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. 20-0680-EL-UNC

REPLY COMMENTS OF INTERSTATE GAS SUPPLY, INC.
PUBLIC VERSION

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Reply Comments of Interstate Gas Supply, Inc.

I. Introduction

In this case, Dayton Power and Light Company ("DP&L") must demonstrate that its current electric security plan ("ESP"), ESP I, passes two tests. First, DP&L must show that ESP I will be more favorable in the aggregate than a market rate offer ("MRO"), an ESP versus MRO test. Second, DP&L must show that ESP I is not expected to produce significantly excessive earnings (a significantly excessive earnings test or "SEET"). If it fails either test, the Commission may terminate ESP I and impose such conditions on the termination of the plan as it considers reasonable and necessary to accommodate the transition from ESP I to the more advantageous alternative. R.C. 4928.143(E).

In response to an Entry of the Public Utilities Commission of Ohio ("Commission"), DP&L and several intervening parties filed comments on July 1, 2020.

In its Comments, DP&L argues that ESP I would pass the ESP versus MRO test because the plan is quantitatively more favorable that an MRO and provides qualitative benefits. To show that ESP I is quantitatively more favorable than an MRO, DP&L bloats the cost of an MRO with an impermissible financial integrity charge that exceeds the nonbypassable rider it is collecting under ESP I, the Retail Stability Charge ("RSC"). Initial Comments of The Dayton Power and Light Company at 8-14 (July 1, 2020) ("DP&L Comments"). On the SEET, it argues that ESP I will not result in significantly excessive earnings during the next four years. To support that argument, it asks the Commission to accept that DP&L will benefit from equity injections for which there is little substantive commitment that effectively reduce return on equity. *Id.* at 14-16. Apparently recognizing that its defense of ESP I is not persuasive, DP&L begs the Commission to authorize DP&L

to bill and collect approximately $78 million annually when the Commission finds that ESP I must be terminated. *Id.* at 16-19.

With one limited exception,[1] the commenters respond negatively to DP&L's claims that ESP I meets the tests. Moreover, many parties demonstrate, once again, that the problem that DP&L is trying to solve through the continuation of the often buried but never killed RSC is the result of the structure of the merger between DPL Inc. ("DPL") and AES Inc.[2]

DP&L has had its opportunity to be heard and failed to demonstrate that ESP I can pass both tests. Without further ado, the Commission may terminate ESP I and "impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative." R.C. 4928.143(E).[3]

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[1] Comments of Ohio Energy Group (July 1, 2020) ("OEG Comments") (ESP I fails the quantitative test but provides qualitative benefits).

[2] Comments by the Office of the Ohio Consumers' Counsel (July 1, 2020) ("OCC Comments") (ESP I fails both tests); Initial Comments of the Ohio Hospital Association (July 1, 2020) ("OHA Comments") (ESP I fails ESP versus MRO test); Initial Comments of Interstate Gas Supply, Inc. (July 1, 2020) ("IGS Comments") (ESP I fails ESP versus MRO test; reserves argument on SEET); Initial Comments of Honda of America Mfg., Inc. and the City of Dayton Regarding the Application of The Dayton Power & Light Company (July 1, 2020) ("Dayton-Honda Comments") (ESP I fails both tests); Industrial Energy Users-Ohio's Comments (July 1, 2020) ("IEU-Ohio Comments") (ESP I fails both tests); Comments of The Kroger Co. (July 1, 2020) ("Kroger Comments") (ESP I fails both tests); Comments of The Ohio Manufacturers' Association Energy Group (July 1, 2020) ("OMAEG Comments") (ESP I fails both tests).

[3] R.C. 4928.143(E) provides in relevant part that "the commission may terminate the electric security plan [if the electric distribution utility fails either the ESP versus MRO test or the SEET], but not until it shall have provided interested parties with notice and an opportunity to be heard." DP&L has presented both its application and supporting testimony and schedules, but failed to advance a prima facie case to support continuation of ESP I. It has also addressed what it would like to happen if the Commission concludes that ESP I should be terminated. Accordingly, the Commission may summarily resolve this matter.

Summary disposition is supported by R.C. 4928.143(E) and Commission practice applying similar principles drawn from the Rules of Civil Procedure. The statute requires an opportunity to be heard, but does not specify the method that the Commission must use. The Commission's rules do not provide for dismissal or summary disposition as set out in Rules 12 and 56 of the Rules of Civil Procedure, but R.C. 4903.082 directs the Commission to rely on the Rules of Civil Procedure "whenever practicable." In practice, the Commission has repeatedly granted summary disposition when a party has not advanced a

What remains are the conditions for the transition. *Id.* When the Commission terminates ESP I, it should reject the recommendation of DP&L to continue a charge that would collect $314 million over the next four years since the continuation of the charge is not lawful, reasonable, or necessary. If the Commission nonetheless determines that some transition charge is required, it should order that the charge be bypassable as required by R.C. 4928.142(D) and that the authorization is temporary.

II. DP&L fails to demonstrate that ESP I passes the ESP versus MRO test

DP&L's attempt to pass the ESP versus MRO test requires the Commission to find that an MRO would include a financial integrity charge exceeding the RSC or accept that the alleged qualitative benefits of ESP I offset a $314 million dead-weight loss associated with the RSC. DP&L Comments at 8-14. DP&L also leaves no doubt that the problem it is trying to "fix" is the debt load weighing down the credit ratings of DPL and the effects of its default on DP&L if the Commission does not find that ESP I is more favorable in the aggregate than an MRO. *Id.* at 3-8.

DP&L's story that the Commission is required to bail out DPL by imposing nonbypassable charges that hurt both customers and competition is far from new. DP&L has repeated these claims so many times that the Commission might conclude that this is some sort of regulatory "Groundhog Day."[4] For at least the third time, the Commission

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lawful basis for relief. *See, e.g., In the Matter of a Request for an Exemption from Stopping School Buses and Other Motor Vehicles at the Highway/Railroad Grade Crossing Located at U.S. Route 6 (477-633E), Village of Napoleon, Henry County*, Case No. 03-2524-RR-RCP, Entry at 1-2 (June 2, 2004). In a similar vein, a former Commissioner has encouraged the Commission to dismiss without an evidentiary hearing claims that lack merit. *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code,* Case Nos. 12-2400-EL-UNC, Concurring Opinion of Commissioner Lynn Slaby (Feb, 13, 2014).

[4] *See* Rob Hartill, Storyline, Groundhog Day, IMDb Website, viewed at https://www.imdb.com/title/tt0107048/?ref_=ttfc_fc_tt ("A weather man is reluctantly sent to cover a story about a weather forecasting "rat" (as he calls it). This is his fourth year on the story, and he makes no effort

is asked to fix the mistakes AES made when it elected to pay a premium financed by debt pushed down to DPL, despite the commitments made in 2011 that the new subsidiaries of AES would not pay for its financing decisions. IGS Comments at 1; Dayton-Honda Comments at 7-8. While the Commission has repeatedly afforded DP&L relief in the guise of nonbypassable charges since the merger, the Commission can dictate the ending of ESP I and with it the unlawful RSC based on DP&L's failure to provide a coherent justification that ESP I passes the ESP versus MRO test.

Initially, as several parties demonstrate, the Commission could not lawfully authorize the addition of a financial integrity charge as part of an MRO because DP&L does not satisfy the conditions warranting such a charge. IGS Comments at 13-22; IEU-Ohio Comments at 11-15; Dayton-Honda Comments at 14-24; OCC Comments at 4-10. Based on DP&L's own analysis, DP&L at worst claims that it will suffer from low profits. Contrary to its "emergency" claim, it will have access to internal funding and continue to pay its bills.

Additionally, the estimate of the size of the alleged financial integrity charge is patently unreasonable. OEG Comments at 1-2; IGS Comments at 19. Given that a financial integrity charge to address an emergency would be less than the current RSC if there was a problem paying current bills, the math advanced by DP&L to pass the quantitative portion of the ESP versus MRO test cannot be true. IGS Comments at 19-21. Fundamentally, then, not only does DP&L fail to show any emergency, its claim that

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to hide his frustration. On awaking the 'following' day he discovers that it's Groundhog Day again, and again, and again. First he uses this to his advantage, then comes the realisation that he is doomed to spend the rest of eternity in the same place, seeing the same people do the same thing EVERY day.").

the MRO would contain a charge in the range it proposes is demonstrably untrue based on DP&L's own financial statements regarding ESP I.

Further, DP&L's attempt to fill the gap between the costs of an MRO and ESP I with an environmental charge cannot succeed since the charge for a closed generation facility such as the Hutchings generation station could not be authorized as an adjustment to an MRO [redacted] DP&L's explanation is only to point to R.C. 4928.142(D) and say the Commission should authorize such a charge. DP&L Comments at 12. It has still not provided any reasoned basis for concluding that the Commission would authorize a charge under an MRO for a closed generation facility. IGS Comments at 22-24; OCC Comments at 10-11. This failure indicates again that there is no justification.

The efforts of DP&L to justify ESP I as qualitatively more favorable than an MRO also go nowhere. Apart from OEG, no commenter finds any benefit from retaining the flexibility of an ESP so that DP&L can attempt to find new reasons to impose nonbypassable charges on customers. The same may be said for the other alleged benefits advanced by DP&L. *See, e.g.,* IGS Comments at 25-30; OCC Comments at 11-16; Dayton-Honda Comments at 25-26; OHA Comments at 3-4.

A broader policy issue is also presented by DP&L that warrants a finding that ESP I fails the ESP versus MRO test. DP&L confirms that AES will withhold internal investment funding for DP&L unless the Commission authorizes continuation of ESP I. DP&L Comments at 12-13. Thus, it is asking the Commission to approve continuation of ESP I, apparently even if ESP I fails the ESP versus MRO test, or else bad things will happen. Although DP&L has not demonstrated such funds make a difference one way or another for purposes of keeping the lights on—something DP&L is doing just fine—hostage taking is not the basis for lawful or reasoned regulation.

In summary, DP&L has failed to provide a lawful and reasoned basis for the Commission to conclude that ESP I is and will be more favorable in the aggregate than an MRO. It rests its argument on a financial integrity charge that the Commission could not lawfully authorize at the levels DP&L must demonstrate to pass the ESP versus MRO test, and the claimed qualitative benefits of ESP I are generally without merit and do not offset the $314 million dead-weight loss imposed by the RSC directly and indirectly on customers and competition.

III. DP&L fails to demonstrate that significantly excessive earnings will not occur during the remaining term of ESP I

DP&L also alleges that ESP I will not produce significantly excessive earnings during its remaining term (which is operationally defined as through 2023 for this proceeding). The initial comments, however, demonstrate that DP&L is assuming that AES will make a substantial equity infusion to hold down the return on equity. Given the weak support for a finding that the equity injection will materialize, the Commission should not find that DP&L has presented sufficient information for the Commission to find that ESP I will not produce significantly excessive earnings.

The SEET is based on an earnings calculation: net income divided by the annual average equity balance. Direct Testimony of R. Jeffrey Malinak at 84 and RJM Ex. 29 (Apr. 1, 2020) ("Malinak Testimony"). Reducing the numerator (net income) or increasing the denominator (average equity) will tend to reduce the return on equity.[5]

[5] In the past, the Commission permitted electric distribution companies to remove revenue from the numerator. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating*

Over the four-year period for which DP&L provides financial projections, [redacted] DP&L also projects a $300 million equity injection by AES, [redacted]

The equity injection is the key to DP&L's attempt to pass the SEET. By assuming that AES will inject $300 million in new equity into DP&L, it avoids showing a substantially higher return on equity, all other things being equal.

The promise of that equity infusion, however, is purely speculative. OCC Comments at 11. This unsupported "promise" could be withdrawn without consequence. More needs to be shown if the Commission is to accept this otherwise obvious attempt to pull down the return on equity to avoid an adverse finding that ESP I fails the SEET.

Before the Commission may find that DP&L will pass the SEET, DP&L must carry its burden of proof that significantly excessive earnings will not occur under ESP I. R.C. 4928.143(E). DP&L has provided the Commission with scant evidence that AES will

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Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 212 (Oct. 12, 2016). The lawfulness of removing the revenue associated with a rider approved as a term of an electric security plan remains unresolved. *In re Ohio Edison Co.,* 157 Ohio St. 3d 73 ¶¶ 32-34 (2019).

inject hundreds of millions of dollars. Accordingly, DP&L has not carried its burden to show that significantly excessive earnings will not occur if the Commission permits ESP I to continue.

IV. The Commission may not lawfully extend the RSC when it finds that ESP I should be terminated

Apparently recognizing that ESP I will fail the ESP versus MRO test and the SEET, DP&L offers that it should be permitted to retain the RSC as part of any transition plan. DP&L Comments at 16-19. To support its request, DP&L relies on the same claims regarding financial distress that it alleges support the authorization of a financial integrity charge under an MRO. *Id.*

As a transition mechanism, the RSC is not necessary, lawful, or reasonable.

Initially, the alleged emergency on which DP&L bases its request to continue the RSC rests on the same faulty claims that drive its allegation that it would be entitled to a financial integrity charge. Malinak Testimony at 61-66. Since DP&L's defense of the RSC is based on the same alleged emergency, the Commission cannot justify a transition RSC if it also finds that the MRO would not include a financial integrity charge. Because one fails, both fail.

Of course, the Commission could conclude that ESP I passes the ESP versus MRO test but would fail the SEET. Although the Commission still may terminate the plan, the authorization of a transition RSC would remain unlawful because, at a minimum, it lacks a cost justification. According to DP&L, the only "cost-based" justification for the charge is that it covers DP&L's risk to serve as the provider of last resort, but DP&L further admits that it has no idea what its cost to serve as the provider of last resort is. Malinak Testimony at 66. Under well understood Ohio law, therefore, the failure to demonstrate the cost of provider of last resort service renders the charge unlawful. *In re Columbus S. Power Co.,* 128 Ohio St. 3d 512 ¶¶ 22-30 (2011) (authorization of provider of last resort charge based on insufficient record support reversed).

In any case, DP&L's risk of serving as the provider of last resort is negligible, given that the responsibility to serve the standard service offer falls squarely on successful bidders in the auctions for generation service. IGS Comments at 8. As a result, it would also be unreasonable to assess retail customers $314 million to cover the "cost" to serve as the provider of last resort when that "cost" approaches zero.

For these reasons, DP&L has failed to advance a lawful basis for the Commission to authorize a nonbypassable transition RSC.

If the Commission nonetheless determines that DP&L is entitled to some form of emergency relief, the Commission may adjust the "standard service offer price." Because the standard service offer price is a bypassable rate, any adjustment must remain bypassable and be phased out over time.

V. Conclusion

DP&L's defense of ESP I fails the requirements of R.C. 4928.143(E). As a result, it is time for the Commission to terminate ESP I and transition the standard service offer to an MRO. As the Commission does so, it should terminate the RSC or transition it to a bypassable charge (if there is some reasonable and necessary basis for doing so that currently is not apparent) and direct that the other riders that cannot be part of an MRO be phased out. It is time to move on.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Reply Comments of Interstate Gas Supply, Inc.* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 16, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on the parties subscribed to this proceeding. Additionally, notice was provided to the parties listed below.

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