BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E).	))))))	Case No. 20-680-EL-UNC

COMMENTS
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Customers in the Dayton area—where there is 32% poverty in the city and 17% food insecurity in Montgomery County—have been irreparably harmed by DP&L's so-called electric security plans. First, they paid millions for DP&L's so-called "Service Stability Rider"—until it was ruled unlawful by the Ohio Supreme Court. Customers will never get a refund from that unlawful charge. Then they paid millions for DP&L's so-called "Distribution Modernization Rider"—until it was ruled unlawful by the PUCO following binding Ohio Supreme Court precedent. Customers will never get a refund from that unlawful charge. As a result of these unlawful charges, DP&L has pocketed hundreds of millions of dollars of consumers' money.

Yet now, DP&L once again is asking the PUCO to allow it to continue charging customers through its electric security plan hundreds of millions of dollars in subsidies to bolster DP&L's "financial integrity." For consumer protection, the PUCO should say "no more" to DP&L. Instead, the PUCO should order DP&L to provide generation to customers under the long-ignored part of the 2008 energy law that allows a *market rate offer.* This approach will trade monopoly subsidies for a market price, giving consumers lower monthly electric bills at a time of crisis when many people have a great need for money.

DP&L has the burden to show that electric service provided under its electric security plan is more favorable in the aggregate than what would be provided under a market rate offer. It has not met that burden—not by a long shot. It also has the burden to show that its expected profits under the electric security plan are not significantly excessive. DP&L has not met that burden either. To the contrary, DP&L would charge customers for significantly excessive utility profits if it were allowed to continue under its current electric security plan.

The General Assembly envisioned a move to market-based rates more than 20 years ago, yet the benefits of competitive markets—lower costs to consumers—have been offset by the unlawful charges they have paid under electric security plan "riders." The PUCO should give DP&L consumers the protection that is theirs under the law by terminating the electric security plan and requiring DP&L to make a market rate offer.

I. BURDEN OF PROOF AND LEGAL STANDARD

The PUCO long ago held that a utility bears the burden of proof in support of its applications.[1] More recently, the PUCO reaffirmed this rule, stating that "utilities continue to bear the burden of proof for any application submitted for [the PUCO's] consideration."[2] And because this case involves the PUCO's review of DP&L's electric security plan under R.C. 4928.143(E), DP&L's burden of proof is statutory.[3]

To prevail in this case, DP&L must prove two things. First, DP&L must prove that its current electric security plan, including its "existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in

[1] *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-T, 1973 Ohio PUC LEXIS 3, at *4 ("the applicant must shoulder the burden of proof in every application proceeding before the Commission").

[2] Case No. 16-481-EL-UNC, Opinion & Order ¶ 106 (July 17, 2019).

[3] R.C. 4928.143(E) ("The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.").

the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[4] This is sometimes referred to as the "more favorable in the aggregate" test or, alternatively, the "ESP vs. MRO" test, with "MRO" referred to a market rate offer under R.C. 4928.142.

Second, DP&L must prove that its electric security plan is not "substantially likely to provide [it] with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[5] This second test is sometimes referred to as the "prospective SEET," where "SEET" stands for "significantly excessive earnings test." In essence, DP&L must prove that it will not charge customers for significantly excessive profits as a result of its electric security plan.

If DP&L fails to pass either of these tests, then the PUCO "may terminate the electric security plan."[6] In terminating the electric security plan, the PUCO "may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative."[7] The more advantageous alternative for consumers is a market rate offer under R.C. 49281.142.

[4] R.C. 4928.143(E).

[5] R.C. 4928.143(E).

[6] R.C. 4928.143(E).

[7] R.C. 4928.143(E).

II. COMMENTS

A. DP&L's application of the "more favorable in the aggregate" test is flawed and unreasonable and thus fails to satisfy the utility's burden of proof, so the electric security plan should be terminated under R.C. 4928.143(E) to protect consumers.

1. DP&L has not proven that the PUCO could or would approve a "financial integrity charge" to consumers under a market rate offer, so its electric security plan should be terminated to protect consumers.

DP&L claims that customers would pay more under an MRO than under its ESP.[8] The key to this claim is DP&L's theory that under an MRO, the PUCO would approve an annual "Financial Integrity Charge" that is higher than the $79 million per year that customers would pay under the ESP's so-called "Rate Stabilization Charge."[9] Thus, reasons DP&L witness Malinak, the ESP is more favorable in the aggregate for customers than an MRO, as required by R.C. 4928.143(E). DP&L's theory is flawed and unfounded.

The plain language of the MRO statute (R.C. 4928.142), unlike the ESP statute (R.C. 4928.143) does not allow a Financial Integrity Charge to be imposed on consumers through single-issue ratemaking (*i.e.*, a rider).[10] A market rate offer reflects the standard offer price for electricity, based on a competitive bidding process. Unlike the electric security plan, a market rate offer does not contain gifts to utilities (in the form of increased charges) through various riders at consumer expense. Rather, a market rate offer includes "the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process."[11]

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[8] Malinak Testimony at 79-80.

[9] Malinak Testimony at 79-80.

[10] *See generally* R.C. 4928.142.

[11] R.C. 4928.142(C)(3).

To get around this problem, DP&L cites R.C. 4928.142(D)(4) and argues that the Financial Integrity Charge could be approved "to address any emergency that threatens the utility's financial integrity."[12] But R.C. 4928.142(D)(4) does not help DP&L's cause for several reasons.

First, the language that DP&L cites is taken out of context. And as the Ohio Supreme Court has cautioned when interpreting statutes, "context matters."[13] It is true that R.C. 4928.142(D) includes the following sentence: "Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in the taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution." DP&L reads this sentence as a catch-all provision, allowing the PUCO to approve any and all charges under an MRO, in any conceivable amount, as long as the PUCO believes that the charge is necessary for the utility's "financial integrity." This is not a reasonable interpretation of the statute because it ignores the context surrounding that statutory language.

R.C. 4928.142(D) is a statutory provision that addresses how the PUCO should set standard service offer ("SSO") prices under an initial MRO (a "first application filed under this section") where the utility still owns generation as of 2008. It begins by providing that a certain percentage of SSO load must be competitively bid (10% in year one, increasing to 50% in year five). The law then allows the PUCO to make adjustments to the non-competitively-bid portion

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[12] Malinak Testimony at 52.

[13] *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 516 (2014) (rejecting party's interpretation of a statute because the party focused solely on one phrase but failed to interpret it in context).

of the SSO price based on the utility's fuel costs, purchased power costs, costs to meet state renewable and energy efficiency mandates, and environmental costs.[14] None of these adjustments make sense in today's regulatory climate. DP&L does not own any generation (other than a small percentage of the Ohio Valley Electric Corporation ("OVEC"), which DP&L does not use to serve its customers). And 100% of DP&L's SSO generation to its consumers is already procured through competitive bidding, which DP&L concedes.[15] The point of this statute is to give utilities time to phase in the move to competitive bidding. That doesn't apply anymore because that move has already been made. Thus, there would be no basis for the PUCO to make any of the adjustments contemplated by R.C. 4928.142(D).

The language in the statute allowing adjustments for the utility's financial integrity must be related to the statutory section it is found in,[16] R.C. 4928.142(D), which pertains to generation. The hypothetical "Financial Integrity Charge" has nothing to do with generation owned by DP&L (DP&L owns no generation, except a small percentage of OVEC, which itself is already subsidized under HB 6). Thus, R.C. 4928.142(D) does not apply at all and cannot be used to justify a hypothetical "Financial Integrity Charge" that is designed to improve DP&L's cash flows and credit ratings.

It is unreasonable to conclude that R.C. 4928.142(D) contains very specific guidance on adjustments that the PUCO can make to SSO generation rates in an initial MRO application, and then also conclude that buried in the middle of a section in that same statute, the General Assembly gave the PUCO virtually unlimited power to approve any rate in any amount as long

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[14] R.C. 4928.142(D)(1)-(4).

[15] *See* Malinak Testimony at 79 ("I assume that generation rates reflect the Competitive Bidding Plan ('CBP') rate, which reflects the projected results of competitive bidding for the opportunity to supply DP&L's retail customers. Consequently, the generation rates will be the same under both the MRO and Amended Stipulation so they do not affect the Aggregate Price Test.").

[16] *See State v. Bryant*, 2020-Ohio-1041, ¶ 17 (words of a statute must be read in the context of the whole statute).

as it believes such rate supports the utility's "financial integrity." But that is precisely what DP&L is asking the PUCO to do. The PUCO should reject this interpretation and conclude that there would be no Financial Integrity Charge in an MRO for purposes of applying the more favorable in the aggregate test.

Such interpretation would be consistent with past PUCO practice. Over the years, the PUCO has at times approved charges similar to DP&L's Rate Stabilization Charge and addressed them in the context of the more favorable in the aggregate test. In these cases, the PUCO did not assume that it would approve a similar (or higher) financial integrity charge in a hypothetical MRO.

In DP&L's 2012 ESP case, for example, the PUCO compared DP&L's electricity security plan, which contained a "Service Stability Rider," to a hypothetical MRO for purposes of the more favorable in the aggregate test.[17] Just as it does now, DP&L argued that the hypothetical MRO should include a financial integrity charge under R.C. 4928.142(D)(4), and the PUCO rejected DP&L's argument.[18] The PUCO reasoned that DP&L failed to prove that it was facing a financial emergency, thus making R.C. 4928.142(D) inapplicable.[19] The PUCO also found that DP&L failed to prove that there was any emergency because it could potentially have taken other steps to improve its financial position, including reducing operating costs or filing a distribution rate case.[20] The PUCO similarly conducted the better in the aggregate test for AEP Ohio in Case No. 11-346-EL-SSO, where the cost of AEP's "Retail Stability Rider" was

[17] Case No. 12-426-EL-SSO, Opinion & Order (Sept. 4, 2013).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 49.

included in its ESP but not in an MRO, thus concluding that the ESP was substantially more costly to consumers than an MRO.[21]

And while it is true that the PUCO did include a financial integrity charge in the hypothetical MRO when applying the more favorable in the aggregate test in DP&L's most recent ESP case, that still does not support doing so here. In that case, the PUCO found that a financial integrity charge would likely be included in an MRO to protect DP&L's financial integrity under R.C. 4928.142(D).[22]

But since that time, DP&L's financial integrity has already been bolstered by charging customers more than $215 million in "Distribution Modernization Rider" charges that the Supreme Court of Ohio later ruled unlawful. By all indications, DP&L has very robust earnings in recent years recently thanks to these charges. Specifically, DP&L earned $125 million with a return on equity of 27.22% in 2019, and it earned $87 million with a return on equity of 22.35% in 2018, both far exceeding those earned by peer electric utilities in Ohio and nationwide.[23] Contrary to the claims by DP&L in this case, one can reasonably conclude that DP&L is not experiencing and will not face any usual and undue financial and business risks in comparison to other electric utilities over the next four years.

The Supreme Court of Ohio has ruled that financial integrity charges to AEP Ohio and DP&L customers, despite their name (in AEP's case the "Retail Stability Rider, " and in DP&L's case the "Service Stability Rider"), were in fact unlawful transition charges under R.C. 4928.38.[24] Subsequently, the Supreme Court ruled that such transition charges can still be lawful

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[21] Case No. 11-346-EL-SSO, Opinion & Order at 75 (Aug. 8, 2012).

[22] Case No. 16-395-EL-SSO, Opinion & Order ¶ 91 (Oct. 20, 2017).

[23] *See* DP&L FERC Form 1 (2018 and 2019).

[24] *See In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 449 (2016); *In re Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016).

if approved under R.C. 4928.143(B)(2) because that provision allows certain charges "notwithstanding any other provision of Title XLIX of the Revised Code."[25] But that doesn't help DP&L here, because there is no similar "notwithstanding" language in the MRO statute.[26] So DP&L's hypothetical "Financial Integrity Charge" would still be an unlawful transition charge in an MRO, and thus it cannot form the basis of a conclusion that DP&L's ESP is more favorable in the aggregate than an MRO.

Finally, R.C. 4928.142(D) does not apply here because it only applies to the "first application under" R.C. 4928.142.[27] If DP&L were to file an application for an MRO, it would not be its "first application" because DP&L previously filed an application for an MRO in its second standard service offer case, Case No. 12-426-EL-SSO.[28] In that case, the PUCO found that the MRO application was *not* a "first application" under R.C. 4928.142 because the PUCO "made no determinations on the completeness of the application, no evidentiary hearing was held on the application, and the Commission made no legal or factual findings on the merits of the application."[29]

The PUCO should not follow this precedent because that issue was wrongly decided. The plain language of the statute says, "first application filed under this section by an electric distribution utility."[30] It does not say "first application where the PUCO makes a determination on the completeness of the application." It does not say "first application upon which an evidentiary hearing is held." It does not say "first application upon which the PUCO makes legal

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[25] *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement*, 155 Ohio St.3d 326 (2018).

[26] R.C. 4928.142.

[27] R.C. 4928.142(D).

[28] Case No. 12-426-EL-SSO, Application (Mar. 30, 2012).

[29] Case No. 12-426-EL-SSO, Second Entry on Rehearing ¶ 49 (Mar. 19, 2014).

or factual findings on the merits." It says, "first application filed." The PUCO cannot write additional words into the statute and ignore its plain language.[31]

Thus, it should now rule that R.C. 4928.142(D) does not apply based on the plain language of the statute. It is entitled to revisit past decisions and reverse course as long as it explains in "a few simple sentences" why it is doing so.[32] It would be easy for the PUCO to explain why it reversed course from this previous decision: the previous decision relied on an unlawful interpretation of R.C. 4928.142(D).

The result of this analysis is that continuing DP&L's ESP would be substantially more expensive for consumers than an MRO. Under the ESP, customers would pay $314 million from 2020 to 2023 under the Rate Stabilization Charge[33]—money they would not pay under an MRO. The PUCO should therefore find that DP&L has failed to meet its burden of proof on the quantitative portion of the more favorable in the aggregate test.

2. DP&L has not proven that the PUCO could or would approve charges to consumers for environmental expenses under a market rate offer, so its electric security plan should be terminated to protect consumers.

According to DP&L witness Malinak, an advantage of the ESP as compared to an MRO is that DP&L would be allowed to charge customers under an MRO for environmental cleanup costs associated with its interest in the Hutchings power plant, but that there would be no similar

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[30] R.C. 4928.142(D).

[31] *State v. Hughes*, 86 Ohio St.3d 424, 427 (1999) ("In construing a statute, we may not add or delete words.").

[32] *In re Ohio Power Co.*, 144 Ohio St.3d 1, 5 (2015) (PUCO may decline to follow earlier precedent as long as it puts "a few simple sentences in its order to explain why the earlier case was no longer controlling.") (citations omitted).

[33] Malinak Testimony at 79.

charges under an ESP.[34] DP&L cites no legal authority for this claim.[35] DP&L has therefore failed its burden of proving that this factor supports its ESP as compared to an MRO.

It is possible that DP&L believes that R.C. 4928.142(D)(4) allows these charges, similar to its claim regarding the hypothetical Financial Integrity Charge. But for all the reasons explained above, R.C. 4928.142(D) does not apply because this is not DP&L's first application for a market rate offer, DP&L owns no generation other than OVEC (which, again, is not used to serve Ohio customers), and Ohio has transitioned to 100% competitively-bid SSO procurement.

3. DP&L has not proven that its alleged "qualitative" factors make its electric security plan more favorable in the aggregate for consumers than an MRO, so the plan should be terminated to protect consumers.

The PUCO has previously ruled that even if an ESP will cost customers more than an MRO, the ESP might still be more favorable in the aggregate if there are qualitative factors that outweigh the increased costs. DP&L, therefore, has identified various purported qualitative benefits to bolster its claim that the ESP is more favorable in the aggregate than an MRO.

First, DP&L claims that its parent company, AES, plans to provide $300 million in equity under its ESP but would only provide $150 million under an MRO.[36] This claim deserves no weight. It is entirely self-serving and unenforceable. Notably, at no point does AES affirmatively commit to making this equity infusion. DP&L is careful to always say that AES "plans" to make the infusion, but AES is not committing to do so as part of the continuation of ESP I.[37]

More importantly, if the PUCO were to give this any weight, it would allow utilities to manipulate the more favorable in the aggregate test at will. In each ESP case, the utility would

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[34] Malinak Testimony at 80; Application at 2.

[35] *See generally* Malinak Testimony (claiming that DP&L would have the right to charge customers for these costs, but citing no authority).

[36] Malinak Testimony at 14 ("under the proposed ESP I, AES [DP&L's ultimate parent] plans to infuse an additional $300 million in equity versus just $150 million under the MRO.").

simply represent that its parent entity "plans" to make an equity infusion if an ESP is approved but not if an MRO is approved, and voila, the ESP is more favorable in the aggregate than the MRO. Never mind that given the lack of a firm commitment to do so, the equity infusion might never be made.[38] Or alternatively, if an equity infusion is truly in the best interest of the utility, then the parent should be willing to make it under an MRO as well.

Regardless, an equity infusion of this nature could result in higher rates for consumers. It could increase the cost of capital because the cost of equity is higher than the cost of debt. This would increase the amount that customers pay for base distribution rates in a future rate case, and it could increase the amount that customers pay through single-issue ratemaking "riders," some of which are based in part on the cost of equity and ratio of equity to debt. In short, AES's self-serving and unenforceable "plan" to provide $300 million to DP&L under an ESP should be considered at best irrelevant, and at worst harmful to consumers.

Next, DP&L claims that customers benefit from an ESP because the ESP is subject to the significantly excessive earning test ("SEET"), which does not apply to an MRO.[39] In theory, the SEET was intended to provide an-after-the fact check on the rates customers pay under an electric security plan. In practice, it has done little to protect customers.

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[37] *See generally* Malinak Testimony.

[38] In its regulatory filings, AES Corporation provided a statement of intent to make capital contribution to DPL Inc. or DP&L.[38] It should be noted that any such equity capital contribution may not be made to DP&L (instead to DPL Inc.) and it may not be in cash. For example, AES Corporation has counted certain tax-sharing payments DPL Inc. owed ($137.1 million) as equity investment in the past. Specifically, it was stated that "AES Corporation ("AES") provided a statement of intent to provide capital contributions of $150 million in the aggregate to DPL or DP&L, by June 30, 2020 (the "2020 Contribution") to enable DP&L to improve its infrastructure and modernize its grid while maintaining liquidity. In addition, AES provided a statement of intent to contribute an additional $150 million to DPL or DP&L in 2021 (the "2021 Contribution" and, together with the 2020 Contribution, the "Contributions") to enable smart grid investment. The payment of the Contributions to DPL or DP&L are not guaranteed and are dependent on certain conditions, including, with respect to the 2021 Contribution, recovery of grid modernization investments through the infrastructure investment rider.

[39] Malinak Testimony at 81.

In a decade of SEET cases, there have been very few instances where the PUCO ordered excess profits to be returned to customers. The SEET fails to protect consumers for a number of reasons. First, it allows utilities to charge consumers for excessive earnings, just not significantly excessive earnings. This sets a low bar for consumer protection.

The PUCO has also unlawfully cherry-picked provisions from electric security plans and excluded them from the calculation of profits under the SEET. This undermines the SEET as a consumer protection mechanism, which it was intended to be under the 2008 law. Also, the PUCO has benefited utilities by defining the threshold for when profits become "significantly excessive" (and not chargeable to consumers) as very high. For example, profits as high as 17% have not been considered by the PUCO to be significantly excessive.

As discussed earlier, DP&L has extraordinarily high earnings with a ROE of 27.22% in 2019 and 22.35% in 2018. This level of earnings, even adjusted for the annual SEET review, should be considered as significantly excessive by any reasonable standard. Yet DP&L's customers have not received any refund. The PUCO has not acted on these two SEET cases, and more concerning for consumers, the PUCO has excluded a very large amount of earnings ($70.6 million in 2019, and $82.6 million in 2018) derived from the unlawful distribution modernization rider ("DMR") from the annual SEET review.[40] This exclusion of DMR earnings has artificially and unreasonably reduced the earnings subject to SEET review and has essentially neutered the annual SEET review.

Further, the very fact that there is no SEET under an MRO is evidence that an MRO is inherently more protective of consumers than ESPs. The MRO does not allow for the rampant

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[40] *See* Case No. 20-1041-EL-UNC (May 15, 2020); Case No. 19-1121-EL-UNC (May 15, 2019).

single-issue ratemaking that has proven to be costly to customers and is all too common under electric security plans.

DP&L also claims that customers benefit from an ESP because, under the law, once a utility operates under an MRO, it cannot revert to an ESP.[41] This is true.[42] But again, this would be a welcome result for consumers. Rates set by the competitive market have consistently been low. There are always some risks and rewards associated with an MRO similar to taking any market-oriented decision. Even though in the past, the PUCO has found some ESPs were more favorable in the aggregate than MROs, some of these conclusions by the PUCO have generally turned out to be wrong because the wholesale market prices of electricity have declined continuously and dramatically since 2008. There is no real value associated with the "flexibility" of an ESP, at least not up now.

Further, experience has shown that the PUCO has routinely approved unlawful charges through ESPs, like AEP's Retail Stability Rider,[43] DP&L's Service Stability Rider,[44] FirstEnergy's Distribution Modernization Rider,[45] and DP&L's Distribution Modernization Rider.[46] Customers have paid more than a billion dollars under these unlawful charges, and they'll never get a refund. DP&L's claim that customers would benefit from preserving the ESP option is absurd. ESPs have done little more than harm customers for a decade. Eliminating the possibility of a future ESP would be one of the primary *benefits* of transitioning to an MRO. This qualitative factor strongly favors an MRO over an ESP.

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[41] Malinak Testimony at 81.

[42] *See* R.C. 4928.142(F).

[43] *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439 (2016).

[44] *In re Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016).

[45] *In re Application of Ohio Edison Co.*, 157 Ohio Edison Co., 157 Ohio St.3d 73 (2019).

[46] Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 110 (Nov. 21, 2019).

Next, DP&L claims that because its hypothetical Financial Integrity Charge would be bypassable (meaning only paid by non-shopping customers), there could be a "death spiral" where customers all begin shopping to avoid paying the Financial Integrity Charge, and ultimately, just a small number of customers are left to pay the substantial Financial Integrity Charge. This reasoning fails. For one, as explained above, a hypothetical MRO would *not* have a Financial Integrity Charge, so there could be no death spiral. Further, customers currently pay bypassable charges (for example, utilities' charges for renewable energy mandates), and these charges have not caused customers to leave the SSO en masse. Indeed, many customers recognize the benefits of the competitively priced SSO as compared to marketer offers, many of which are higher than the SSO price. The suggestion that substantially all customers would leave the SSO under an MRO is unfounded, unreasonable, and highly speculative.

Finally, DP&L claims that rate increases under an ESP would be more gradual than under an MRO because grid modernization investments would be charged through base rates, which "would result in infrequent and lumpy increases."[47] But once again, this factor supports an MRO. Charging customers through base rates for things like grid modernization is more protective of customers than charging them on an accelerated basis through riders. In a rate case, customers benefit from a full examination of the utility's operations—not just increases but decreases too. In ESP riders, it's a one-way street: higher charges for consumers.

Moreover, accelerating charges to consumers gives the utility an incentive to spend more, thus resulting in higher charges to consumers both in the short run and long run. As for the "lumpy" nature of such rate increases, in the absence of so many ESP riders, utilities would likely file rate cases more often, thus reducing the risk of any alleged rate shock. Indeed, the

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[47] Malinak Testimony at 82.

most shocking thing for consumers about ESPs is the fact mentioned earlier that they have paid hundreds of millions for charges that were later found unlawful, and they don't get that money back.

And of course, even if any of these alleged qualitative factors favored an ESP over an MRO, they would not come close to outweighing the harm to consumers from continuing to pay DP&L's $79 million annual "Rate Stabilization Charge."

The PUCO should find that DP&L has not met its burden of proving that its current electric security plan is more favorable in the aggregate than a market rate offer.

B. DP&L has not proven that it will not charge customers for significantly excessive earnings under its electric security plan, so the plan should be terminated under R.C. 4928.143(E) to protect consumers.

1. DP&L's proposed 16.6% SEET threshold is unreasonable and would provide little or no protection for consumers.

DP&L witness Malinak proposes a SEET threshold of 16.6%, which means that consumers would not receive a refund of the high profits that DP&L charges unless it earns a return on equity in excess of 16.6%.[48] He arrives at this number by taking the average return on equity for a sample of companies from the XLU exchange traded fund for the past four years (which he says is 10.4%), multiplying it by 1.5, and adding 100 basis points based on DP&L's alleged "higher-than-usual operational risks."[49] The PUCO should not use 16.6% as the threshold at which DP&L's profits are deemed to be significantly excessive. Instead, the appropriate threshold is 12.0%.

In DP&L's 2012 ESP case, the PUCO approved a "Service Stability Rider," which was substantially similar to the Rate Stabilization Charge that was revived when DP&L reverted to its

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[48] Malinak Testimony at 85.

[49] Malinak Testimony at 85.

first (and now current) ESP.[50] In that Order, the PUCO also ordered a 12.0% profit threshold for DP&L's significantly excessive earnings test, meaning that any profits above 12.0% would result in a refund to consumers.[51] The PUCO reasoned that a 12.0% threshold was appropriate "to ensure that DP&L does not reap disproportionate benefits from the ESP as a result of the approved" Service Stability Rider.[52] The 12.0% threshold was adopted again in DP&L's third ESP again.[53]

The same logic applies in the current case. By continuing its first ESP, along with the $79-million-per-year Rate Stabilization Charge, DP&L is already reaping benefits from the ESP at the expense of consumers. The PUCO should protect consumers, as it previously did, by adopting a 12.0% SEET threshold so that DP&L cannot "reap disproportionate benefits from the ESP."

2. DP&L's projected return on equity is likely to be above a 12.0% profit threshold, so the PUCO should terminate the ESP under R.C. 4928.143(E) to protect consumers.

DP&L witness Malinak projected DP&L's earnings for the remaining term of the ESP, years 2020 through 2023.[54] According to Mr. Malinak, DP&L's average earnings would be below 11.8% during this period.[55] Thus, he concludes that DP&L's ESP is not likely to result in significantly excessive profits paid by customers, and it thus passes the prospective SEET test under R.C. 4928.143(E).

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[50] Case No. 12-426-EL-SSO, Opinion & Order at 25 (Sept. 4, 2013).

[51] Case No. 12-426-EL-SSO, Opinion & Order at 26 (Sept. 4, 2013).

[52] Case No. 12-426-EL-SSO, Opinion & Order at 26 (Sept. 4, 2013).

[53] Case No. 16-395-EL-SSO.

[54] Malinak Testimony at 88; Malinak Testimony Ex. RJM-29.

[55] Malinak Testimony at 88 (calculating a SEET "safe harbor" of 11.8 to 12.4% and concluding that his projected average rate of return "is below the SEET safe harbor threshold").

DP&L is assuming that under its ESP, AES "plans" to make a $150 million equity contribution in 2020 and another $150 million contribution in 2021.[56] One effect of this equity infusion, however, is that it would reduce DP&L's reported return on equity. This is because the return on equity is simply net income divided by average equity, so as average equity increases, return on equity decreases.

In calculating DP&L's expected return on equity under the ESP, the PUCO should exclude the allegedly forthcoming $300 million equity infusion from AES. By all accounts, this equity infusion is simply too speculative. First, as noted above, AES is not making a firm commitment to these equity payments. The best DP&L can do is say that AES "plans" to make these payments. Second, throughout DP&L witness Malinak's testimony, he states that DP&L needs to be in a strong financial position, including through the planned equity infusion, to be able to make investments in grid modernization.[57] But DP&L has yet to file a grid modernization plan under the current ESP. DP&L's currently-pending grid modernization case (Case No. 18-1875-EL-GRD) was filed under DP&L's third ESP, which has now been withdrawn (thus resulting in the reversion to ESP I, and ultimately, the present case).

It appears, therefore, that DP&L will not be investing in grid modernization anytime soon, thus further calling into question whether AES will in fact make the $300 million in equity investments. Third, if AES does make an equity infusion, it is unclear in what form this equity capital infusion will take. Over the last few years, AES has made equity capital investments to DPL Inc. through the flow back of shared tax payments by DPL Inc. This type of non-cash equity infusion, if applicable to DP&L, would provide little benefit, if any, to the customers of DP&L. Given the amount of uncertainty regarding whether DP&L will actually receive the cash

[56] Malinak Testimony at 10 ($300 million equity infusion with "half in mid-2020 and half in mid-2021).

equity capital infusion or whether the customers will actually benefit from such an equity capital infusion, these equity capital infusions should not be added to the projected year-end equity of 2020 to 2023 when calculating the expected return on equity.

Indeed, making just this one change shows that DP&L's average return on equity would be above the 12.0% profit threshold during the 2020 to 2023 period.[58] Thus, the PUCO should conclude that DP&L is likely to have significantly excessive earnings under its continued ESP, and the ESP should be terminated under R.C. 4928.143(E).

C. To protect consumers, the PUCO should reject DP&L's proposal that it be allowed to continue charging customers the Rate Stabilization Charge even if the electric security plan is terminated.

In a final attempt to keep customer-funded subsidy dollars flowing, DP&L proposes perhaps its most outrageous imposition on consumers' monthly electric bills. DP&L seeks to continue charging customers its Rate Stabilization Charge even if the PUCO finds that DP&L fails to meet its burden of proof in this case (*i.e.*, that the ESP is less favorable in the aggregate than an MRO or that the ESP is likely to result in significantly excessive earnings).[59] According to DP&L, a PUCO order invalidating the Rate Stabilization Charge "would make it impossible for DP&L to continue to provide safe and reliable service."[60] The PUCO should reject this proposal because it defeats a key element of the 2008 energy law under the ESP vs. MRO test in R.C. 4928.143(E).

The law provides that when an electric security plan is less favorable in the aggregate than an MRO, or when the electric security plan is projected to result in significantly excessive

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[57] *See generally* Malinak Testimony.

[58] OCC does not concede that this is the only necessary adjustment and reserves the right to argue for additional changes in testimony and otherwise.

[59] Application at 3.

[60] Application at 3.

profits, the PUCO may terminate the plan and "impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative."[61] The "more advantageous alternative" refers to the plan being more protective of customers than a plan that was projected to result in too high profits for the utilities. That means for consumers the transition will be lower, not higher rates that include a continuation of above-market subsidies. A more advantageous alternative would be a market rate offer under R.C. 4928.142. Under a market rate offer, customers can finally receive the full benefits of low market prices without the burden of numerous above market "riders" charged to consumers that benefit the utility and its shareholders.

There is also no reasonable basis for DP&L to claim that absent these subsidies, it cannot provide safe and reliable service. DP&L's service reliability has generally been comparable or better than other electric utilities, including Ohio's other five major electric utilities:[62]

		2013	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
AEP	SAIFI	1.03	1.13	1.13	1.08	1.15	1.3	1.2
DP&L	SAIFI	0.7	0.82	0.85	0.69	0.68	0.83	0.87
Duke	SAIFI	0.98	0.99	1.04	1.05	1.16	1.01	0.86
CEI	SAIFI	0.86	1.03	1.02	1.02	1.02	0.95	0.9
OE	SAIFI	0.71	0.7	0.88	0.79	0.86	0.94	0.9
TE	SAIFI	0.52	0.51	0.62	0.55	0.51	0.49	0.62

		2013	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
AEP	CAIDI	140.97	146.61	139.03	143.45	146.02	150.32	140.98
DP&L	CAIDI	110.51	121.86	118.69	119.08	133.07	118.41	131.11
Duke	CAIDI	117.8	108.28	117.32	136.42	127.28	130.22	118.47
CEI	CAIDI	99.55	103.23	125.04	110.44	116.19	131.65	125.74
OE	CAIDI	100.78	108.89	100.63	104.78	104.32	105.4	116.64
TE	CAIDI	100.87	104.54	98.43	96.57	95.58	103.07	106.81

[61] R.C. 4928.143(E).

[62] Excludes interruptions during major events, transmission and related outages, and momentary interruptions.

DP&L admitted that its customers have not experienced more frequent or longer outages in comparison to its peer utilities during the 2013 to 2018 period.[63] Furthermore, DP&L has achieved and maintained its current service reliability without making any grid modernization capital investment under the Infrastructure Replacement Rider.[64]

DP&L witness Malinak repeatedly cites DP&L's plan to invest in grid modernization. But grid modernization is not *required* for safe and reliable service. Utilities have been providing safe and reliable service to customers for decades without grid modernization. Whatever the benefits of grid modernization might be (if done properly and with appropriate PUCO oversight), it is simply false to claim that DP&L cannot provide safe and reliable service without it. One way for DP&L to save money, therefore, would be to abandon its plan to spend hundreds of millions of dollars on grid modernization and instead focus on providing customers with what they really need: safe and reliable service at the lowest possible price.

Further, allowing DP&L to continue charging customers the Rate Stabilization Charge would be unreasonable because such a charge is now unlawful under Ohio Supreme Court and PUCO precedent. The PUCO previously ruled that the Rate Stabilization Charge from ESP 1 is a non-bypassable provider of last resort charge ("POLR") to allow DP&L to fulfill its POLR obligations.[65]

When the Rate Stabilization Charge was originally authorized,[66] DP&L owned power plants that were providing power to DP&L customers. Because DP&L owned the power plants and the power generated by the power plants, it arguably was providing POLR service to

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[63] *See* DP&L's response to OCC INT-2-7.

[64] *See* DP&L's response to OCC INT-2-4.

[65] Case No. 08-1094-EL-SSO, Finding & Order ¶ 23 (Aug. 26, 2016).

[66] *In re Application of Dayton Power & Light for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion & Order (Dec. 28, 2005).

customers. The POLR service allowed customers to buy power from marketers and then switch back to DP&L if they wanted to or if the marketer defaulted. DP&L was paid well for this service—it collected from customers approximately $76 million per year for its POLR responsibilities.[67]

In DP&L's ESP I, parties agreed that customers would continue to pay DP&L a POLR charge (Rate Stabilization Charge) that was based on 11% of DP&L's own generation rate for power. The power produced by DP&L's plants was the tool enabling DP&L to provide POLR service to customers.

Under DP&L's next electric security plan, ESP II, however, the PUCO approved significant changes that dramatically decreased and eventually eliminated DP&L's POLR obligations.[68] Under DP&L's ESP II plan, POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L's consumers. Since January 1, 2014, DP&L has procured 100% of the power for standard service through various rounds of competitive auctions. Under the latest DP&L competitive auctions, held in March 2020, winning generation suppliers have contracted to supply the standard service offer through May 31, 2022.[69] Those winning bids have set the standard service offer rate to DP&L customers who do not buy power directly from a marketer.

DP&L's standard service offer rate no longer has any relationship to DP&L's power plants (which it no longer owns) or its generation rate (it has no generation, and hence has no generation rate). And DP&L currently does not provide POLR service for customers. The PUCO

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[67] *Id.* at 11.

[68] Case No. 12-426-EL-SSO, Opinion & Order at 15-17 (Sept. 4, 2013).

[69] Case No. 17-957-EL-UNC, Finding & Order (Mar. 11, 2020).

acknowledged this when it ruled in DP&L's first ESP withdrawal that "POLR service is currently provided by competitive bidding process auction participants."[70]

Yet if the PUCO allows DP&L to continue charging customers for the so-called Rate Stabilization Charge, customers will be forced to pay DP&L $79 million in annual POLR charges. When the POLR charge was originally authorized, DP&L was generating power used to provide public utility service as part of the standard service offer. DP&L divested its power plants—they are no longer used and useful in providing utility service. DP&L stopped providing the POLR utility service to its customers. Therefore, while the POLR charge was a provision, term, and condition of ESP I, the power plants that facilitated the POLR service are no longer used and useful in rendering public utility service to customers. And the POLR service is no longer being provided by DP&L as a utility service to its customers.

Further, in its Application, DP&L explicitly asks the PUCO to continue the Rate Stabilization Rider so that DP&L can "maintain its financial integrity."[71] The PUCO has already ruled, following the line of Ohio Supreme Court cases overturning similar charges, that "nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans."[72]

Under these changed facts, there is no justification for allowing DP&L to continue charging customers under the Rate Stabilization Rider. The PUCO should reject DP&L's request to do so.

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[70] Case No. 08-1094-EL-SSO, Finding & Order ¶ 23 (Aug. 26, 2016).

[71] Application at 3.

[72] Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 108 (Nov. 21, 2019).

D. It is in consumers' interests that the PUCO give intervenors an opportunity to file testimony and hold a hearing in this case affecting the rates that consumers pay for electric distribution service.

OCC appreciates the opportunity to file comments and reply comments in this case regarding rates that consumers pay for electric distribution service. But OCC and other intervenors should also have an opportunity to file testimony. DP&L filed detailed testimony (nearly 300 pages) of two witnesses in support of its Application and its claims that its ESP complies with R.C. 4928.143(E). Obviously, it presents only one side of the story. Intervenors should be allowed to file expert testimony that responds to DP&L's claims.

Further, the PUCO set a hearing for October 13-14, 2020 "if necessary."[73] A hearing is necessary so that parties have an opportunity to present their witnesses and cross-examine DP&L's witnesses. Allowing Intervenors to file expert testimony and holding a hearing during which they can present testimony and cross-examine DP&L's witnesses will provide the PUCO with a full, robust record. That will allow the PUCO to decide this case in consumers' best interests consistent with the governing legal standards.

III. CONCLUSION

After years of Dayton-area consumers paying subsidies and above-market rates, the PUCO has an opportunity to do right by consumers with an end to DP&L's electric security plan. Consumers have been abused by unlawful ESP charges for long enough. OCC respectfully requests that the PUCO terminate DP&L's ESP, immediately eliminate the $79 million annual charge under DP&L's "Rate Stabilization Charge," and order DP&L to file an application for a market rate offer.

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[73] Entry, ¶ 8 (Apr. 23, 2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments has been served via electronic transmission upon the following parties of record this 1st day of July 2020.

/s/ Christopher Healey
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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