**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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). | )<br>)<br>)<br>)<br>)<br>) | Case No. 20-0680-EL-UNC |

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# COMMENTS
# OF
# THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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## I. INTRODUCTION

The Dayton Power and Light Company (DP&L) filed an Application on April 1, 2020, seeking a determination by the Public Utilities Commission (Commission) that DP&L's current modified Electric Security Plan (Modified ESP I) passes the prospective significantly excessive earnings test (SEET) and the more favorable in the aggregate (MFA) test as required by R.C. 4928.143(E). R.C. 4928.141 requires an electric distribution utility to provide a standard service offer (SSO) for generation services to customers within the utility's certified territory. The utility may offer the SSO in the form of either an Electric Security Plan (ESP) or Market Rate Offer (MRO).[1]

The Commission first approved the original ESP I in 2009, which, among other things, included a nonbypassable Retail Stability Charge (RSC).[2] In 2013, the Commission approved

[1] R.C. 4928.141(A); *See also* R.C. 4928.142 *and* R.C. 4928.143.

[2] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Opinion and Order at 3, 5, 13 (June 24, 2009).

DP&L's application for a second ESP (ESP II).[3] Subsequently, however, the Supreme Court of Ohio reversed the Commission's decision after concluding that a similar retail stability rider unlawfully collected transition revenues, and invalidated such a rider in a different utility's ESP.[4] After reversal, DP&L withdrew ESP II and nominally reverted to ESP I; however, in reality, the Commission approved a *blended* ESP I, which allowed DP&L to blend two ESPs together, retaining certain provisions from ESP II and certain provisions from ESP I, without conducting the statutorily-mandated reviews to protect consumers.[5] Prior to the Court reviewing the Commission's order allowing DP&L to withdraw ESP II and implement a blended ESP I, the Commission approved DP&L's third ESP (ESP III) in 2017.[6] Among other riders, ESP III contained a distribution modernization rider (DMR). The Court later reversed this decision as well, holding that R.C. 4928.143 did not authorize the DMR.[7]

As a result, the Commission removed the DMR from ESP III, and DP&L withdrew ESP III on November 26, 2019.[8] The Commission ultimately approved DP&L's application to revert back to charges from ESP I and ESP II, removing several riders approved as part of ESP III (such as the reconciliation rider, the regulatory compliance rider, and the uncollectible rider), while

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[3] *In re The Dayton Power and Light Co*., Case No. 12-426- EL-SSO, et al., Opinion and Order (Sept. 4, 2013).

[4] *In re Application of Dayton Power & Light Co*., 147 Ohio St.3d 166, 2016-Ohio-3490, *citing In re Application of Columbus Southern Power Co.,* 147 Ohio St.3d 439, 2016-Ohio-1608.

[5] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶ 28 (Dec. 18, 2019).

[6] *In re Dayton Power and Light Co*., Case No. 16-395-EL-SSO, Opinion and Order at ¶ 131 (Oct. 20, 2017).

[7] *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

[8] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order, ¶¶ 8-9 (Dec. 18, 2019); *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 Nos. 16-395, et al., Supplemental Opinion and Order at ¶ 110 (Nov. 21, 2019).

reinstating the unlawful transition charge, the RSC (hereinafter, "Modified ESP I").[9] The Commission also ordered a review of the Modified ESP I pursuant to R.C. 4928.143(E) to determine whether the Modified ESP I passes both the SEET review and MFA test.[10]

On April 23, 2020, the Commission issued an Entry, directing interested parties to intervene by June 15, 2020, to file initial comments regarding the application by July 1, 2020, and to file reply comments by July 16, 2020. On May 13, 2020, the Ohio Manufacturers' Association Energy Group (OMAEG) filed its motion to intervene. In accordance with the Commission's April 23, 2020 Entry, OMAEG hereby submits the following comments.

## II. COMMENTS

### A. DP&L Failed to Sustain its Burden of Proof.

DP&L bears the burden of proof for its Application submitted in this proceeding.[11] Additionally, R.C. 4928.143(E), specifically notes that the electric distribution utility bears the burden of proof for demonstrating that it did not collect significantly excessive earnings under the electric security plan. As explained herein, DP&L failed to satisfy its burden of proof in this proceeding. DP&L asserts that the Modified ESP I proves more favorable than an MRO, partly because under its hypothetical MROs, DP&L would be able to recover additional costs.[12] DP&L claims it would be able to collect a financial integrity charge (FIC) and recover certain

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[9] Id. at ¶¶ 36-42.

[10] Id. at ¶ 41.

[11] *See, e.g. In the Matter of the Filing By Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company of a Grid Modernization Business Plan*, Case Nos. 16-481, et al., Opinion and Order ¶ 106 (July 17, 2019) ("Utilities continue to bear the burden of proof for any application submitted for our consideration.")

[12] Application at 2 (April 1, 2020); *see also* Testimony of R. Jeffrey Malinak at 13 (April 1, 2020).

environmental clean-up costs. However, DP&L has failed to demonstrate that it legally could or would in fact collect either charge.

DP&L asserts that it would be able to collect a bypassable financial integrity charge under a hypothetical MRO, which would be greater than what DP&L would collect under the RSC included in the Modified ESP I.[13] DP&L has failed to prove that it would be entitled to such a charge, or that the actual level of recovery that DP&L would be entitled to would be greater than the RSC. In support of such a charge, DP&L's witness points to an earlier order concerning a completely different ESP and a different charge, the DMR, in which the Commission explained that the DMR should be excluded from a quantitative analysis as a charge like the DMR may be available under either an MRO or an ESP.[14] However, the case is not on point and is not persuasive.

The previous decision only held that a charge similar to a DMR may be *available* under a hypothetical MRO based on the facts and circumstances in that case, including DP&L's financials at that time, and under the context of an emergency rate case filing under R.C. 4909.16, which DP&L has not filed. It does not speak to whether DP&L's *current* financial situation would *entitle* it to a FIC, or the amount or level of any hypothetical FIC that may or may not be authorized. The ruling also relies on the application of the standards in emergency rate relief filings under R.C. 4909.16.[15] However, DP&L has not made any showing that it would be entitled to emergency rate relief under the current proceeding. DP&L has also not established that borrowing costs have increased in any meaningful way. DP&L has also not established that even if DPL Inc. sought bankruptcy protection that it would have any impact on customers whatsoever.

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[13] Application at 2 (April 1, 2020).

[14] Testimony of Gustavo Garavaglia M. at 9-10 (April 1, 2020).

[15] *Id.* at 9; *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 Nos. 16-395, et al., Opinion and Order at ¶ 90 (October 20, 2017).

It is clear from the unsupported testimony filed that any financial emergency DP&L faces results from poor debt structuring by its parent companies, DPL Inc. and AES, and not from its business outlook. For example, DP&L asserts that it would collect a FIC under a hypothetical MRO, because it if did not collect a FIC under a hypothetical MRO, its parent company would not make investments in the company.[16] AES' poor financial decision-making should not entitle DP&L to place the burden on consumers. Additionally, this unsupported opinion testimony simply relies on an additional hypothetical, rather than pointing to any current financial data.

Second, DP&L asserts that it would be able to collect "certain environmental clean-up costs" under a hypothetical MRO, but not under the Modified ESP I. However, it does not explain how or why, and has not included anything in the application or testimony to support its assertion. In testimony, DP&L's witness merely makes repeated, conclusory, and unsupported statements about the availability of DP&L to collect environmental clean-up costs from customers under a hypothetical MRO.[17] DP&L advances no real argument as to why these costs would be available, yet relies on them as proof of the costs of a hypothetical MRO and its conclusions of why the Modified ESP I is more favorable in the aggregate than the expected results of an MRO.

DP&L does not sufficiently demonstrate the availability or the level of either hypothetical charge and, therefore, cannot rely on the inclusion of such charges when applying the MFA test. Accordingly, DP&L's Modified ESP I is less favorable in the aggregate than an MRO. Moreover, under the SEET review, as set forth in more detail below, DP&L's rates under the Modified ESP I, including the unlawful RSC charge, will allow DP&L to earn significantly excessive profits. As such, allowing DP&L to collect the RSC would cause DP&L to receive a return on equity that is significantly in excess of a reasonable rate of return. Thus, the Commission should not allow the

[16] Testimony of R. Jeffrey Malinak, 53 (April 1, 2020).
[17] *See* Testimony of R. Jeffrey Malinak, 7, 13, 49, 80 (April 1, 2020).

RSC to survive the SEET test. DP&L has failed to sustain its burden of proof in its Application pursuant to Commission precedent and R.C. 4928.143(E) and should be denied.

### B. DP&L's Modified ESP I is less favorable in the aggregate than the expected results of a MRO.

DP&L's Modified ESP I is not more favorable in the aggregate than the expected results of a MRO because it requires customers to pay a nonbypassable charge that would otherwise be deemed an unlawful transition charge. The Commission initially implemented the RSC in 2005, prior to DP&L's first ESP application (prior to the enactment of Am. Sub. S.B. 221 in 2008), which established the electric security plan pursuant to a settlement.[18] Later, pursuant to another settlement, the Commission retained the RSC under the original version of ESP I, with the RSC set to terminate in 2012.[19] However, instead of allowing the RSC to expire, the Commission reinstated the charge in a modified version of ESP I in 2019.[20] The Commission did so despite a series of cases in which the Supreme Court of Ohio invalidated various forms of a financial stability charge or financial integrity charge that the Commission had authorized under the ESP framework.[21]

Specifically, in *In re Application of Columbus S. Power Co.*,[22] the Court found that a similar Retail Stability Rider ("AEP's Stability Charge") collected from customers the equivalent of transition revenue, in violation of R.C. 4928.38.[23] In its decision, the Court explained that AEP's

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[18] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Opinion and Order at 3 (June 24, 2009).

[19] Id. at 5.

[20] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶¶ 36-42 (Dec. 18, 2019).

[21] *See In the Matter of the Application of the Dayton Power & Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO et al., Comments Of The Ohio Hospital Association, at 6 (December 4, 2019).

[22] 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 ("*Columbus S. Power Co.*").

[23] Id.

Stability Charge was "intended to guarantee recovery of lost revenue resulting from certain discounted capacity prices offered to CRES providers and from expected increases in customer shopping during the ESP," and because electric utilities were not able to recover transition revenues, or the equivalent of transition revenues, AEP's Stability Charge was unlawful.[24] The Court struck down the stability charge at issue in *Columbus S. Power Co.* because "R.C. 4928.38 bars the 'receipt of transition revenues *or any equivalent revenues* by an electric utility' after 2010." *Id.* at ¶ 21 (emphasis in original). The Court further stated: "By inserting the phrase 'any equivalent revenues,' the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name."[25]

Then, in *In re Application of Dayton Power & Light Co.*,[26] the Court reversed the PUCO's order approving the Service Stability Rider contained in DP&L's ESP II, on the authority of *Columbus S. Power Co.*

Although in previous filings before the PUCO DP&L did not dispute that it is not providing provider of last resort (POLR) services to consumers, in this case, DP&L appears to claim that the RSC is a POLR Charge and that DP&L "bears the burden of acting as the [POLR] in its service territory."[27] But DP&L cannot credibly claim that it has such risk or that Rider RSC somehow compensates DP&L for providing POLR service or is otherwise justified by specific costs when such costs are now included in another rider. The standard service offer or default service for generation service is no longer provided by DP&L. Instead, customers compensate wholesale

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[24] *Columbus S. Power Co.* at ¶¶ 23, 25.

[25] Id.

[26] 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

[27] Garavaglia Testimony at 13; Malinak Testimony at 65-66.

market participants for bearing POLR risk through the competitive auction process. When blending the two ESPs together to form a new, blended ESP, DP&L retained the competitive sourcing of the standard service offer. Thus, DP&L cannot argue it bears a POLR risk under its new Modified ESP I. DP&L no longer owns generation and, therefore, some provisions of the original ESP I (such as the RSC and Environmental Investment Rider) are simply inapplicable.

Additionally, DP&L cannot credibly claim that it is exposed (through its Modified ESP I or an MRO) to the risk of having to procure power at market rates if a supplier defaults through the competitive auction process[28] as those costs are paid for through another rider, a true-up mechanism associated with the SSO. DP&L is not and will not be at risk for any financial differences in market pricing. Moreover, DP&L's reference to COVID-19 and nonpayment of utility bills,[29] is again misplaced, particularly in light of the Commission's recent order authorizing deferral of such costs and the existence of uncollectible riders. DP&L seems to be confusing its obligations as a distribution utility with the provision of default generation service through the competitive market either under a competitive auction process established by an ESP or one established by an MRO.

The RSC, as a nonbypassible charge, requires distribution customers of DP&L to subsidize DP&L even if they do not take generation service pursuant to DP&L's SSO. DP&L admits as much in its testimony but continues to attempt to justify the purported need for the RSC by confusing the issues, mixing distribution services with generation services provided under a standard service offer, and by threatening the viability of the Company (and parent company) and

[28] Testimony of R. Jeffrey Malinak at 65-66.

[29] Id. at 66.

service to customers.[30] Regardless of whether DP&L wants or claims it "needs" the RSC to bolster its bottom line or that of its parent, the fact remains that the RSC represents transition revenue or its equivalent, as it is substantially identical to both the Service Stability Rider that the Court struck down in *In re Application of Dayton Power & Light Co.* and AEP's Stability Charge that the Court struck down in *Columbus S. Power Co.*, as well as FirstEnergy's and DP&L's Distribution Modernization Riders struck down recently.[31] Given that DP&L's RSC embedded in the Modified ESP I is an unlawful transition charge in violation of R.C. 4928.37 through 4928.40, it would not be able to be collected from customers in an MRO. Simply put, the Commission could not lawfully authorize the RSC, a POLR charge, or any similar financial integrity charge if DP&L were to include it in a future application to establish an MRO (or even a new ESP).

Precedent clearly demonstrates that R.C. 4928.143 does not authorize nonbypassable riders, implemented to promote the general financial viability of electric distribution utilities.[32] This includes POLR charges, rate stability riders, service stability riders, and DMRs.[33] However, regardless of whether the Commission correctly implemented the RSC under the first modified ESP I or under the current Modified ESP I—which it did not—the qualitative implications for the

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[30] Testimony of R. Jeffrey Malinak at 5-7 (April 1, 2020) ("For example, if the inflows under ESP I, including the RSC or any external capital infusions, were reduced or eliminated, it would reduce DP&L's ability to pay its debt service or invest sufficiently in its system for its customers."). See Malinak Testimony at 8 where Malinak admits that DP&L's parent company, DPL Inc. would face greater financial distress without some sort of financial integrity charge.

[31] *In re Application of Ohio Edison Co.*,157 Ohio St.3d 73 (2019), reconsideration denied, 2019-Ohio-3331, 156 Ohio St.3d 1487.

[32] *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 Nos. 16-395, et al., Supplemental Opinion and Order at ¶ 108 (Nov. 21, 2019).

[33] *Id.* at ¶¶ 104-07; *See, e.g. In re Application of Columbus Southern Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608 (retail stability rider); *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401 (DMR).

MFA test remain the same. Modified ESP I forces DP&L distribution customers to pay an additional charge to subsidize DP&L that they would not otherwise be forced to pay.

While DP&L's Witness Malinak admits that a 'hypothetical MRO' would not contain a nonbypassable RSC,[34] without support and without a legal basis,[35] he incorrectly presumes that under his hypothetical MRO scenarios, DP&L customers may pay a different, albeit bypassable, financial integrity charge (FIC).[36]

First, as discussed above, DP&L has cited no authority which would suggest that any type of financial integrity charge (similar to that of an RSC or POLR charge) would be approved in an MRO (as either a bypassable or nonbypassable charge) since it is unjustified under Ohio law and from a cost perspective.

Second, even if a future MRO contains a FIC charge as suggested by DP&L, the FIC charge would be bypassable. The bypassability of the FIC charge is more favorable to consumers than an unlawful, nonbypassable RSC charge under the Modified ESP I simply by nature of it being nonbypassable. Under DP&L's hypothetical MRO with a bypassable FIC, customers who purchase their electricity generation services from a CRES provider will not be forced to subsidize DP&L and would not pay this financial integrity charge. Thus, even assuming that customers would have to pay a FIC charge under a MRO as DP&L argues, the FIC charge is bypassable. By this fact alone, an MRO is an improvement, and thus, more favorable than the Modified ESP I.

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[34] Malinak Testimony at 79-80.

[35] In its Application, DP&L states: "During the forecast period, DP&L would be able to collect a bypassable financial integrity charge under a hypothetical MRO that is greater than what DP&L is collecting under the nonbypassable [RSC]." DP&L offers no citations to Ohio law, the PUCO rules, or precedent for its alleged claim that DP&L has a right to collect such charge from customers.

[36] Id.; see also Malinak Testimony at 7 ("I evaluate three hypothetical MRO scenarios that differ only in the amount of the assumed FIC and external borrowing amounts.").

Additionally, again assuming that DP&L can lawfully implement a FIC charge under its hypothetical MRO, DP&L's hypothetical MRO encourages shopping as customers will be incentivized to shop if shopping can cause them to avoid the new, bypassable FIC charge. Notably, in implementing a competitive framework, Ohio sought to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service," "ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs," and "recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment."[37] The nonbypassable, unlawful RSC in Modified ESP I does nothing to support the state policy to encourage competitive markets, but an MRO will. Even an MRO that contains DP&L's assumed FIC charge in its hypothetical MRO will promote this state policy. Therefore, by encouraging competitive markets and shopping by the implementation of a bypassable FIC charge, DP&L's hypothetical MROs are also more favorable in the aggregate then the Modified ESP I.

Again, without support and without a legal basis,[38] DP&L incorrectly presumes that, under an MRO, DP&L customers will pay certain environmental clean-up costs associated with DP&L's interest in Hutchings.[39] In its Application, without support and a legal basis, DP&L claims: "Under an MRO, DP&L would also have a right to collect from customers certain environmental clean-up costs associated with DP&L's interest in Hutchings, which are not recoverable under DP&L's ESP. DP&L offers no authority or basis for its claim. Additionally, in DP&L Witness Malinak's

[37] R.C. 4928.02(A), (B), and (G).

[38] In its Application, DP&L states: "During the forecast period, DP&L would be able to collect a bypassable financial integrity charge under a hypothetical MRO that is greater than what DP&L is collecting under the nonbypassable [RSC]." DP&L offers no citations to Ohio law, the PUCO rules, or precedent for its alleged claim that DP&L has a right to collect such charge from customers.

[39] Application at 2.

testimony, Witness Malinak states: "A secondary difference is that the MRO allows DP&L to recover from ratepayers approximately [REDACTED] of environmental costs related to generation."[40] He also states: "Another difference is that DP&L can collect about [REDACTED] from customers related to recovery of generation environmental expenses under an MRO but not an ESP."[41] Again, DP&L's witness offers no authority or basis for his assertions. As explained above, without more, DP&L has not met its burden of proof and cannot demonstrate that there is an existing right or claim to charge customers for environmental clean-up costs under an MRO, but not under an ESP. Accordingly, the lack of certain environmental clean-up costs included in the Modified ESP I or an alleged avoidance of those costs under the Modified ESP I cannot be considered as a quantifiable benefit for implementing the Modified ESP I as more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.

Accordingly, DP&L's Modified ESP I is not more favorable in the aggregate than the expected results of a MRO because it requires customers to pay a nonbypassable charge that would otherwise be deemed an unlawful transition charge. DP&L has also not demonstrated that any of its purported additional charges (such as FIC or environmental clean-up costs) would in fact apply under an MRO and not an ESP. DP&L has not demonstrated that the costs or shortcomings of its hypothetical MRO exceeds the unlawful, nonbypassable RSC charge and total cost of the Modified ESP I. In the aggregate, DP&L has not demonstrated that the Modified ESP I is more beneficial or more favorable as compared to the expected results that would otherwise apply under an MRO

[40] Malinak Testimony at 13.

[41] Malinak Testimony at 49.

### C. DP&L's Modified ESP I Generates Significantly Excessive Earnings, Failing the SEET Test.

DP&L recovers significantly excessive earnings under its Modified ESP I in violation of R.C. 4928.143(E). DP&L's witnesses acknowledge and attempt to justify DP&L's excessive earnings. In claiming that it carries an unusual level of risk, DP&L points to DP&L's own self-inflicted debt obligations and operating costs, and to its lack of recovery under various riders—despite the fact that the Supreme Court of Ohio has invalidated these riders as unlawful. DP&L's risk as a distribution utility and the fact that the Court has also invalidated similar riders for other Ohio distribution utilities under various ESPs hardly makes the situation unusual to DP&L.

DP&L advocates for a SEET return on equity (ROE) threshold ranging from 13.1% to 15.6%.[42] But, even the lowest numbers in this range go beyond the range that the Commission typically selects as a threshold for an acceptable ROE.[43] In DP&L's last SEET application, DP&L argued for a much more reasonable ROE threshold of 12%.[44]

In addition to its unreasonable ROE threshold, DP&L also argues for an entirely separate, arbitrary increase to its allowable SEET threshold. After arguing that the Commission should set a SEET threshold between 13.1% and 15.6%, DP&L argues that the threshold should be *further* increased by an additional 100 basis points (or 1%), up to a total of 16.6%, to adjust for "unusual risks" that DP&L claims to be facing.[45] In reality, these "unusual risks" result from either DP&L's

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[42] Malinak Testimony at 88.

[43] *See, e.g. In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test*, Case No. 19-460-EL-UNC, Stipulation and Recommendation at 2 (March 9, 2020), *citing In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Electric Distribution Rates*, Case Nos. 12-1628-EL-AIR, et al., Staff Report, 18 (Jan. 4, 2013) (establishing an acceptable ROE threshold of 9.84%, with Duke's ROE falling well below that threshold).

[44] *In the matter of the application of the Significantly Excessive Earnings Test under Section 4928.143(F)*, Case No. 14-0831-EL-UNC, Application of the Dayton Power and Light Company at 8 (May 15, 2014).

[45] Garavaglia Testimony at 4.

own business decisions, or lawful Court and Commission rulings which also apply to every other electric distribution utility in the state. As justification, DP&L's witness notes that DP&L has abnormally low credit ratings.[46] However, these low credit ratings largely result from DP&L's own financial structuring[47] or the application of Ohio law, which applies to all electric distribution utilities who implement an ESP.[48] As a distribution only, rate regulated utility, DP&L does not provide generation service, which can have risk. To the contrary, as a distribution only utility, DP&L is a low-risk delivery service utility and, with the ratemaking statutory provisions, simply cannot claim that payment for its distribution services is at risk.

Moreover, DP&L's witnesses claim that its RSC was originally implemented to compensate DP&L for the elimination of its POLR rider.[49] As explained previously, DP&L no longer provides POLR service to customers. The standard service offer is provided by generation suppliers through a competitive bidding process. Additionally, as the Commission notes, after the market development period, POLR riders are no longer authorized under ESPs.[50] Therefore, DP&L is not at any greater risk than the other utilities for providing SSO service through the competitive bidding process. If anything, DP&L actually faces *reduced* risks compared to other utilities, since the Modified ESP I still includes the RSC, which compensates DP&L for such purported risks.

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[46] *Id.*

[47] *Id.* at 12, 17-21.

[48] *Id.* at 5-7.

[49] Garavaglia Testimony at 13; Malinak Testimony at 65-66.

[50] *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 Nos. 16-395, et al., Supplemental Opinion and Order at ¶ 107 (Nov. 21, 2019).

The Commission should not raise the allowable SEET ROE threshold based on these purported "risks." DP&L does not face unusual risks under the Modified ESP I. This is true even without a DMR rider and a RSC charge as the Court has struck down financial integrity charges, like the DMR and RSC, and deemed them to be unlawful under the ESP framework.[51] Ohio law does not authorize any public utility to implement financial integrity charges under an ESP, and so this financial situation is not unique to DP&L.

Finally, any risk DP&L faces is due to a lack of other riders results from DP&L's own doing. As discussed above, after withdrawing ESP III, DP&L sought to revert to Modified ESP I.[52] Despite knowing certain riders were unavailable under the original ESP I, DP&L made the conscious decision to revert to a modified version of ESP I. If DP&L needed those riders, it should have filed a new ESP. Allowing DP&L to avail itself of the benefits of reverting to an earlier ESP while avoiding the costs of reverting would be patently unfair to customers.

Overall, it is unreasonable to deem DP&L as "unusually risky" due to the consequences of its own business decisions. Ohio consumers should not be expected to subsidize business mistakes, yet DP&L wants to earn a higher return on equity to cover these mistakes. This, coupled with the fact that DP&L requests an abnormally high ROE threshold to begin with, shows that DP&L's Modified ESP I fails the SEET review.

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[51] *See In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401

[52] *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 Nos. 16-395, et al., Supplemental Opinion and Order at ¶¶ 36-42 (Nov. 21, 2019).

## III. CONCLUSION

As demonstrated above, DP&L's current, Modified ESP I results in a less favorable outcome in the aggregate for consumers, and enables DP&L to recover significantly excessive earnings from customers. R.C. 4928.143(E) explicitly states that the burden of proof for demonstrating that significantly excessive earnings did not occur is on the utility. As explained herein, DP&L did not satisfy its burden of proof. Accordingly, pursuant to R.C. 4928.143(E), the Commission should deny DP&L's Application and find that DP&L's Modified ESP I fails both the SEET review and the MFA test.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on July 1, 2020 upon the parties listed below.

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