Ohio asserted that the RSC is an equivalent successor economic stability charge to the DMR, and thus, subject to certain conditions agreed to in the ESP III Stipulation; conditions that were approved by the Commission.⁸

⁴ *In re Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan*, 2016-Ohio-7535, ¶ 16 (quoting *Allnet Comm. Servs., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994)).

⁵ *Id.* ¶ 22 (emphasis in original).

⁶ *See id.* ¶ 19.

⁷ *See* ESP I, DP&L Revised Tariff Sheets, PUCO Electric Tariff Sheet No. 17 (Nov. 26, 2019).

⁸ While this type of charge has historically gone by different names or descriptions depending on the utility or proceeding, for purposes of this application such charges will be described either as “financial integrity” or “economic stability” charges. *See, e.g.*, ESP I, IEU-Ohio’s Response to DP&L Notice of Withdrawal at 6-8 (Dec. 4, 2019); ESP III, Opin. & Order at 9-10, 15-16, 23 (Oct. 20, 2017) (“ESP III Order”).

In the Order, the Commission concluded the RSC was not a successor financial integrity charge. The entirety of the Commission's response to the question is the following:

Likewise, we disagree with IEU-Ohio and Dayton/Honda that the economic development provisions of the amended stipulation filed in the ESP III Case should be continued. We are not persuaded that the RSC, as a POLR charge, is "an equivalent economic stability charge" pursuant to the amended stipulation. Opinion and Order at ¶ 14.⁹

These two conclusory sentences are insufficient to discern the Commission's reasoning. The Commission is required to explain why it does not believe the RSC is a financial integrity charge (as discussed in the next section, a result that is incompatible with the Commission's prior definitions of POLR charges like the RSC as financial integrity charges).

The determination of whether the RSC is a financial integrity charge is material because it effects the determination of whether the economic development provisions from the ESP III Stipulation should have been continued. The economic development provisions were a material provision in the ESP III Stipulation that led to parties putting down their litigation position in an effort to reach a reasonable compromise. In the Commission's own words, these provisions "support[] state policy to facilitate the state's effectiveness in the global economy."¹⁰ The Commission should grant rehearing and conclude that the RSC is a successor financial integrity charge, but if it still disagrees it must provide its reasoning for reaching that conclusion.

⁹ Order at 15-16.

¹⁰ ESP III Order at 41 (Oct. 20, 2017).

2. The Order is unlawful and unreasonable and against the manifest weight of the evidence as a result of the Commission's conclusion that the RSC is not a successor financial stability charge.

The Commission's conclusion that the RSC is not a financial integrity charge is erroneous and contradicts a recent Commission decision. The information before the Commission requires the Commission to grant rehearing and conclude that the RSC is a financial integrity charge.

Commission decisions must be based on the information before the Commission.¹¹ Decisions that run contrary to the manifest weight of the evidence are unlawful and unreasonable.¹²

In the Supplemental Order in the ESP III Case, issued just two months ago, the Commission defined POLR charges as financial integrity charges.

Since the enactment of Am. Sub. S.B. 221 in 2008, which established the electric security plan statutory framework, the Supreme Court of Ohio has ruled on a line of cases on nonbypassable riders in electric security plans established to address financial risk or the financial stability of an EDU in this state. In each of these cases, the Commission relied upon various provisions in R.C. 4928.143(B)(2) as authority for these nonbypassable financial stability riders. In each of these cases, the Supreme Court reversed the Commission.

In the first of this line of cases, the Commission established a nonbypassable provider-of-last-resort (POLR) charge in AEP Ohio's first electric security plan case, based upon the costs incurred by AEP Ohio as the default service provider. The Supreme Court overturned this POLR charge, holding that the Commission's decision was against the manifest weight of the evidence.¹³

¹¹ See R.C. 4903.09.

¹² *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 29.

¹³ *In re Application of DP&L for Approval of its Electric Security Plan* ("ESP III"), Case No. 16-395-EL-SSO, Supplemental Opin. & Order at 43-45 (Nov. 21, 2019) ("ESP III Supplemental Order").

By the Commission's own, and recent, definition, AEP-Ohio's POLR charge was the first in a line of financial integrity charges authorized by the Commission and reversed by the Court.

There is no dispute that the RSC was authorized as a POLR charge. The Commission itself has stated that the RSC is a POLR charge, including in the Order.¹⁴ The definition of POLR charges as financial integrity charges in the ESP III Supplemental Order is incompatible with the Commission's conclusion here that the RSC is not a financial integrity charge.

Moreover, the Commission concluded there are only two types of nonbypassable charges in the ESP statute: cost-based charges and financial integrity charges. As discussed in the subsequent sections, the RSC is not recovering any actual costs for DP&L. The RSC is a financial integrity charge and the Commission should grant rehearing and find that the RSC is a successor financial integrity charge.

3. The Order is unlawful and unreasonable because the Commission concluded it was precluded from considering whether the economic development provisions from ESP III should continue.

In the Order the Commission concluded not that it was making a conscience decision to eliminate the economic development provisions, but that it was required to do so because they were terms of an ESP that was withdrawn. That conclusion is incorrect.

The Order states that the Commission "is bound by the plain language of R.C. 4928.143(C)(2)(b)," specifically the requirement that if a utility terminates its ESP application, "the commission *shall* issue such order as is necessary to continue the

¹⁴ Order ¶ 40.

provisions, terms, and conditions of the utility’s most recent standard service offer” until a subsequent ESP is approved.¹⁵ According to the Order, because DP&L withdrew ESP III, “the Commission *must* restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.”¹⁶ The Order also states that any provisions created in ESP III “should be eliminated with the withdrawal of ESP III.”¹⁷

The Commission believes itself to be strictly limited in its authority regarding the withdrawal of ESP III and reinstatement of ESP I. But the last time DP&L withdrew its ESP, the Commission was not similarly bound. As the Order itself points out, the Finding and Order reinstating ESP I after the withdrawal of ESP II authorized (over the objections of other parties like IEU-Ohio) DP&L to continue the nonbypassable transmission charge approved in ESP II, despite ESP I containing a bypassable transmission charge. The Commission offered the reasoning for doing so as avoiding “unduly disrupt[ing]” individual customer contracts.¹⁸ Focusing on the potential for disruption and the need for flexible regulatory treatment, the Commission concluded it could continue the nonbypassable transmission charge because it wasn’t prohibited or incompatible with ESP I.¹⁹

The Commission reached a similar conclusion for DP&L’s Storm Rider. The Storm Rider was created in ESP II. When DP&L withdrew ESP II and reverted to ESP I, IEU-Ohio opposed the continuation of the charge. The Commission disagreed, concluding that the ESP I stipulation authorized DP&L to request approval of a storm rider.²⁰

¹⁵ Order ¶ 26 (emphasis added).

¹⁶ *Id.* ¶ 27.

¹⁷ *Id.* ¶ 37.

¹⁸ ESP I, Finding and Order ¶ 21, 24 (Aug. 26, 2016); *see also* Order ¶ 28.

¹⁹ ESP I, Third Entry on Rehearing at 8 (Dec. 14, 2016).

²⁰ ESP I, Finding and Order ¶ 26 (Aug. 26, 2016).

Applying that logic here, the economic development provisions could continue if the Commission decided to rely on the state policy encouraging flexible regulatory treatment, if discontinuance would be disruptive, or if the economic development provisions aren't prohibited by or incompatible with the ESP I.

As to the first two, the Commission recognized the importance of the economic development provisions in complying with the state's energy policy and helping to facilitate the competitiveness of businesses served by DP&L in the global economy.²¹ Ceasing the economic development provisions would also be disruptive to the many businesses that relied upon the Commission-approved settlement. These businesses need certainty to prepare operating budgets. They compete for internal allocations of capital in the global market. They are businesses that sell products in the global market. Circumstances here support the Commission's flexible regulatory treatment in extending the economic development provisions, just like it previously provided to others.

Finally, continuing the economic development provisions is not prohibited by or incompatible with ESP I. The ESP I Stipulation provides that its purpose is to "provide stable rates."²² The ESP I Stipulation also provides for authorization of an Economic Development Rider for "recovery (if any) of delta revenues associated with economic development contracts and other reasonable or unique arrangements."²³ ESP I clearly contemplated the existence of economic development funds being provided to customers and recovered through the EDR. Continuing the economic development provisions also satisfies the "stable rates" purpose of the ESP I Stipulation. The situation with the

²¹ ESP III Order at 41.

²² ESP I, Stipulation and Recommendation at 3 (Feb. 24, 2009).

²³ *Id.* at 7.

economic development provisions is no different than the continuation of the nonbypassable transmission rider or storm rider. The Commission is not precluded from continuing these economic development provisions and should grant rehearing and reinstate them.

4. The Order is unlawful and unreasonable because it modified the ESP III stipulation without providing a substantively lawful and reasonable explanation for the change in course.

The Commission erred when it changed course without a substantively lawful and reasonable explanation.²⁴ The ESP III Stipulation required the Commission to extend the economic development provisions when it reinstated the RSC. The Commission deviated from that course and provided no explanation. Moreover, under the circumstances, the deviation was not lawful or reasonable.

The ESP III Stipulation was a package of terms agreed to by the Signatory Parties. One of the carefully negotiated items was a series of economic development provisions designed to provide economic development support to Ohio businesses that may otherwise face significant negative effects due to the results of the imposition of economic stability charges on those businesses. The Commission agreed that the package of terms and conditions was reasonable.²⁵ Without the continuation of these provisions, the Commission has removed the economic development support that it previously recognized “support[ed] state policy to facilitate the state’s effectiveness in the global

²⁴ Order ¶ 40; see R.C. 4903.09.

²⁵ ESP I Order ¶ 130 (“Upon consideration of the record, we find that the Amended Stipulation, as modified by the Commission, satisfies the three prong criteria employed by the Commission for consideration as to the reasonableness of a stipulation.”)

economy.”²⁶ The Commission has also taken no evidence about or given any consideration to the effects of continuing a financial integrity charge without these economic development provisions. No rationale could be reasonable without the evidence to support that conclusion.²⁷ Accordingly, the Commission failed to offer a reasonable basis for deviation and until it receives evidence, no change in course could be considered substantively reasonable.

Moreover, while the Commission can revisit prior decisions, including those approving stipulations, modifying the carefully crafted terms and conditions of a stipulation should not be taken lightly. To do otherwise could work to discourage future compromises among the parties and simply lead to more litigation before the Commission. The modification of the ESP III Stipulation was unreasonable, and the Commission should grant rehearing, reverse course, and restore the economic development provisions.

B. The Commission Erred by Reinstating the RSC

- 1. The Order is unlawful and unreasonable because the Commission failed to respect its precedent which requires the Commission to consider whether a charge being reinstated can prospectively be justified at a non-zero rate.**

The Commission has the authority and duty to ensure that when it reinstates a prior ESP, the terms and conditions it is reinstating continue to be just and reasonable.²⁸ If the Commission reinstates the RSC at its previous rate without any evidence of its reasonableness or without any mitigating factors in place such as the economic

²⁶ ESP III Order ¶ 81. See also *In re Application of FirstEnergy*, Case No. 14-1297-EL-SSO, Opin. & Order at 223-225; *In re Application of AEP Ohio*, Case No. 13-2385-EL-SSO, Opin. & Order at 186 (Feb. 25, 2015).

²⁷ See R.C. 4903.09.

²⁸ See R.C. 4905.22.

development provisions discussed above, it will produce an unjust and unreasonable result.

This statutory duty is not a theoretical one but in fact one the Commission has already had to practice. As outlined above, several terms were altered or preserved from ESP II when DP&L terminated that application and the Commission subsequently reinstated ESP I. One of the terms at issue was the Environmental Investment Rider (“EIR”). In the first Finding and Order reinstating ESP I, the Commission reinstated the EIR but set the rate to zero.²⁹ The reasoning given by the Commission was that the generating units and the associated environmental controls were no longer being used to provide service, and therefore were not producing costs to recover through the rider.³⁰ To comply with the mandate to restore the terms and conditions of the prior SSO under R.C. 4928.143(C)(2)(b), while still ensuring that rates were just and reasonable, the Commission modified a term of the previous ESP and directed the rate to be changed and set to zero. The Commission had a duty to ensure rates were just, reasonable, and carried out that duty with respect to the EIR.

The Commission need not solely rely on the precedent of the previous Finding and Order in this case, but can look to R.C. 4905.26, which it has found gives it “considerable authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility, which the Ohio Supreme Court

²⁹ ESP I, Finding and Order ¶ 22 (Aug. 26, 2016).

³⁰ *Id.*

has affirmed on several occasions.”³¹ The Supreme Court has upheld this authority, so long as the new course is just and reasonable.³²

As with the EIR, the costs associated with the RSC no longer exist. As discussed in more detail below, the RSC rates were set based on DP&L’s claim of increased generation costs.³³ The generating plants at issue with the EIR are the same plants and costs that led to the creation of the RSC.

If the Commission relies on the reasoning it employed with respect to the EIR, it can set the RSC rates to zero. If the Commission looks to its authority in the complaint statute, IEU-Ohio would encourage the Commission to unilaterally initiate such a proceeding, schedule a hearing, and set the RSC rate subject to refund pending the outcome of a review of whether there are any underlying and lawfully collectible POLR costs through the RSC.

2. The Order is unlawful and unreasonable because it implements the RSC that is no longer a cost-based nonbypassable charge.

In considering whether to reinstate the RSC at non-zero rates, or at all, the Commission must look to its recent ESP III Supplemental Order and conclude that the RSC should not have been reinstated at all.³⁴ In that decision the Commission defined nonbypassable ESP charges as falling into two categories: lawful cost-based charges, and unlawful, non-cost-based charges authorized for a variety of reasons best summed

³¹ *AEP Ohio Capacity Case*, Case No. 10-2929-EL-UNC, Entry on Rehearing at 9 (October 17, 2012); see also *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485 (the Commission’s “prior orders can be collaterally attacked through R.C. 4905.26 complaint proceedings.”).

³² *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 52.

³³ See generally, *In re Application of DP&L for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR.

³⁴ See ESP III Supplemental Order at 43-45.

up as providing financial stability to the utility.³⁵ As discussed herein, the RSC is not collecting any actual costs. The RSC is therefore an unlawful, non-cost-based nonbypassable charge.

C. The RSC Does Not Satisfy the Requirements for a POLR Charge

1. The Order is unlawful and unreasonable because it authorizes a POLR charge that is not based on actual incurred costs.

POLR charges may only collect actual costs associated with an EDU's POLR risks and costs. The RSC rates bear no relation to any actual POLR costs.

In the appeal of AEP Ohio's ESP I, the Supreme Court found that AEP Ohio's formula-based charge did not bear a reasonable relationship to costs or risks.³⁶ The Supreme Court said that charges must bear a relationship to costs, and "admonished the commission to 'carefully consider what costs it is attributing' to 'POLR obligations.'"³⁷ On remand in that case, the Commission concluded that a POLR charge must be based on actually incurred costs.³⁸

The RSC rates are the results of a few settlements in the mid- to early 2000s. First, parties entered into a settlement that created a Rate Stabilization Plan, which permitted DP&L to seek an RSC.³⁹ In a 2005 case, parties entered into a settlement that established the RSC rates. The RSC was created to allow DP&L to recover increases in generation costs. By settlement in 2009, the RSC rates were continued as a term of ESP I.

³⁵ See ESP III Supplemental Order at 43.

³⁶ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 23-28.

³⁷ *Id.* ¶ 23.

³⁸ AEP ESP I, Case No. 08-917-EL-SSO, Order on Remand at 22 (Oct. 3, 2011).

³⁹ Case No. 05-276-EL-AIR, Stipulation and Recommendation at 3 (Nov. 3, 2005).

But a review of the underlying costs used to justify the RSC rates in 2005 (and even in 2009) easily demonstrates that the costs no longer exist. First, DP&L has transferred or sold all of those generating assets. If any costs exist for the generating plants to establish the RSC rates in 2005, they are someone else's costs.⁴⁰ Moreover, many of those generating plants have closed since 2005.

Here, the RSC is not recovering any actually incurred costs and therefore does not meet the requirements of a POLR charge.

2. The order is unlawful and unreasonable because it authorized a POLR charge unrelated to DP&L's actual POLR risks.

The RSC's status as a POLR charge is clear and indisputable, but it bears no relationship to DP&L's POLR risks.⁴¹ Since 2005, there has been no demonstration that the RSC bears any such relationship. As of the ESP II Case in 2013, DP&L had "not performed [a] subsequent analysis in the magnitude of costs and risks of providing POLR service since the '05 case."⁴² The lack of a POLR risk analysis was consistent with DP&L's lack of ongoing accounting for POLR costs.⁴³

In reality, DP&L has effectively zero POLR risks because the obligation to be a provider of last resort is being satisfied through a competitive auction where the auction winners (which does not include DP&L) bear the obligation and therefore the risk to serve SSO customers. If DP&L cannot demonstrate the costs or risks it incurs, then it is unlawful

⁴⁰ Although DP&L transferred, sold, or closed all of the generation it owned relevant to the 2005 case, in 2005, like today, DP&L was purchasing power from OVEC. The OVEC purchased power costs are referenced in the 2005 filing in Workpaper WPC1-1.2c (page 49 of 124 of part 2 of the Application PDF). While DP&L still incurs OVEC costs, those costs are already collected elsewhere and could not serve as a basis to justify POLR cost recovery through the RSC.

⁴¹ See *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 27.

⁴² ESP II, Tr. Vol. 5 at 1359.

⁴³ *Id.* at 1358.

and unreasonable to allow them to continue to collect approximately \$76 million per year from customers through the RSC for non-existent risks.

3. The Order is unlawful and unreasonable because it authorized a POLR charge that is not avoidable by shopping customers that agree to return to the SSO at market-based rates.

The RSC is unavoidable by all customers. However, consistent with Commission precedent, the Revised Code, and the ESP I Stipulation, the RSC should be conditionally bypassable by customers who agree to return to the SSO at market-based rates.

The ESP I Stipulation provides that the RSC would initially be nonbypassable, but starting in 2011 it would be conditionally bypassable by government aggregation customers that agreed to return to the SSO at market-based rates. The rationale behind this method is that any POLR risk for the utility would effectively be eliminated because the utility could go out in the market and purchase the wholesale power necessary to serve the returning customer's load. It is also what is required by R.C. 4928.20(J).

With respect to AEP Ohio's POLR charge, the Commission held that all customers could avoid that POLR charge by agreeing to return to the SSO at market-based rates.⁴⁴ In reaching this conclusion the Commission also relied on R.C. 4928.20(J).

The rationale for explicitly making the RSC conditionally bypassable for governmental aggregation customers and making AEP Ohio's POLR charge conditionally bypassable for all customers remains just as valid today. Returning to the SSO at a market-based rate diminishes POLR risks and costs to essentially zero.

If the RSC is reinstated at a non-zero rate and without the continuation of the economic development provisions previously approved in the ESP III Stipulation, the

⁴⁴ AEP ESP I, Case No. 08-917-EL-SSO, Opinion and Order at 40 (March 18, 2009).

Commission should hold that the RSC will prospectively be bypassable for shopping customers that agree to return to the SSO at market-based rates.

III. CONCLUSION

The Commission is well within its discretion and authority to act regarding both the RSC and the economic development provisions in the ESP III Stipulation. Not only is it permissible to act, to refrain from doing so would inevitably result in an unjust, unlawful, and unreasonable outcome. The Commission must act to either remove the RSC from DP&L's ESP, set its rates to zero, or continue the economic development provisions negotiated and agreed upon by the parties to this proceeding, including DP&L. The Commission should grant rehearing and authorize the continuance of the economic development provisions enumerated in Sections IV and V of the ESP III Stipulation, or in the alternative, either terminate the RSC, set its rate to zero, or make it bypassable by shopping customers that agree to return to the SSO at market-based rates.

Dated: January 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission'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 Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 17th day of January 2020, *via* electronic transmission.

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This foregoing document was electronically filed with the Public Utilities

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1/17/2020 4:52:03 PM

in

Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Application Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of Industrial Energy Users-Ohio