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

INITIAL COMMENTS OF HONDA OF AMERICA MFG., INC. AND THE CITY OF DAYTON REGARDING THE APPLICATION OF THE DAYTON POWER & LIGHT COMPANY

I. INTRODUCTION

R.C. 4928.143(E) requires the Commission to review The Dayton Power & Light Company's ("DP&L") current electric security plan[1] under "its then-existing pricing and all other terms and conditions." Therefore, the question in this case is not whether ESP I was appropriate when originally approved by the Commission, or whether certain charges may have been appropriate in the past. Instead, DP&L has the burden to establish that (i) ESP I, as it exists today, is more favorable in the aggregate ("MFA") than a market rate offer ("MRO"), and that (ii) ESP I passes the administration of the significantly excessive earnings test ("SEET"), for the forecast period of 2020-2023 ("Application"). Here, the Commission should find that ESP I fails both the MFA test and the SEET, and either terminate ESP I pursuant to R.C. 4928.143(E) or modify ESP I until a new standard service offer ("SSO") is approved pursuant to R.C. 4928.143(C)(2)(b).

[1] Case No. 08-1094-EL-SSO *et al*. ("ESP I").

First, ESP I fails the MFA test because a hypothetical MRO is more favorable in the aggregate than ESP I. ESP I contains a provider of last resort ("POLR") charge, known as the Retail Stabilization Surcharge ("RSC" or "Rider RSC"), which helps DP&L collect approximately $76 million per year from customers for its POLR costs and risks. However, as a result of DP&L divesting its generation assets in recent years, DP&L no longer incurs the cost nor bears the risk providing POLR services. Those costs are borne by SSO auction bidders and by customers. Hence, unlike ESP I, a hypothetical MRO would not contain such an unnecessary and unreasonable POLR charge. DP&L recognizes that there is no possible justification for the RSC, as it has failed to present any evidence or testimony whatsoever justifying the amount of the POLR charge. Since the RSC is not legally justified as applied currently or under Ohio law as it is not based on the cost to provide POLR service today, the Commission must find that ESP I, as implemented under present circumstances, is less favorable in the aggregate than a hypothetical MRO, and, thus, fails the MFA test.

Second, the Commission must find that ESP I fails the SEET because DP&L's projections are completely unusable. DP&L's projections share one underlying premise, i.e., that DP&L makes a massive $866.9 million investment in grid modernization over the next few years.[2] That assumption is incorrect because DP&L has not conclusively committed to making those investments. Instead, that massive investment is contingent on the approval of Rider DMR-E, which has already been rejected.[3] The investment is also contingent on the results of a grid modernization proceeding pending since 2018 that has failed to result in a stipulation or approval from the Commission or Staff. Given that this massive investment is entirely

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[2] Case No. 18-1875-EL-GRD, Application p. 5. This calculation shows the total investment over 20 years. The vast majority of those costs are "front loaded" in the first few years of the plan.

[3] *Id*. at 10.

speculative right now (even DP&L concedes that it may not happen), there is no reason it should be included in DP&L's projections in this docket.

DP&L's projections in this proceeding all wrongly assume that these investments are a *fait accompli*. Yet, DP&L also presents evidence projecting what will happen if the massive investments are made but DP&L is not granted financial relief. There is an easier answer. DP&L can operate like every other utility in Ohio. It can make proper investments in its distribution system and then seek recovery through the traditional rate case process. By following that tried and true approach, DP&L would ensure ongoing financial security for itself, while customers would receive the benefit of utility service based on assets that are actually used and useful.

When DP&L's speculative assumptions are removed, ESP I produces significantly excessive earnings for DP&L in violation of the SEET. As DP&L has not met its statutorily required burden of proof demonstrating that significantly excessive earnings will not occur, the Commission must find that ESP I fails the SEET.

Finally, with ESP I failing both the MFA test and the SEET, the Commission should terminate ESP I and impose such conditions, as the Commission deems reasonable and necessary, to accommodate the transition from ESP I to an MRO in accordance with R.C. 4928.143(E). In the alternative, pursuant to R.C. 4928.143(C)(2)(b), the Commission should issue an order continuing ESP I, but either removing the RSC entirely or setting the RSC at zero, until the Commission approves a new SSO under R.C. 4928.141.

II. ARGUMENT

A. ESP I Fails the MFA Test Because, Unlike a Hypothetical MRO, ESP I Contains a Costly and Unnecessary Rate Stabilization Surcharge.

1. *Rider RSC is no longer legally or factually justified and should not be continued as part of the ESP.*

a. The Commission must determine whether Rider RSC is appropriate today, not whether Rider RSC was appropriate when it was originally approved.

Pursuant to R.C. 4928.143(E), if an ESP has a term exceeding three years from the effective date of the plan, the Commission must conduct an MFA test in the fourth year (and every fourth year thereafter, if applicable) to determine whether the ESP continues to be more favorable in the aggregate compared to a hypothetical MRO.[4] R.C. 4928.143(E) states, in pertinent part:

> If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the **commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code**.[5]

As illustrated above, when conducting the MFA test under R.C. 4928.143(E), the Commission must assess the ESP based on "its then-existing pricing and all other terms and conditions."[6] In other words, the plain language of the statute requires the Commission to examine how the ESP functions *currently* (i.e., at the time of the MFA test), and whether its implementation under *present* circumstances "***continues***" to render the ESP more favorable in the aggregate than a hypothetical MRO. To read the statute any other way would render the MFA test meaningless. For instance, if the MFA test cannot take into account how ESP I is

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

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

[6] *Id*.

being implemented under the facts as they exist today, but instead must be analyzed under the facts as they existed when the ESP was first approved by the Commission, the requirement for an MFA test in the fourth year of an ESP would amount to nothing more than rubberstamp approval of the ESP in question. Under this distorted interpretation of R.C. 4928.143(E), there would be no circumstance under which an ESP could fail the fourth year MFA test. Before an ESP can be approved by the Commission, it must pass an initial MFA test under R.C. 4928.143(C); hence, all ESPs subject to a fourth year MFA test would have already passed the initial MFA test. Accordingly, for R.C. 4928.143(E) to make any sense, the Commission must examine how ESP I is being *currently* implemented under the factual circumstances as they exist *today*.

b. DP&L no longer has any POLR costs because the risk of customers returning to non-shopping service is now borne by auction participants.

When taking into account how ESP I's terms and conditions apply under present circumstances, the Commission must find that ESP I is *less* favorable in the aggregate when compared to a hypothetical MRO. To explain why the current operation of ESP I fails the MFA test, some background information regarding one component of ESP I, i.e., the RSC, is necessary.

As the Ohio Supreme Court, the Commission, and DP&L have all confirmed, the RSC was approved by the Commission to compensate DP&L for costs incurred to satisfy its POLR obligations.[7] The RSC, as a POLR charge, is a cost recovery mechanism designed to

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[7] *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 4 ("With respect to those customers not taking generation service from DP&L, the rate-stabilization surcharge would act as a mechanism for the recovery of 'provider-of-last-resort' (POLR) costs."); *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO *et al.* ("ESP I"), Second Finding and Order (Dec. 19, 2019), ¶ 40; ESP I, Finding and Order (Aug. 26, 2016), ¶ 5 ("The RSC was authorized to pay DP&L for costs associated with its provider of last resort (POLR) obligations . . ."); *In re the Application of Dayton Power and Light Co. to Establish a Std. Serv. Offer in the Form of an Electric Security Plan*, Case No. 12-426-EL-SSO ("ESP II"), Tr. Vol. V at 1274-

compensate DP&L for its corresponding POLR obligations.[8] When the Commission initially approved the RSC in 2005 and subsequently re-approved it in 2009 as a component of ESP I, DP&L was providing POLR services to non-shopping customers using generation assets it owned at that time.

POLR service is generally considered to be the obligation to serve shopping customers if they return to non-shopping service. Today that service is provided by auction bidders who agree to serve a percentage of non-shopping load.[9] Therefore, under present circumstances, there is no significant POLR risk borne by DP&L, especially when compared to 2005 and 2009 when the Commission first approved the RSC as a POLR charge.

c. DP&L no longer has POLR costs because it divested its generation assets; thus, if a third party auction bidder defaulted, DP&L would serve POLR load via market purchases that would be recovered from customers.

Not only are auction bidders now responsible for serving SSO load, there has also been a major change in DP&L's business operations. In recent years, DP&L has divested the generation assets it once used to satisfy its POLR obligations. In particular, as explained in the Direct Testimony of DP&L witness Gustavo Garavaglia, there have been numerous transfers or

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75 (DP&L testifying under oath that "the RSC was a POLR charge that was developed based on a 2005 case"); *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 ("DP&L SEET/MFA Case"), Direct Testimony of Gustavo Garavaglia M. (Apr. 1, 2020) (Gustavo Testimony), p. 13 ("DP&L's current RSC was established in Case No. 05-276-EL-AIR to compensate DP&L for provider of last resort risks to which DP&L was subject.").

[8] *Id*.

[9] *See Bidding Rules for The Dayton Power & Light Company's CBP Auctions,* Attachment RJL-5, at Sections 2.1 to 2.3 (available at https://www.dpandlpowerauctions.com/Portals/0/Documents/SupplierDocuments/DPL_Bidding_Rules_2-20-17_clean.pdf) ("SSO Load may decrease during the Delivery Period due to customers who switch service to a Competitive Retail Electric Service supplier (CRES) and SSO Load may increase during the Delivery Period due to customers who had previously switched service to a CRES supplier but have chosen to return to SSO. Because each tranche reflects a percentage of DP&L's SSO customer load, a Winning Bidder may experience either increased or decreased supply responsibilities between the start of the Delivery Period and the end of the Delivery Period.").

sales of generation assets owned by the DP&L (and its affiliates) in recent years.[10] As DP&L no longer owns generation, it has no ability to directly serve POLR load.

To the extent that DP&L has any remaining POLR costs or risks, they are minimal. Even if there are minimal costs related to supporting the SSO, those costs are arguably recovered through distribution rates.[11] In any event, DP&L's lack of substantiated ongoing POLR costs and risks and costs is well-established. As part of the ESP II and ESP III cases, DP&L did not present any evidence of any ongoing POLR costs.[12] As of ESP II in 2013, DP&L did not "specifically account for its POLR costs."[13] Further, DP&L had "not performed [a] subsequent analysis in the magnitude of costs and risks of providing POLR service since the '05 case."[14]

Although DP&L claims it still bears POLR risks in the event of an auction participant default, DP&L never explains how it incurs POLR costs now that it no longer owns generation.[15] Indeed, there seems to be good reason for DP&L witness Malinak's lack of specificity on this point. In ESP II, DP&L witness Lee provided testimony concerning DP&L's practices and procedures in the event of an auction participant default. DP&L's "contingency plan" is triggered if a winning bidder defaults prior to or during the SSO delivery period.[16] Under the DP&L contingency plan, the first consideration will be to make the open tranches available in

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[10] Garavaglia Testimony, pp. 23-25.

[11] *See In the Matter of the Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case No. 15-1830-EL-AIR, Opinion and Order (September 26, 2018), pp. 5-12.

[12] *See* ESP II, Tr. Vol. 5 at 1357-58.

[13] *Id*. at 1358.

[14] *Id*. at 1359.

[15] *See* DP&L SEET/MFA Case, Direct Testimony of R. Jeffrey Malinak (Apr. 1, 2020) ("Malinak Testimony"), pp. 65-66.

[16] *See Bidding Rules for The Dayton Power & Light Company's CBP Auctions,* Attachment RJL-5, at Section 11 (available at https://www.dpandlpowerauctions.com/Portals/0/Documents/SupplierDocuments/DPL_Bidding_Rules_2-20-17_clean.pdf).

the next scheduled auction if that auction takes place no later than thirty (30) calendar days prior to the start of the delivery period for the open tranches.[17] Next, any remaining tranches will be offered to current SSO suppliers at the clearing price, starting price, or reservation price, whichever is lowest, from the auction in which the tranches were not procured.[18] Finally, the necessary SSO supply requirements associated with any remaining open tranches will be met through PJM-administered markets at prevailing day-ahead, zonal spot prices. [19] Unless instructed otherwise by the PUCO, additional costs incurred by DP&L in implementing the contingency plan will be assessed first against the defaulting supplier's credit security, to the extent available. [20] As shown through this contingency plan, DP&L has no obvious costs which would be incurred in a supplier default. Any expenses it would incur for market purchases would be reimbursed through its generation charges from non-shopping customers.

With the cost and risk to provide POLR services now borne primarily by the winners of the SSO CBP auctions, DP&L simply acts as an intermediary to collect costs from customers and remit that revenue to the auction winners. As such, the singular justification for imposing the RSC charge – *i.e.*, to compensate DP&L for POLR risks/costs to which DP&L is subject – no longer applies under present circumstances. Therefore, when examined under current circumstances as R.C. 4928.143(E) requires, ESP I allows DP&L to collect a staggering **<u>$76 million windfall every year</u>** for costs it no longer incurs and for risks it no longer bears. This is not reasonable, and DP&L never attempts to justify the amount of this costly and unnecessary rider.

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[17] *Id*. at Section 11.2.

[18] *Id*.

[19] *Id*.

[20] *Id*.

d. <u>Due to a recent change in facts giving rise to new, material issues, res judicata and collateral estoppel do not bar Commission review of the RSC as part of the MFA test under R.C. 4928.143(E).</u>

The City and Honda anticipate that DP&L may try to invoke the doctrines of res judicata or collateral estoppel to preclude the Commission from examining the RSC, as a term or condition of ESP I, as part of the fourth year MFA test review. Although the Commission only recently declined to review the RSC in the ESP I docket due to res judicata and collateral estoppel concerns,[21] the Commission is not forever barred from taking a fresh look at the RSC where, as here, there has been a material change in facts that raises new issues the Commission did not previously consider.

In a Second Finding and Order dated December 18, 2019, the Commission declined to review various legal challenges to the RSC to "respect our precedents in order to assure the predictability which is essential in administrative law."[22] Specifically, the Commission explained that "res judicata and collateral estoppel operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."[23] On that basis, the Commission ruled that intervenors (including the City and Honda) were barred from raising challenges to the RSC at that particular time and in that particular proceeding.[24]

Importantly, however, the Commission did not go so far as to say that the RSC could *never* be challenged or that the RSC would *forever* be immune from Commission scrutiny in

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[21] *See* ESP I, Second Finding and Order, ¶¶ 29, 32, 34.

[22] *Id*. at ¶ 29.

[23] *Id*. at ¶ 32.

[24] *Id*. at ¶ 34. Note, however, on February 14, 2020, the Commission granted certain applications for rehearing for the purpose of further consideration of *res judicata* and collateral estoppel issues raised by various parties, including the City and Dayton. *See* ESP I, Fourth Entry on Rehearing (Feb. 14, 2020).

perpetuity. Nor would (or could) the Commission render such an unlawful and overbroad ruling. It is well-settled under Ohio law that the doctrines of res judicata or collateral estoppel are inapplicable where, as here, "there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action . . . ."[25] In future proceedings, after a material factual change the Commission is unquestionably entitled to change its mind based on new evidence available to it, which it does on a routine basis. Indeed, while certain issues may in fact be subject to res judicata and collateral estoppel, the Commission has previously recognized that many issues "are not barred from relitigation because the facts and circumstances change continually."[26] Under such circumstances, the Commission cannot (and does not) bar litigants from challenging a previously approved charge, so long as the challenge is based on a change in facts that raises a new material issue. As a matter of law and consistent with Commission practice, res judicata and collateral estoppel do not (and cannot) permanently insulate the RSC from Commission scrutiny or oversight where there has been a change in facts that raise new material issues.

Here, there have been significant changes giving rise to new material issues. As described above, with DP&L divesting its generation assets in recent years, DP&L no longer incurs costs or bears the risk of providing POLR service to customers; instead, those costs and

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[25] *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 45, 399 N.E.2d 81, 83 (1980); *see also Dinks II Co. v. Chagrin Falls Village Council*, 8th Dist. Cuyahoga No. 84939, 2005-Ohio-2317 (stating that changed circumstances sufficient to negate the doctrine of res judicata is well-founded Ohio law); *Stand Energy Corp. v. Ruyan*, 1st Dist. Hamilton No. C-050004, 2005-Ohio-4846, ¶ 15 ("In the absence of changed circumstances or newly discovered grounds for relief, the trial court correctly held that res judicata barred [plaintiff's] attempt to relitigate against [defendant] its claim for the unpaid gas invoices."); *Chagrin Falls v. Geauga Cty. Bd. of Commrs*., 11th Dist. Geauga No. 2003-G-2530, 2004-Ohio-5310, ¶ 44, *citing Grava v. Parkman Twp*., 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226 (1995) ("The Supreme Court of Ohio has clarified that res judicata will not be applicable if the party attempting to avoid this doctrine can demonstrate 'changed circumstances.'").

[26] *See, e.g., In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify and Increase its Rates for Electric Service to All Jurisdictional Customers*, Case No. 81-1256-EL-AIR, 1982 WL 974334, Entry (July 15, 1982), ¶ 4; *Ohio Suburban Water Company*, Case No. 81-657-WW-AIR, Entry (April 7, 1982).

risks are borne by third party SSO CBP participants. Due to a material change in facts with respect to DP&L's ownership of generation assets (or lack thereof), the singular justification for imposing the RSC charge – *i.e.*, to compensate DP&L for POLR risks/costs to which DP&L is subject – no longer applies. Consequently, as a matter of law, the doctrines of res judicata and collateral estoppel do not bar an examination of the RSC, or how it operates under current circumstances, especially in the context of applying the MFA test as required by R.C. 4928.143(E).

This is particularly true when examining an important Supreme Court decision issued after ESP I was approved in 2009. In 2011, the Ohio Supreme Court invalidated another electric utility's POLR charge where there was no evidence it was based on the cost to provide POLR service.[27] The Supreme Court explained:

> We have carefully reviewed the record, and we can find no evidence suggesting that AEP's POLR charge is related to any costs it will incur. AEP derived its charge using a mathematical formula created to price exchange-traded options . . . And witnesses for other parties confirmed that the POLR charge was not based on cost . . . In short, the manifest weight of the evidence contradicts the commission's conclusion that the POLR charge is based on cost. In contrast with our recent admonition that the commission must 'carefully consider what costs it is attributing' to 'POLR obligations,' no evidence supports the commission's characterization of this charge as based on cost. Ruling on an issue without record support is an abuse of discretion and reversible error. Therefore, we reverse the provisions of the order authorizing the POLR charge.[28]

Similarly, here, the Commission should find that the RSC, as a POLR charge, is entirely unsupported by any costs DP&L has incurred or will incur in providing POLR services. Despite being given the opportunity in this proceeding, DP&L has failed to present any evidence of any

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[27] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 518, 947 N.E.2d 655, 663-664 (2011).

[28] *Id.* (internal citations omitted).

ongoing POLR costs justifying the continued imposition of the RSC under present circumstances. Although DP&L claims it still bears POLR risks today (e.g., extreme weather events like a polar vortex or black swan events like COVID-19), as discussed above, DP&L does not provide any specific evidentiary support that is has actually incurred any specific POLR costs (let alone $76 million per year in POLR expenditures) now that it no longer owns generation.[29]

With the Supreme Court explicitly admonishing the Commission to "carefully consider what costs it is attributing to POLR obligations", the Commission cannot allow the RSC to evade scrutiny in this proceeding, especially where a material change in circumstances and the plain language of 4928.143(E) necessitate it.

2. *The hypothetical MRO should not include Rider RSC or an equivalent financial integrity charge.*

a. <u>A hypothetical MRO would not include Rider RSC because there is a difference between POLR and financial integrity charges.</u>

A hypothetical MRO, on the other hand, would not contain such a hefty and unnecessary surcharge for POLR services not rendered. The statute that authorizes the establishment of an MRO, R.C. 4928.142, does not require such surcharges, nor would DP&L even be able to recover POLR charges where, as here, there is no evidence necessitating any mechanism for POLR cost recovery.

Not to be deterred, DP&L claims that a hypothetical MRO would contain a financial integrity charge ("FIC"), which DP&L insists is similar to the RSC in terms of its overall effect on stabilizing the financial health of the DP&L. Specifically, DP&L posits:

> Though difficult to quantify, there is clear value in having a financially stable provider of last resort. To be able to act as a POLR, DP&L needs to have enough financial and operational

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[29] *See* Malinak Testimony, pp. 65-66.

> stability to step in when needed. The RSC in the ESP or an FIC in an MRO would act as an important source of funds that enables DP&L to serve in this capacity.[30]

In other words, for purposes of applying the MFA test, DP&L views the RSC and FIC as comparable charges since, at the end of the day, both provide financial stability for the utility. Although DP&L states that the RSC is *not* a financial integrity charge,[31] DP&L insists that the removal of the RSC from ESP I "would substantially reduce the cash flows available to DP&L and cause it to go into financial distress."[32] According to DP&L, the RSC operates, at least in actual practice, as a hedge against financial distress under present circumstances.

DP&L is wrong. The RSC is *not* comparable to a financial integrity charge, nor was it ever intended to operate (in practice or in theory) as a hedge against financial distress. In DP&L's own words, the singular purpose of the FIC under a hypothetical MRO is to "allow DP&L to make necessary debt payments and capital expenditures."[33] Yet, as stated previously, the Supreme Court of Ohio, the Commission, and DP&L have confirmed the singular purpose of the RSC is to provide cost recovery to DP&L for its POLR expenditures. In short, they are two completely separate charges for two completely separate purposes. Were the Commission to accept DP&L's reasoning (which it should not), every possible charge, rider, or other cost recovery mechanism in an ESP would equate to a financial integrity charge.

Importantly, the Commission has already rejected intervenor arguments that the RSC is tantamount to a financial integrity charge (often described interchangeably as an "economic stability charge"). Specifically, the Commission recently held: "[w]e are not persuaded that the

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[30] Malinak Testimony, p. 66.

[31] DP&L admits that "the RSC is not a financial integrity charge". Malinak Testimony, p. 42

[32] *Id.*

[33] Garavaglia Testimony, p. 13.

RSC, as a POLR charge, is 'an equivalent economic stability charge' pursuant to the amended stipulation."[34] Further, the Supreme Court has repeatedly rejected financial integrity charges as unlawful and not authorized by the ESP statute (i.e., R.C. 4928.143(B)(2)(d) or (B)(2)(h)).[35] Accordingly, if the RSC was, in fact, tantamount to financial stability charge (or some equivalent thereof as DP&L surmises), such a charge would be unlawful in any event (as DP&L recently discovered with respect to its Distribution Modernization Rider or "DMR"). Accordingly, the Commission must reject outright any comparison of the RSC to the hypothetical FIC for purposes of applying the MFA test in this docket.

In sum, when applying the MFA test, the plain language of the statute requires the Commission examine how ESP I functions *currently*, and whether its implementation under *present* circumstances renders ESP I more favorable in the aggregate than a hypothetical MRO. Here, when taking into account recent changes concerning DP&L's divesture of generation assets, the Commission must find that ESP I is *not* more favorable in the aggregate when compared to a hypothetical MRO. With DP&L no longer incurring POLR costs or bearing POLR risks, the RSC improperly enables DP&L to annually collect a $76 million windfall. No comparable POLR charge (or similar windfall) would be available to DP&L under a hypothetical MRO. Therefore, when applying the MFA test, it is clear that ESP I is less favorable in the aggregate when compared to a hypothetical MRO, and, thus, fails the MFA test under R.C. 4928.143(E).

b. The Commission is permitted to authorize an emergency financial integrity charge in an MRO only if DP&L establishes an

[34] ESP I, Second Finding and Order, ¶ 40.

[35] *See In re the Application of Dayton Power and Light Co. to Establish a Std. Serv. Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO *et al*. ("ESP III"), Supplemental Opinion & Order (November 21, 2019), pp. 43-46 (collecting cases).

<u>“emergency” impacting DP&L, and would not include DP&L affiliates financial condition unless that condition impacts DP&L.</u>

Ohio law permits an emergency financial integrity charges in an MRO only if DP&L could show that it meets the requirements of R.C. 4928.142(D)(4). DP&L’s burden to establish such a charge is high:

> . . . 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 . . . The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.[36]

In brief, DP&L must show an <u>emergency</u> that threatens <u>DP&L’s</u> financial integrity. It is not enough to show that DP&L’s financial integrity would be improved with additional funds. DP&L must show a genuine emergency to include it on the MRO side of the test. There is nothing in Ohio law which would authorize an emergency financial integrity charge for DP&L affiliates like DPL Inc.; therefore, DP&L has the burden to establish that DP&L (and only DP&L) faces an “emergency.”

DP&L witness Malinak’s testimony repeatedly references the combined financial condition of DP&L and DPL, Inc. The extensive financial information provided by Mr. Malinak regarding DPL Inc.[37] is simply irrelevant and should not be considered by the Commission.

In addition to being irrelevant, DPL Inc.’s debt load is largely caused by AES’s merger and acquisition of DP&L in 2011. In that proceeding, DP&L agreed not to charge customers for acquisition premium or costs associated with merger closing.[38] Paying for an acquisition

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[36] R.C. 4928.142(D)(4).

[37] *See, e.g.*, Malinak Testimony, pp. 8, 51.

[38] Case No. 11-3002-EL-MER (November 22, 2011 Order ¶ 19).

premium which was assumed by a non-jurisdictional entity like DP&L is not sufficient to establish an "emergency" under Ohio law.

Mr. Malinak's testimony regarding other riders which DP&L formerly collected is irrelevant as to whether a current emergency exists. Mr. Malinak ignores that DP&L chose to return to ESP I, and thus the Distribution Investment Rider, Uncollectible Rider, and Decoupling Rider were terminated at DP&L's option.[39] It is similarly irrelevant that DP&L no longer receives the DMR after the decision of the Ohio Supreme Court.[40]

What is relevant is whether DP&L is currently in a financial emergency. DP&L has not established the existence of that emergency. As discussed in more detail below, DP&L's projections assume large dividends to DPL Inc. and a huge capital expenditure program. Such actions bely DP&L's self-serving claim that it is in dire financial straits.

c. DP&L has not established that DPL Inc.'s financial difficulties will cause DP&L to have a financial emergency.

DP&L attempts to show a financial emergency by claiming that a DPL Inc. default on its debt would cause DP&L to default as well. DP&L's position is not only legally inaccurate, but it also contravenes the exclusive jurisdiction of the Commission.

DP&L's primary argument to establish that an emergency exists is to rely on the credit downgrade after the DMR was terminated, and to project an additional credit downgrade for DPL Inc. and DP&L if the RSC is also terminated. Even if DP&L is downgraded, without more, this does not establish an "emergency." It merely suggests that borrowing costs will increase in the short term. Without any evidence of something beyond a minor increase in borrowing costs,

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[39] Malinak Testimony, p. 44.

[40] *Id*.

there is simply no justification for assuming a hefty financial integrity charge on the MRO side of the MFA test.

DP&L attempts to support the claimed emergency by arguing that if DPL Inc. defaults on its debts, then DP&L would default as well.[41] As a preliminary matter, neither customers nor the Commission approved DPL Inc.'s 2019 decision to enter into its collateral agreements or to pledge DP&L stock as security.[42] It is inequitable to now force customers to effectively guarantee DPL Inc.'s debt based solely on the unchecked, voluntary decision of DPL Inc. to enter into those agreements. DPL Inc. is a non-jurisdictional entity. Customers of DP&L should not be forced to backstop risky business decisions of an unregulated parent through cross collateralization with a regulated utility.

Setting aside the gross inequities, DP&L's position is legally flawed. DP&L claims that if DPL Inc. defaults, "the Collateral Agent would be able to exercise all voting and dividend rights in DP&L stock that DPL Inc. formerly possessed."[43] DP&L then concludes that the Collateral Agent could sell those shares, triggering a change of control in DP&L.[44] Yet, DP&L forgets that the ownership of public utilities cannot be transferred in this manner consistent with Ohio law. As AES' learned counsel noted in 2011 when AES sought Commission approval to purchase the shares of DP&L, R.C. 4905.402(B) prohibits a change of control absent Commission approval: "(1) No person shall acquire control, directly or indirectly, of a . . . domestic electric utility or a holding company controlling a domestic electric utility unless that

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[41] Garavaglia Testimony, p. 17

[42] *Id*. at p. 18 (describing agreements).

[43] *Id*.

[44] *Id*.

person obtains the prior approval of the public utilities commission under this section."[45] Accordingly, Ohio law and the Commission's exclusive jurisdiction expressly prohibit a change in control of DP&L.

Even if DP&L were sold to another buyer (as a result of DPL Inc.'s default or otherwise), that event, by itself, does not establish a financial emergency for DP&L. Ohio law prohibits owners from looting a regulated utility and putting public safety at risk. Indeed, there is no reason to assume that a new buyer would operate DP&L any differently than DPL Inc. For example, DP&L warns the Commission that if "DPL Inc. cannot maintain its financial integrity, it will (a) need to minimize capital and operating expenditures at DP&L (that otherwise would be necessary to ensure safe and reliable service) in order to ensure that its own financial obligations can be met."[46] In other words, DP&L makes the stunning admission that DPL Inc.'s alleged financial integrity is more important than ensuring safe and reliable service. It is difficult to understand why customers should have to pay such a major premium to avoid a change in control.

Finally, DP&L includes an extensive discussion of the steps taken to improve DP&L's financial integrity.[47] Most of those steps relate to the sale of generation assets required by Ohio law, and the paying down of merger related debt at DPL Inc. Neither of these things justify the supposed existence of a financial emergency today. Instead, AES made its additional $137 capital investment in DPL Inc. in order to protect its larger investment in DP&L. During this same period, customers have paid hundreds of millions in financial integrity charges to DP&L – a much larger investment than has been made by AES.

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[45] R.C. 4905.402(B)

[46] Garavaglia Testimony, p. 13.

[47] Garavaglia Testimony, p. 22.

d. <u>DP&L is unable to meet the legal burden to show a financial integrity charge should be on the MRO side of the MAF test because DP&L incorrectly assumes that speculative grid modernization expenditures will be made.</u>

R.C. 4928.142(D)(4) also requires that DP&L show that the amount of that adjustment is "proper," such that the emergency adjudgment is proper in accordance with this division. As stated in the analogous distribution statute (R.C. 4909.16), in emergency situations, the Commission "may temporarily alter" rates and such rates "shall take effect at such time and remain in force for such length of time as the commission prescribes."[48]

Mr. Malinak's projections in this matter assume that DP&L makes very large grid modernization investments in an MRO without any accompanying distribution rate increase.[49] DP&L's projections all share the same dubious, hypothetical premise that DP&L makes a massive $866.9 million investment in grid modernization over the next 20 years.[50] As a result of making such a dubious and speculative assumption, Mr. Malinak's calculations are unusable in determining whether DP&L actually needs a financial integrity charge. Put differently, Mr. Malinak's projections are so far off DP&L's actual experience that they are rendered useless.

In particular, Mr. Malinak projects a total of BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL over the four year forecast period.[51] This forecast, which is assumed under both the ESP and MRO scenarios, translates into an annual average of BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL, an increase of BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL over the average expenditure for 2017 to 2019

[48] R.C. 4909.16.

[49] Malinak Testimony, p. 8.

[50] Case No. 18-1875-EL-GRD, Application p. 5. This calculation shows the total investment over 20 years. The vast majority of those costs are "front loaded" in the first few years of the plan.

[51] Malinak Testimony, p. 45.

of $121 million.[52] It is simply not feasible to assume that an entity currently suffering an "emergency" would increase capital expenditures by such a substantial amount.

Of the total increase, BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL is related to "smart grid" capital costs.[53] Even if one assumes that the massive increase in capital expenditures for T&D assets is justified, DP&L's smart grid assumptions are unreasonable. DP&L projects that Property, Plant & Equipment will increase from BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL DP&L's desire for advanced infrastructure and an immense increase to Gross Plant in Service does not establish an emergency.

This error then flows through the remainder of Mr. Malinak's calculations. By assuming a massive increase in capital expenditures, Mr. Malinak lowers cash flow and increases equity investments and, by the combination of the lower cash flow and increased equity, dramatically lowers the projected ROE of the entity. These fundamentally flawed assumptions render DP&L's proposed calculations largely useless.

The major problem with using Mr. Malinak's estimate of future spending is that the commitment is completely conditional. DP&L's own words confirm as much. Specifically, DP&L's grid modernization application in Case No. 18-1875 expressly states that those investments are conditioned on the continuation of the Rider DMR-E.[54] As Rider DMR-E has been rejected, there is a significant chance DP&L withdraws the grid modernization application completely. Similarly, DP&L has made clear that up to $300 million in equity investments may

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[52] Malinak Testimony, p. 45-46.

[53] Malinak Testimony, p. 46.

[54] Case No. 18-1875, Application, p. 10.

be made by AES, but again, that investment is conditional.[55] Witness Garavaglia testifies that AES will only make those investments "if AES believes that DP&L is positioned to return to being a financially sound utility."[56]

Even if one assumes that DP&L wants to move forward with both this projected spending and the accompanying equity investment by AES, DP&L assumes that the Commission will approve its grid modernization plan "as filed." But that case has been pending since 2018, and, to date, has not been approved by the Commission, nor has a stipulation been filed with any party or Staff. In light of the uncertain nature of how that proceeding will resolve itself, it is inappropriate to simply assume that grid modernization investments will be made by DP&L exactly as proposed in its application.

One representative example demonstrates the extreme nature of DP&L's proposed adjustments. Though admittedly not a direct comparison because it involved a different time period and just one line item, DP&L's most recent distribution case underscores the significance of the proposed adjustments. When looking at that test period ending May 31, 2016, DP&L claimed Deprecation and Amortization expense of $56 million.[57] After proposing adjustments, Staff reduced it to $47 million.[58] This difference is material because even when looking at just one known year, instead of a four-year future forecast period introducing uncertainty, there was almost a 15% disparity between DP&L and Staff's calculations. This significant disparity illustrates why DP&L's calculations and projections in this case cannot be accepted as

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[55] Garavaglia Testimony, p. 4.

[56] *Id*.

[57] Case No. 15-1830, Staff Report dated March 12, 2018, Schedule C-3.14.

[58] *Id*.

conclusive evidence of a four year "emergency" and the corresponding justification for a four-year financial integrity charge.

The Staff Report's discussion of Depreciation and Amortization Expense is also relevant to show the sheer size of the difference in the most recent set of Commission evaluated numbers and DP&L's projections. DP&L is projecting that Depreciation Expense will go from $47 million in the test period to BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL in this short period, which has a massive impact on Operating Income.

As discussed above, it is simply not appropriate for DP&L to base all of its calculations on a highly speculative plan conditioned on the existence of a financial integrity rider like DMR-E, as doing so would dramatically change DP&L's financial structure. DP&L should have presented evidence of an emergency under routine operations, or at least limited its future forecasts to programs that had already been approved by the Commission. Since DP&L did not do so, DP&L has not provided the Commission with sufficient evidence to establish that an emergency exists today.

3. *DP&L has made no attempt to tie the amount of the financial integrity charge with any supposed emergency.*

DP&L's calculation of the MRO financial integrity charge is unrelated to the amount of funding DP&L needs to avert an emergency or to survive to the next rate case. Instead, Mr. Malinak "calculated the FIC so that it is sufficient to make up for the loss of the $150 million equity (with an adjustment for taxes) and the $79 million RSC."[59] This is irrelevant. The amount of the investment AES suggests it might make bears no relationship to DP&L's actual

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[59] Malinak Testimony p. 53; RJM-8A.

demonstrated need. The POLR charge calculated years ago is similarly irrelevant. Indeed, Mr. Malinak expressly states that he calculated the financial integrity charge "to produce a level of financial condition and integrity for DP&L that is similar to ESP I with an RSC."[60] It begs the question to simply assume, without support, that the same charge would appear on both sides of the MFA test.

Not content to simply replace the legally and factually unsupported RSC, Mr. Malinak then suggests that the financial integrity charge should be set at a level sufficient to cover the "planned capital expenditures, debt service at DP&L, and interest expense at **DPL**."[61] In addition to recovering all DPL Inc. interest expense, Mr. Malinak makes this assumption by starting with the Cash Flow under an ESP that includes the aforementioned Grid Modernization improvements.[62]

Much like AEP's past use of the Black Scholes option-pricing model, DP&L has simply chosen the wrong model. DP&L must show that the amount of financial integrity charge required is reasonably related to the emergency being addressed. Assuming arguendo that DP&L's invalid forecasting assumptions should be adopted, the measures used by DP&L simply do not support that DP&L, as the regulated utility, is suffering an emergency in the amounts sought by DP&L for the hypothetical MRO.

For example, suppose that DP&L is correct and that it is downgraded as projected by Mr. Malinak. It is reasonable to assume that this will cause an increase in DP&L's cost of debt, and, therefore, the question is whether the financial integrity payment would be sufficient and reasonable to avoid that increase.

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[60] *Id*.

[61] *Id*. at p. 54; RJM 8B (emphasis added)

[62] *Id*.

Fortunately, recent DP&L cases illuminate this exact issue, and it is expressly addressed by DP&L witness Garavaglia. Until recently, DP&L's credit rating fell below investment grade. When it was upgraded to investment grade, DP&L refinanced its $425 million first mortgage bond. The refinancing increased the term from 5 to 30 years and lowered the interest rate from 4.49% to 3.95%, a change of 54 basis points.[63] This results in a savings of $2.7 million in interest expense per year.[64] It is unreasonable to demand customers pay hundreds of millions of dollars per year in "financial integrity" charges so as to avert a minor increase in interest expense.

That is particularly true where, as here, DP&L's total long-term debt is very low ($574 million), as explained by Mr. Malinak.[65] The total amount of financial integrity charges sought by DP&L in this case would pay off that debt and more, so long as DP&L was not also compelled to make dividend payments to DPL Inc. to pay off its debt.

Again, that is particularly true in this case where DP&L's last distribution case utilized a hypothetical cost of debt of 5.29%.[66] It is inequitable to require customers (i.e., customers who are already paying a higher cost of debt than DP&L is actually paying) to pay hundreds of millions of dollars for a small interest savings that does not directly benefit them. It is also noteworthy that DP&L's testimony of Mr. MacKay in the last distribution case supported the hypothetical cost of debt by projecting that the first mortgage debt would be refinanced at a hypothetical 6.6%, as opposed to the actual 3.95% DP&L ultimately obtained.[67]

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[63] Garavaglia Testimony, p. 12.

[64] Garavaglia Testimony, p. 13.

[65] RJM-1.

[66] Case No. 15-1830, Staff Report.

[67] Case No. 15-1830, MacKay Testimony pp. 12-13.

4. The qualitative factors do not establish that the ESP is more favorable in the aggregate than the MRO.

Mr. Malinak claims several qualitative factors suggest that ESP I is superior to an MRO. He first relies on the contingent AES equity investment, but as that investment is specifically quantified in his testimony, it is unclear why it should also be considered a qualitative investment.[68]

Mr. Malinak then claims that somehow customers benefit from the existence of the IIR, "which allows grid modernization investments to be included in rates on a near real time basis."[69] While this may be appropriate from a ratemaking perspective, it is not a "benefit" of the ESP to customers. It would merely accelerate payments to be made by customers. Under no circumstances would it actually benefit them.

Mr. Malinak then concludes that benefits to DPL Inc.'s financial integrity are a benefit of the ESP.[70] Again, that is not accurate. The benefits that would flow to affiliates of the regulated utility are not part of the MFA test and, thus, are irrelevant.

Finally, Mr. Malinak's testimony is flawed because he fails to conduct a cost-benefit analysis. Mr. Malinak claims that higher investment rated companies tend to make more capital investments than non-investment rated companies, or tend to have lower borrowing costs. That may be true, but Mr. Malinak acknowledges that DP&L has not demonstrated as much in its operations metrics. Even if he is correct, a comparison must be made between the benefit to customers and the costs customers will pay. Mr. Malinak assumes that anything which improves DP&L's financial condition is inherently good because it will allow better access to capital, but

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[68] Malinak Testimony, p. 81.

[69] *Id*. p. 82.

[70] *Id*.

he never compares the cost of capital with the cost paid by customers. Thus, under Mr. Malinak's distorted analysis, a customer charge of $100 million per year would be justified if it reduced borrowing costs by only $1 million per year, so long as doing so improved the financial condition of the utility. This is obviously imprudent, and yet that is the position DP&L asserts in this proceeding.

5. <u>Approving DP&L's financial integrity claim would cause a flood of financial integrity claims by Ohio utilities.</u>

The Commission should be aware of the precedent to be created in this case. DP&L is attempting to justify a financial stability charge by: (1) proposing a massive new capital expenditure program; (2) that is not needed to provide safe and reliable service; (3) to obtain a contingent promise that a parent entity "might" make a capital contribution; (4) so that the parent entity can service merger related DPL Inc. debt that it promised the Commission would <u>**not**</u> be recovered from customers; all of which to obtain (5) an indefinite "financial stability" charge that is not even arguably based on the amount of funds needed to meet issues (1) to (4). The Commission must decline to establish such an imprudent and reckless precedent; otherwise, the Commission should expect to see similar applications filed in the near future.

B. DP&L Has Failed to Prove that Significantly Excessive Earnings Will Not Occur Because DP&L Included Grid Modernization Costs It Has Not Actually Incurred and that, If Removed, Would Produce Significantly Excessive Earnings for DP&L.

The Commission must find that ESP I fails the SEET because the Application and supporting witness testimony improperly include costly grid modernization expenditures that have not been made (and may never be made), and when such expenditures are removed from the SEET calculation as they should be, ESP I produces significantly excessive earnings for DP&L in violation of the SEET.

1. *As DP&L's projections are unreliable, DP&L has failed to meet its burden to show that it would not recover excessive earnings.*

DP&L has the burden to establish that its returns shall not exceed those of publicly traded companies, including utilities, that face comparable business and financial risk.[71] As the foregoing demonstrates, due to its speculative assumptions and future forecasts DP&L has not met its statutory burden of proof demonstrating that significantly excessive earnings will not occur. Therefore, the Commission should find that ESP I fails the SEET due to DP&L's failure to meet its burden.

2. *Modified versions of DP&L's projections would show significantly excessive earnings.*

There is no way to accurately revise DP&L's projections to completely eliminate the impact of DP&L's improper assumptions. Mr. Malinak accepted those assumptions as part of his calculations, and there is no readily acceptable calculation that clearly removes them.

With that said, it is possible to examine the information DP&L has provided to discern DP&L's position without any speculative grid modernization expenditures and equity investments. As discussed above, DP&L's grid modernization forecast in both the ESP and MRO scenarios translates into an annual average of BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL, an increase of BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL over the average expenditure for 2017 to 2019 of $121 million.[72] Of the total increase, BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL is related to "smart grid" capital costs.[73] If those expenditures do not go forward, there would also be flow through impacts into O&M and other variables that were not separately identified by Mr. Malinak.

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

[72] Malinak Testimony, p. 45-46.

[73] Malinak Testimony, p. 46.

The two primary expenses that will be impacted are 1) Direct O&M Expense and 2) Depreciation Expense. DP&L projects Direct O&M Expense to BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL from 2020 to 2023 as the grid modernization investments are made.[74] DP&L also projects Depreciation and Amortization Expense to increase BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL during that same period.[75] Those 2020 values are larger than the 2019 period before the grid modernization expenditures were projected to begin. The values also increase based on proposed changes to interest expense. There are likely other revisions to expenditures that would be made as well.

Those expense adjustments would be offset by whatever revenue would be received on the grid modernization investments by 2023. Without granular data as to those assumptions, it is not possible to estimate that revenue.

DP&L's proposed equity would also be impacted by these projections. DP&L's equity projected to increase from BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL.[76] This has the effect of increasing the denominator of the SEET test by that amount of wholly speculative funds.

Beyond these representative examples, as discussed in detail above, DP&L's projections are simply too speculative and, thus, cannot be a basis on which the Commission can rely. Accordingly, DP&L has failed to meet its burden to establish its earnings will not be significantly excessive.

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[74] RJM-44(A).

[75] *Id.*

[76] RJM-44(B).

3. *There is no need for an adjustment of 100 basis points to the peer group.*

DP&L claims that an adjustment of 100 basis points is necessary due to the "unique" risks that it faces.[77] This adjustment is not appropriate because DP&L has failed to establish that its risks are somehow different than those of the peer group. Indeed, the entire purpose of a peer group is to gather a wide range of comparable companies without the need for individualized adjustments. While DP&L's infrastructure may be aging and while DP&L may not recover from certain riders, those two facts alone do not necessarily distinguish it from the peer group.

It is also worth reiterating that DP&L voluntarily chose to withdraw from ESP I. As such, DP&L cannot create a "regulatory risk" based on its own voluntary business decisions. Again, it is worth noting that DP&L is the only Ohio electric utility receiving a "POLR charge" despite not providing POLR service.

C. The Commission Should Terminate ESP I and Transition to an MRO, or in the Alternative, Modify ESP I by Removing the RSC or Setting It to Zero Until the Commission Approves a New SSO.

If a utility fails the MFA test or the SEET as part of a four-year review under R.C. 4928.143(E), the Commission is authorized to terminate the ESP once all interested parties are provided notice and an opportunity to be heard. R.C. 4928.143(E) states, in relevant part:

> If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on 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 will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, **the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to**

[77] Garavaglia Testimony, p. 3.

> **accommodate the transition from an approved plan to the more advantageous alternative**. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.[78]

After terminating the ESP (i.e., upon providing the requisite notice and opportunity to be heard), the Commission may impose conditions on the termination, "as it considers reasonable and necessary", to accommodate the transition to "the more advantageous alternative." The statute does not specifically clarify what is meant by "the more advantageous alternative", though it presumably refers to the MRO (i.e., the alternative to which the ESP was compared under the MFA test). Thus, with ESP I failing both the MFA test and the SEET, the Commission should terminate ESP I and transition to an MRO, and take any other measures in the interim "as it considers reasonable and necessary" to accommodate that transition pursuant to R.C. 4928.143(E).

In the alternative, instead of transitioning to an MRO under R.C. 4928.143(E), the Commission should find that the current implementation of ESP I, particularly the application of the RSC under present circumstances, is no longer reasonable for the reasons described above. As such, the Commission should disapprove the application for ESP I, thereby triggering R.C. 4928.143(C)(2)(b), which allows the Commission to "issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised

[78] R.C. 4928.143(E) (emphasis added).

Code, respectively."[79] Here, pursuant to R.C. 4928.143(C)(2)(b), the Commission should issue an order continuing ESP I, but either removing the RSC entirely or setting the RSC at zero, until the Commission approves a new SSO under R.C. 4928.141.

III. CONCLUSION

WHEREFORE, Honda and the City respectfully request that the Commission, in issuing any order regarding the Application filed in this docket by DP&L, specifically consider and adopt their foregoing comments and concerns.

Respectfully submitted,

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[79] R.C. 4928.143(C)(2)(b).

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st day of July, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/*s/ Mark T. Keaney*
One of the Attorneys for Honda of America Mfg., Inc. and The City of Dayton