BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Dayton Power & Light Company 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

PUBLIC VERSION OF INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS

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INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS

In accordance with R.C. 4928.143(E) and the Commission's December 18, 2019 Second Finding and Order in Case No. 08-1094-EL-SSO ("ESP I"), on April 1, 2020, Dayton Power & Light Company ("DP&L") submitted an application asking the Commission to determine that its current Electric Security Plan ("ESP") passes the ESP vs. Market Rate Offer ("MRO") test and the significantly excessive earnings test ("SEET"). In its April 23, 2020 Entry, the Commission solicited comments from intervenors regarding DP&L's application.

The Industrial Energy Users-Ohio ("IEU-Ohio") has reviewed DP&L's application and supporting testimony and submit these comments in response.

I. INTRODUCTION

Comparing DP&L's current ESP over the next four years to a market rate offer yields one simple conclusion: the ESP is substantially less favorable in the aggregate than an MRO. DP&L, of course, and again, argues that there is a financial emergency at

DP&L that would justify emergency rate relief under an MRO.[1] DP&L uses this contrived argument to inflate the actual costs of an MRO so that it can justify its current nonbypassable charge; a charge that is unlawful and unreasonable as it is untethered to the collection of any actual costs of DP&L.[2]

But this case, just like their last two ESPs, has nothing to do with the financial health of DP&L. The underlying issue remains the repayment of debt of DP&L's parent company, DPL Inc., that was placed at DPL Inc. as a result of AES' acquisition in 2011. DP&L's testimony freely argues that the debt of its parent company continues to impair the credit rating of DP&L and the financial health of DP&L.[3] From there, DP&L leaps to the conclusion that customers would be better off paying many tens of millions of dollars (or even more than a hundred million) each year to avoid a few million in increased borrowing costs that ***could*** occur if DP&L were forced to refinance debt at slightly less favorable terms and conditions.[4]

For example, in an attempt to justify the benefits of the prior imposition of the DMR, DP&L asserts that by collecting $105 million per year through the DMR DP&L was able to refinance debt at a reduction of 54 basis points which amounted to annual savings of $2.7 million.[5] On its face, the argument is nonsensical. Faced with $2.7 million or $105 million per year in increased charges, customers will choose the former.

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[1] Garavaglia Testimony at 9-10.

[2] *Id*. at 15 ("No, without a financial integrity charge in the MRO or the RSC under the ESP, DP&L would not have sufficient funds to pay its operating expenses, make needed capital expenditures and make required debt payments.")

[3] *See*, *e.g.*, *id*. at 2, 13-14, 17-18, 19, 21.

[4] *See*, *e.g.*, Malinak Testimony at 83.

[5] Garavaglia at 12-13.

DP&L then moves from nonsensical cost savings to threatening to run DP&L as lean as possible in an effort to maintain DPL Inc. (all of DP&L's projections assume AES never steps in to resolve the problem it single-handily created). Specifically, DP&L asserts that without continued nonbypassable charges to support DPL Inc.'s financial integrity that DP&L would then "minimize capital and operating expenditures at DP&L (that otherwise would be necessary to ensure safe and reliable service."[6] This statement begs the question of whether the Commission should initiate an investigation about what controls, including ring-fencing measures, may need to be put in place at DP&L.

DP&L also suggests that failure to bail out DPL Inc. could result in a change of control.[7] But if the alternative is being held hostage with threats of lack of safe and reliable service, then perhaps the alternative outcome DP&L suggests could be an improvement over current conditions.

Of course, DP&L's current actions are no surprise. It was predictable and predicted that AES would put substantial pressure on DP&L to seek to continue its nonbypassable charges to pay off the debt associated with AES' 2011 acquisition of DPL Inc. The merger involved the acquisition of DPL Inc. at a substantial premium to the then-current DPL Inc. share price and highly levered requiring the issuance of a substantial amount of new debt to fund the acquisition.[8] *The acquisition debt included the premium paid to the then-*

[6] *See id.* at 13

[7] *See id*. at 17-18.

[8] Preliminary Proxy Statement Relating to a Merger, Acquisition or Disposition ("PREM14 A") at 7. The $30 per share value offered to shareholders represents an 8.7% premium over DPL's closing share price on April 19, 2011, the last trading day prior to announcement of the transaction. This represented a premium of 10.7% over the 30-day average of DPL's closing price before the time of announcement, a premium of 12.3% over the 60-day average of DPL's closing price before the time of announcement, and a premium of 13.4% over the 90-day average of DPL's closing price before the time of announcement. About $3.5 billion will be required to fund the transaction including the premium paid to DPL shareholders.

current shareholders of DPL Inc. The transaction included $3.5 billion in debt being taken out to acquire DPL Inc, including approximately $1.2 billion of debt that was placed at DPL Inc.[9]

In its Preliminary Proxy Statement Related to a Merger, Acquisition, or Disposition, it was noted that the merger assumed that "**DP&L will continue to recover provider-of-last-resort (POLR) charges from 100% of its retail distribution load after 2012.**" (The POLR charge referenced is the current Rate Stabilization Charge ("RSC")).[10] In comments filed at the Commission in 2011, IEU-Ohio warned the Commission that "[t]he highly-leveraged transaction will potentially pressure AES to use its control over DPL to assure that DP&L and other DPL subsidiaries generate adequate cash flow to service the newly issued debt [ ] and that debt service can be expected to be drawn from the customers of DP&L."[11]

It is not DP&L's customers' obligation to repay any of AES' acquisition debt; none of which was ever resided at DP&L. In fact, perhaps the easiest solution to resolve the concerns of the unsecured creditors of DPL Inc.'s acquisition debt would be for AES to repay or guarantee the debt it took out in the first place to acquire DPL Inc. The problem lies with AES, so too should the solution. If the reverse outcome had occurred and DP&L and DPL Inc.'s unregulated generation fleet continued to produce very robust returns for shareholders, there is zero chance AES would have shared the upside of the transaction with ratepayers.

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[9] *In re Application of Dayton Power & Light* Company, Case No. 16-395-EL-SSO, Tr. Vol. I at 30 (Apr. 3, 2017) ("ESP III").

[10] PREM14 A at 33.

[11] Case 11-3002-EL-MER, IEU-Ohio Initial Comments at 7 (July 18, 2011) ("Merger Case").

Stripping away the claim that repayment of the acquisition debt constitutes a financial emergency at DP&L, there is nothing that supports a finding of financial emergency as that concept has long been applied by the Commission. As discussed below, the Commission's emergency rate relief precedent requires DP&L to demonstrate a financial emergency exists (no emergency exists at DP&L); it requires DP&L to demonstrate the minimum level of rate relief, from a cash flow perspective, to avert the emergency (DP&L has cash flow and capital expenditure projections, but none in the context of what is necessary to keep the lights on); it requires DP&L to demonstrate it engaged in self-help under existing rate mechanisms before seeking emergency rate relief (DP&L's testimony includes no analysis of the revenue it would seek through rate cases at the PUCO or FERC, or through an ESP, if it doesn't retain the RSC); and it requires the amount of emergency rate relief to actually fix the problem (bypassable emergency relief under an MRO is unsustainable because the majority of load is already shopping and additional bypassable charges would only lead to additional shopping).[12] DP&L could not obtain emergency rate relief under an MRO.

Simply put, because all of the components of the current ESP compared to the MRO are essentially the same, except for the nonbypassable RSC on the ESP side of the equation, the ESP is considerably less favorable in the aggregate than an MRO.

II. COMMENTS

R.C. 4928.143(E) requires that the Commission must test any ESP that exceeds three years in duration to determine whether the plan, "including its then-existing pricing

[12] *See infra* at 11-15; *see also In re Application of Akron Thermal*, Case Nos. 09-453-HT-AEM et al, Opin. & Order at 13-14 (Sept. 2, 2009).

and all other terms and conditions" continues to be more favorable in the aggregate and during the remaining term of the plan than an MRO. The statute also requires the Commission to test whether the prospective effect of the ESP is substantially likely to provide the electric distribution utility ("EDU") in question with a return on common equity that is significantly in excess of the return on common equity of comparable companies, known as the significantly excessive earnings test, or SEET.

Because DP&L withdrew its application from its most recent ESP application in ESP III, ESP I is once again the Company's operative ESP, and has been in place for more than three years, subjecting it to this statutory provision. Accordingly, the Commission directed DP&L to file the Application in this matter to review whether DP&L ESP is projected to remain more favorable in the aggregate and whether the ESP is substantially likely projected to produce significantly excessive earnings.

A. ESP v. MRO Test

1. *Quantitative Analysis*

DP&L's ESP v. MRO test quantitative analysis is straight forward, albeit incorrect. DP&L projects the next four years based on the statutory language that requires an ESP longer than 3 years be tested every fourth year.[13] DP&L assumes SSO generation costs are equal because both the ESP and MRO source SSO generation through a CBP.[14] On the ESP side, DP&L correctly adds $79 million/year (or $314 million in total) to the ESP side to account for the RSC. IEU-Ohio agrees with these assumptions and projections; however, this is where IEU-Ohio's agreement with DP&L's methodology ends.

[13] *See* R.C. 4928.143(E).

[14] Malinak at 79.

On the MRO side, DP&L incorrectly assumes it would be authorized to collect a bypassable financial integrity charge of $[redacted] to $[redacted] annually ($[redacted] to $[redacted] in total).[15] On the MRO side, DP&L also incorrectly assumes it could collect [redacted] in environmental costs associated with the Hutchings Plant scheduled to occur in [redacted].[16] DP&L would not collect either of these. Correcting for these errors demonstrates that the ESP is projected to be $314 million less favorable.

The first major issue in DP&L's application is its assumption that Ohio ratepayers are responsible to pay the debt of DPL Inc., an entity not subject to the Commission's jurisdiction.[17] The debt load at DPL Inc., which is inflated because of the AES acquisition, is the factor that has driven and continues to drive DP&L's claim that it has a financial emergency that needs remedied by a nonbypassable rider that is pure profit to the utility. The acquisition of DPL Inc. (including DP&L) by AES involved taking out $3.5 billion in debt, $1.2 billion of which was placed at DPL Inc.[18] In this proceeding, DP&L incorrectly assumes that the DPL Inc. debt, including acquisition debt, can be considered as part of any claim of financial emergency at DP&L. But, this is counter to the promises made by AES, DPL Inc., and DP&L during the merger proceeding.

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[15] *See id*. at 53.

[16] *See* Application at 2; Malinak at 80. This assumption rests on a misreading of the statute. Under R.C. 4928.142(D), DP&L is only entitled to recover such costs if the SSO load is calculated as a blend of utility-owned generation and competitively bid generation. Because DP&L's SSO load is already entirely competitively bid, it is not eligible for this adjustment.

[17] Garavaglia at 9-25 (explains financial emergency in context of DPL Inc. debt obligations and the secondary effect the DPL Inc. debt could have on DP&L).

[18] *In re Application of Dayton Power & Light* Company, Case No. 16-395-EL-SSO, Tr. Vol. I at 30 (Apr. 3, 2017) ("ESP III").

In the Merger Case, DP&L, DPL. Inc. and AES jointly agreed that:

> ***costs incurred directly related to the negotiation, approval and closing of the merger will not be recovered from ratepayers or through regulated rates***.[19]

DP&L, DPL Inc. and AES further jointly agreed that:

> ***neither the costs incurred directly related to the negotiation, approval and closing of the merger nor any acquisition premium shall be eligible for inclusion in rates and charges applicable to retail electric service provided by DP&L.***[20]

As discussed above, the debt that was taken out was to fund a transaction that included the substantial acquisition premium paid to acquire DPL Inc. Thus, any obligation to contribute towards the DPL Inc. debt is a requirement that ratepayers fund a portion of the acquisition premium.

Furthermore, regardless of what was intended by the parties to the merger, DP&L's ratepayers have already paid a very substantial amount in nonbypassable charges that has been used to burn down the acquisition debt that resides at DPL Inc. Since the merger, DP&L has collected a nonbypassable financial integrity charge every year. The Company collected approximately $76 million each year the RSC was originally in place; approximately $110 million annually through the Service Stability Rider ("SSR") after it was approved in ESP II before being struck down by the Ohio Supreme Court; $105 million annually under the DMR approved in ESP III before it was withdrawn by the Commission in response to a similar charge being struck down by the Ohio Supreme Court; and DP&L is again authorized to collect approximately $76 million annually under

[19] Merger Case, Finding and Order at 7.

[20] *Id.* at 9.

the RSC.[21] All told, since the merger of AES and DPL Inc., DP&L ratepayers have paid at least $700 million in nonbypassable charges.

At the end of 2011, DPL Inc.'s debt, excluding DP&L debt, was approximately $1.7 billion.[22] DPL Inc.'s debt as of December 31, 2019 was approximately $788.7 million, excluding DP&L's debt, much of which still relates to the acquisition debt.[23] Between 2012 and 2019, DP&L issued dividends of $791.8 million to DPL Inc.[24] It is pretty clear that the approximately $700 million in nonbypassable revenue is directly correlated with the pay down of acquisition debt at DPL Inc.

Although ratepayers have already contributed substantial amounts, DP&L's projections in this case assume that customers will contribute hundreds of millions more in nonbypassable charges over the next four years (the 4-year RSC projection is $314 million).[25] In total, that would translate to DP&L's ratepayers paying, directly or indirectly,

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[21] *See In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (Dec. 28, 2005) (setting RSS at $76,250,127); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order at 5 (June 24, 2009) (continuing RSS, but changing name to RSC); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No.12-426-EL-SSO, Entry Nunc Pro Tunc at 2 (Sept. 6, 2013) (setting SSR at $110 million); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No.16-395-EL-SSO, Opinion and Order at 6 (Oct. 20, 2017) (setting DMR at $105 million); Case No. 08-1094-EL-SSO, Second Finding and Order at 1 (Dec. 18, 2019) (reinstituting ESP I and approving tariffs including populated RSC).

[22] DP&L 2011 SEC Form 10-K at 35.

[23] *See* DP&L SEC Form 10-K, Note 7, at 75-77.

[24] 2012: $145 million dividend (net income $91.2 million) – DP&L SEC 2014 10-K at 131-132.
2013: $190 million dividend (net income $83.6 million) – DP&L SEC 2014 10-K at 131-132.
2014: $159 million dividend (net income $115 million) – DP&L SEC 2014 10-K at 131-132.
2015: $50 million dividend (net income $106.4 million) – DP&L SEC 2017 10-K at 132.
2016: $70 million dividend (net income negative 772.7 million) – DP&L SEC 2017 10-K at 132.
2017: $39 million dividend (net income $17 million) – DP&L SEC 2017 10-K at 132.
2018: $43.8 million dividend (net income $86.7 million) – DP&L SEC 2019 10-K at 98.
2019: $95 million dividend (net income $124.9 million) – DP&L SEC 2019 10-K at 98.

[25] Malinak at 79.

for approximately $1 billion of the $1.2 billion in acquisition debt that was originally placed at DPL Inc. If the $700 million in nonbypassable revenue to-date had been used to actually improve the quality of DP&L's operations then DP&L would be in a very robust financial position. But, rather than engage in self-help (e.g. AES paying off the debt or guaranteeing it so the unsecured creditors at DPL Inc. know they will get paid), a condition that as discussed below is a prerequisite to obtaining emergency rate relief, DP&L asks that the PUCO again ignore its commitment to not seek ratepayer funds to address the costs of AES' acquisition of DPL Inc. The Commission should enforce DP&L's merger commitment and set aside any consideration of DPL Inc.'s debt as impacting its analysis in this case. Moreover, as discussed below, this is what the law requires.

While ignoring the merger case commitments, DP&L defends its theory that an MRO could include a financial integrity charge that considers DPL Inc.'s debt, citing the Commission's order in DP&L's ESP III case which in turn cited the FirstEnergy ESP IV case.[26] It is not clear that these orders provide any support for DP&L's proposition, as the FirstEnergy order was reversed by the Ohio Supreme Court and the DP&L decision was reversed by the Commission because the DMR was unlawful. Moreover, this very issue was challenged in both cases but ultimately remained unresolved because the DMRs were both deemed unlawful and reversed. The Commission was wrong on the DMR decisions because debt of the parent company is beyond the Commission's jurisdiction, a nonbypassable charge is unavailable under the MRO, and DP&L already agreed that the DPL Inc. debt would not be considered in assessing charges on ratepayers. The Ohio

[26] Garavaglia at 9-10.

Supreme Court had a similar reaction in striking down FirstEnergy's DMR but didn't conclusively rule on the issue as reversal of the DMR made the issue moot:

> *The commission did not weigh the costs of the DMR to ratepayers under the statutory test, because it determined that the same amount of revenue could be recovered by the companies from ratepayers had the companies sought a market-rate offer under R.C. 4928.142 rather than an ESP. Although we question the commission's interpretation of R.C. 4928.142 to exclude the DMR revenues under the ESP-versus-market-rate-offer test, our decision holding that the DMR is unlawful renders this issue moot*.[27]

Moreover, since the DMR decisions, the Commission has applied the *Akron Thermal* standard as the appropriate standard for emergency rate relief.[28] Given the reversals of the Commission decisions that abrogated the *Akron Thermal* standard to include the credit ratings analysis and parent company debt analysis, and the Commission's return to *Akron Thermal* and its cash flow analysis more recently, in considering emergency rate relief under an MRO the Commission should apply the *Akron Thermal* standard.[29]

In *Akron Thermal*, the Commission listed several standards by which it determines whether or not to grant emergency relief under R.C. 4909.16. First, an emergency must actually exist. The applicant's evidence "must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation."[30] Next, the Commission must determine that emergency relief is not being sought as a way

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[27] *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401 ¶ 37.

[28] *In re Review of Youngstown Thermal, LLC and Youngstown Thermal Cooling, LLC*, Case No. 17-1534-HT-UNC, Third Finding and Order, ¶ 20 (Aug. 2, 2017).

[29] *In re Application of Akron Thermal*, Case Nos. 09-453-HT-AEM et al, Opin. & Order at 13-14 (Sept. 2, 2009).

[30] *Id*. at 13.

to circumvent or substitute permanent rate relief under R.C. 4909.18.[31] Finally, the Commission will only grant relief at the minimum level necessary to avert or relieve the emergency.[32] The ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired.[33] The Commission also considers whether emergency rate relief will ultimately address the underlying issue and restore the utility to a healthy condition.[34] Any emergency rate relief provided must "be deemed necessary to prevent injury to the interests of the public or of the public utility."[35]

Under the *Akron Thermal* standard, the first question is whether an emergency situation truly exists, and the underlying analysis is based on cash flows.[36] Under Mr. Malinak's analysis, even without the RSC, DP&L projects [redacted].[37] DP&L does not indicate the level of capital expenditures that are necessary to maintain adequate and reliable service. DP&L does indicate it would like to invest [redacted] to "improve its aging infrastructure and implement SmartGrid.[38] And, DP&L also indicates it would like to invest [redacted] in capital expenditures this year including [redacted] in base capital expenditures and the remainder related to SmartGrid.[39] But replacing aging

[31] *Id*.

[32] *Id*.

[33] *Id*. at 13-14.

[34] *Id*. at 63-64.

[35] *Id*. at 14.

[36] *Id*. at 7-13.

[37] Malinak at Ex. RJM-44C.

[38] Garavaglia at 3. DP&L's as-filed SmartGrid plan was more than $800 million.

[39] *Id.* at 15.

infrastructure, engaging in modernizing billing systems, and installing smart meters, are not capital expenditures that necessarily correlate exactly with expenditures necessary to ensure that DP&L can keep the lights on.[40] There is no information presented by DP&L upon which the Commission could determine the "minimum level necessary to avert the crisis" and maintain DP&L's ability to "render service."[41]

The *Akron Thermal* standard also maintains that emergency rate relief is not a substitute for other statutory rate relief.[42] At the time of *Akron Thermal*, rate regulation was under R.C. 4909.18, but today rate regulation for DP&L includes base distribution rate cases, FERC transmission rate cases, and SSO Cases. Under the *Akron Thermal* standard, DP&L is required to engage in self-help first by utilizing the existing statutory rate mechanisms before it can seek emergency rate relief. But DP&L's testimony and projections make no effort to demonstrate the amount of revenue DP&L would first seek through existing mechanisms before seeking emergency rate relief. For example, if DP&L does not have an RSC going forward it would be required to file a base rate case and or new ESP with a distribution investment rider before it could obtain emergency rate relief in lieu of the revenue available under those mechanisms. DP&L's projections that ignore this requirement are thus insufficient to calculate the minimum level of emergency rate relief that would be necessary to avert the emergency and allow DP&L to keep the lights

[40] In its 2019 SEC 10-K report DP&L projected spending only "approximately $73.0 million within the next five years to reinforce its transmission system to comply with mandatory NERC and FERC Form 715 planning requirements." DP&L SEC Form 10-K at 41.

[41] *Akron Thermal* at 6.

[42] *Id*. at 13.

on. Thus, there is no basis to conclude, at this time, that DP&L would be entitled to recover any emergency rate relief under an MRO.[43]

While DP&L is incorrect that it could obtain emergency rate relief under the MRO statute, it is correct that any such relief would be "bypassable."[44] The MRO statute provides:

> *[a]dditionally, 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 a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution.*[45]

A comparison between a bypassable financial integrity charge under an MRO and a nonbypassable RSC under the ESP is apples and oranges from the financial impact on shopping customers, which reflect 70% of DP&L's MWh.[46]

Moreover, under *Akron Thermal* the Commission has refused to provide emergency rate relief to a utility if it could not solve the underlying emergency. In *Akron Thermal*, despite finding that an emergency existed and calculating the minimum amount

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[43] Like the unavailability of nonbypassable financial emergency charges under an MRO, DP&L also could not obtain authorization of a POLR charge under the MRO statute. Initially, no provision of the statute authorizes nonypassable charges for any purpose. Just as critical, however, is that even if a POLR charge could be authorized under the statute it must bear some relation to actually incurred POLR costs and actual risks. The RSC POLR charge is based on generation costs of plants that are no longer owned by DP&L, many of which have been completely closed down. The competitive bid process mandated by the MRO statute also means that the POLR risk is all but transferred to the auction winners. Accordingly, even if a POLR charge could be authorized under an MRO, it would effectively be set at or near zero.

[44] Malinak at 80.

[45] R.C. 4928.142(D)(4) (emphasis added).

[46] See puco.ohio.gov, Customer Switch Activity, DP&L 2020, available at: https://app.powerbigov.us/view?r=eyJrIjoiZTliZDEzNGEtZjlhYi00YWEzLThjZjktMGZmNDg4OWE4ZDFkIiwidCI6IjUwZjhmY2M0LTk0ZDgtNGYwNy04NGViLTM2ZWQ1N2M3YzhhMiJ9 (last accessed 6/30/20).

necessary to avert the financial crisis, the Commission refused to provide any relief because had the Commission imposed the emergency rate relief it would have led to additional customers leaving the Akron Thermal system and driving up the price for remaining customers: the proverbial death spiral.[47] The Commission concluded that imposing the emergency rate relief requested, despite proving an emergency and the minimum amount necessary to avert the emergency, was unsustainable and therefore would not serve the public interest and denied the emergency rate relief.

Bypassable emergency rate relief under an MRO would continue to drive remaining SSO customers to shop, requiring the remaining customers to pay even more. Just like in *Akron Thermal* it would be unsustainable to assess any significant amount of financial emergency rate relief under an MRO. Thus, DP&L projections that assume the availability of substantial emergency rate relief under the MRO are unrealistic and should be given no weight in considering the ESP v. MRO test.

DP&L would also not be eligible to collect any environmental clean-up costs associated with its interest in the Hutchings generation plant. R.C. 4928.142(D). The MRO statute requires a blend of the existing SSO price and a competitive bid MRO process. Here that would be blending a competitive bid with a competitive bid. As discussed above, DP&L correctly identifies this as a wash. While the MRO statute allows for an adjustment for prudently incurred environmental costs, environmental costs unrelated to the provision of service would not be prudent and recoverable.[48] Because

[47] *Akron Thermal* at 63-64.

[48] This is the same conclusion made by the Commission with respect to DP&L's Environmental Investment Rider.

DP&L is served entirely through competitive bid, this section does not apply and DP&L would not be able to collect these environmental clean-up costs through an MRO.

In sum, on a quantitative basis, the information DP&L presents indicates that the ESP is $314 million less favorable than an MRO over the 4-year projection period. There is insufficient information presented by DP&L to know if an emergency condition would exist without the RSC and to calculate the minimum level necessary to avert the emergency. Moreover, because financial emergency relief under the MRO is bypassable, even if some amount of emergency rate relief were calculated, the ESP with a nonbypassable charge would remain quantitatively worse for shopping customers that reflect 70% of DP&L's load in terms of MWh.[49]

2. *Qualitative Application*

DP&L also asserts that there are several qualitative benefits to the ESP.[50] In reality, non of them are actual qualitative benefits of this ESP.

First, DP&L asserts that a benefit of the ESP is that AES will invest $300 million in equity in DP&L under an ESP, but not an MRO.[51] In the merger case DP&L, DPL. Inc., and AES committed to maintaining a capital structure of DP&L of at least 50 percent equity.[52] Thus, under either an ESP or an MRO, AES already has a binding requirement to inject equity into DP&L as needed. This is not an additional qualitative benefit of the ESP.

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[49] See puco.ohio.gov, Customer Switch Activity, DP&L 2020, available at: https://app.powerbigov.us/view?r=eyJrIjoiZTliZDEzNGEtZjlhYi00YWEzLThjZjktMGZmNDg4OWE4ZDFkIiwidCI6IjUwZjhmY2M0LTk0ZDgtNGYwNy04NGViLTM2ZWQ1N2M3YzhhMiJ9 (last accessed 6/30/20).

[50] Malinak at 81-84.

[51] *Id*. at 81.

[52] Merger Case, Order at 9.

Second, DP&L asserts that a qualitative benefit of an ESP is that the ESP statute includes the SEET, which could produce potential refunds.[53] Under DP&L's testimony in this case, however, it asserts that no refunds should be provided unless DP&L's earnings exceed 16.6% and asserts that it passes the SEET even while collecting approximately $79 million through the nonbypassable RSC.[54] Under DP&L's theory and projections, it is hard to see customers ever receiving a refund under the SEET, and it would therefore not be a benefit under DP&L's own theory. Moreover, the only reason there would be refunds is if the utility produces not just excessive earnings but significantly excessive earnings. An MRO that does not include all the riders like the RSC is substantially more likely to not even produce excessive earnings, let alone significantly excessive earnings, triggering a refund opportunity. This factor is a qualitative benefit of the MRO, not an ESP.

Third, DP&L asserts as a qualitative benefit of an ESP the fact that once a utility has an approved MRO it cannot return to an ESP.[55] If the ESP is a device to continually hold ratepayers hostage to requests for nonbypassable charges and has the ability to produce excessive earnings, then, perhaps, a move to an MRO is a benefit to customers. Again, this point is a qualitative benefit of an MRO.

Fourth, DP&L asserts that a qualitative benefit of the ESP is that customers could avoid the financial integrity charge under an MRO but cannot avoid the nonbypassable RSC. Avoiding an unlawful and unreasonable charge would certainly be a benefit (see the prior discussion on lack of availability of a lawful and reasonable emergency charge

[53] Malinak at 81.

[54] *Id*. at 88.

[55] *Id*. at 81.

under an MRO and the current RSC as an unjustifiable going forward POLR charge).[56] Again, this is a qualitative benefit of the MRO.

Fifth, DP&L asserts that a qualitative benefit of the ESP is that rate increases under an ESP are more gradual.[57] But this is in comparison to the massive $79 million rate decrease under an MRO and then no future rate increases under the MRO. Again, this is a qualitative factor supporting the MRO.

Finally, DP&L concedes that under its projections the operating metrics would be somewhat less robust under its ESP.[58] Again, DP&L's projections are based on assumptions irrelevant to lawful and reasonable ratemaking in Ohio. The projections should carry no weight for either quantitative or qualitative analysis.

In sum, the qualitative factors in favor of an ESP as alleged by DP&L are illusive or nonexistent. Most actually weigh in favor of the MRO. Even if these were somehow viewed as providing some qualitative benefit to the ESP, they certainly do not outweigh the $314 million quantitative amount the ESP is less favorable than an MRO.

B. SEET

Mr. Malinak states in his testimony that the SEET threshold for DP&L should be 15.6%.[59] Mr. Garavaglia, however, asserts that the Commission should consider "company-specific" factors, such as the unusual financial risks the Company is subject to, and increase the threshold by 100 basis points, to 16.6%.[60] The purpose of this request

[56] *See supra*, at 10-14.

[57] Malinak at 82.

[58] *Id*. at 90.

[59] *Id*. at 15.

[60] Garavaglia at 3.

is unclear, given that under Mr. Malinak's analysis, DP&L is well under both of these threshold numbers, and is even under his calculated "safe harbor" threshold of 12.4%.[61] Regardless of the purpose of the request, the Commission should reject the notion that a utility's financial instability is cause to arbitrarily increase the threshold at which its earnings can be considered significantly excessive.

First and foremost, there is no statutory authority for such a request. R.C. 4928.143(F) requires a comparison of the earned return on common equity with that of other companies that face comparable business and financial risk. By doing so, any financial instability experienced by the utility is accounted for. For instance, in determining the appropriate ROE for comparison, Mr. Malinak identifies several companies that have similar investment grade ratings to DP&L.[62] This allows him to calculate a reasonable comparable ROE given DP&L's particular financial risk profile.[63] The adjustment DP&L requests double counts the business risk of DP&L.

Additionally, Mr. Garavaglia argues that DP&L faces unique challenges due to the COVID-19 crisis.[64] This argument misses the mark; as Mr. Garavaglia himself states, all utilities in the country, and indeed around the world, are experiencing financial strain as a result of this pandemic.[65] This is a unifying factor, not a distinguishing one. Any financial strain DP&L experiences due to COVID-19, and even any particular distress DP&L has

[61] Malinak at 16.

[62] *Id*. at 86.

[63] *Id*. at 87-89.

[64] Garavaglia at 7-8.

[65] *Id*.

faced given its poor financial condition, is again accounted for by comparing it to companies facing comparable business and financial risk.

Additionally, when considering that DP&L is essentially fully regulated with authorized ROEs of approximately 10%, the RSC certainly has the potential to cause this ESP to produce significantly excessive earnings over the next few years.[66] The RSC collects approximately $76 million annually (approximately $60 million after federal income taxes), which translates to a 12.35% addition to the ROE based on DP&L's equity balance of $485.5 million as of March 31, 2020.[67] DP&L has committed to filing a base distribution rate case by October 2021, and if it is not achieving its authorized ROE, it is well within its rights to file sooner. At FERC, DP&L has a pending request to switch from stated rates to a formula rate, which if approved, will true-up to produce DP&L's authorized transmission ROE every year. Suffice it to say, it is quite plausible that DP&L's ROE without the RSC can return to the approximately 10% authorized regulated ROE. Even if there is a substantial increase in DP&L's equity balance over the projection period, the ROE adder from the RSC would produce significantly excessive earnings.[68] Even if equity was injected to reach a 50/50 capital structure, *i.e.*, an equity balance of $574.5 million, the RSC translates to a 10.44% adder to the ROE. If another $200 million in equity was added after that, the RSC would still result in a 7.74% addition to the ROE. Even

[66] DP&L's distribution ROE is 9.999% (*see In re Application of Dayton Power& Light Company*, Case No. 15-1830-EL-AIR, Opin. & Order at 24 (Sept. 26, 2018)). DP&L current transmission revenue requirement is produced by a black box settlement; however, it has a pending request at FERC for new transmission rates. DP&L's pending ROE request from FERC is an all-in ROE of 10.89%, which includes ROE incentives. *See* FERC Docket ER-20-1150, Section 205 Filing at 13 (Mar. 3, 2020).

[67] See DP&L SEC 10-Q Report for Quarter ending March 31, 2020 at page 31

[68] DP&L asserts that approximately $300 million in equity is planned to be injected into DP&L if it retains the RSC.

under DP&L's proposed inflated threshold of 16.6%, if DP&L achieved its authorized regulated ROE of approximately 10%, even a 7.74% addition to DP&L's equity balance would produce significantly excessive earnings.

Pursuant to R.C. 4928.143(E) the Commission must consider whether the ESP over the next four years is "substantially likely" to produce significantly excessive earnings. DP&L asks the Commission to assume that a fully regulated utility will not come close to achieving an authorized ROE and that the utility and regulators will take no steps to address this outcome. This is substantially *un*likely. What is more likely is that DP&L will take steps to improve its earned ROE and bring that in line with its authorized ROE. Given this much more realistic scenario, the continuation of the RSC is substantially likely to produce significantly excessive earnings.

III. CONCLUSION

IEU-Ohio appreciates the opportunity to comment on DP&L's application for its ESP v. MRO test and SEET. While the financial integrity of the Company is an important factor for the Commission to consider, the legality of the terms of the ESP as currently approved must be the primary consideration. IEU-Ohio respectfully requests that the Commission consider these comments and rule accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 1st day of July 2020, *via* electronic transmission.

/s/ Rebekah J. Glover
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Summary: Comments Public Version of Industrial Energy Users-Ohio's Comments electronically filed by Ms. Rebekah J. Glover on behalf of Industrial Energy Users-Ohio