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
THE KROGER CO.

I. INTRODUCTION.

On July 1, 2020, The Dayton Power and Light Company (DP&L) submitted its initial comments in support of its Application requesting a finding from the Public Utilities Commission of Ohio (Commission) that DP&L's current blended Electric Security Plan (Blended ESP I) passes both the prospective significantly excessive earnings test (SEET) and the more favorable in the aggregate (MFA) test in R.C. 4928.143(E).[1] DP&L's unsupported assertions in those initial comments, however, are fatally flawed and do not rise to the level of satisfying its burden of proof under R.C. 4928.143(E). For example, DP&L claims that its projected return on equity (ROE) during the years 2020 through 2023 is not likely to result in significantly excessive profits paid by customers, and thus, passes the SEET.[2] But, as argued by several intervenors in their respective

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1 See Initial Comments of The Dayton Power and Light Company (July 1, 2020) (DP&L's Comments); see also The Dayton Power and Light Company's Application 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) (April 1, 2020) (Application).

2 DP&L's Comments at 14-16.

initial comments,[3] DP&L's assertion is mere speculation because it relies on a claim that its parent company, AES, "plans" to make a total of $300 million in contributions to DP&L in 2020 and 2021.[4] Thus, in calculating DP&L's projected ROE under the Blended ESP I, the Commission should exclude the alleged, unspecified, and speculative "plan" for equity infusions from AES. In doing so, DP&L's ROE will necessarily be higher than projected which then would likely result in significantly excess profits.

Similarly, DP&L also asserts that the Blended ESP I is more favorable than a market rate offer (MRO) because the MRO statute would allow DP&L to recover a "financial integrity charge" (FIC) in excess of the Rate Stabilization Charge (RSC) contained in the Blended ESP I. However, as argued by The Kroger Co. (Kroger) in its Comments as well as other intervenors,[5] there is no legal authority or factual support for DP&L's claim. And, nothing in DP&L's initial comments cures that fatal flaw. DP&L cannot escape the fact that the Supreme Court of Ohio has ruled that financial integrity charges are in fact unlawful transition charges under R.C. 4928.38.[6] As such, in conducting the MFA test, the Commission should not include DP&L's hypothetical "financial integrity charge" because it would be considered an unlawful transition charge under Supreme Court of Ohio precedent. By excluding the unlawful "financial integrity charge" from

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[3] See Comments of the Office of the Ohio Consumers' Counsel at 17-19 (July 1, 2020) (OCC's Comments); Initial Comments of Honda of America Mfg., Inc. and the City of Dayton at 26-28 (July 1, 2020) (Honda/Dayton's Comments); Comments of Industrial Energy Users-Ohio at 18-21 (July 1, 2020) (IEU's Comments).

[4] Testimony of R. Jeffrey Malinak at 10 (April 1, 2020) (Malinak Testimony).

[5] See Comments of The Kroger Co. at 11-13 (July 1, 2020) (Kroger's Comments); OCC's Comments at 4-10; IEU's Comments at 10-14; Honda/Dayton's Comments at 19-22.

[6] See *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 449 (2016) (finding AEP Ohio's "Retail Stability Rider" to be an unlawful transition charge); *In re Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016) (overturning DP&L's "Service Stability Rider" based on the authority of *In re Application of Columbus S. Power Co.*).

consideration, DP&L has failed to satisfy its burden that its Blended ESP I is more favorable than the MRO.

Finally, DP&L makes the desperate argument that, even if the Commission were to determine that the Blended ESP I did not pass the SEET review or MFA test, the Commission should still allow DP&L to continue to collect the nonbypassable RSC. This request, however, is contrary to well-established Supreme Court of Ohio and Commission precedent. Indeed, the Commission already has ruled, in relying upon Supreme Court of Ohio cases overturning similar financial integrity charges, that "nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans."[7] DP&L similarly cannot justify the RSC as a provider of last resort (POLR) charge as it is not based on the cost to provide POLR service and DP&L no longer bears such POLR risk. Thus, as Kroger and other intervenors have requested,[8] the Commission should invalidate the RSC as unlawful.

Pursuant to the Commission's Entry dated April 23, 2020, Kroger respectfully submits these reply comments for consideration.

II. COMMENTS.

A. DP&L will Likely Recover a Much Higher ROE than It Projects.

In asserting that Blended ESP I passes the SEET,[9] DP&L vastly understates its projected ROE. Kroger shares the concerns of other interested parties regarding DP&L's miscalculations.[10]

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7 *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. 16-0395-EL-SSO, et al., Supplemental Opinion and Order at ¶ 108 (Nov. 21, 2019).

8 See OCC's Comments at 19-23; Honda/Dayton's Comments at 3-12; Comments of the Ohio Energy Group at 2-3 (July 1, 2020) (OEG's Comments).

9 See DP&L's Comments at 16.

10 See Honda/Dayton's Comments at 26-28; IEU's Comments at 18-21; OCC's Comments at 17-19.

By overstating planned equity infusions and capital expenditures, DP&L projects an improbably low ROE. In reality, the actual ROE will likely be much higher, resulting in significantly excessive earnings for DP&L during the years 2020 through 2023 at the expense of consumers. DP&L intentionally understates this ROE in order to pass the SEET review.

First, DP&L's projected ROE relies partially on a "planned" $300 million equity infusion by AES.[11] However, DP&L has not provided any guarantees or binding commitments from AES to actually make this equity infusion nor is it clear from DP&L's initial comments exactly how and in what form AES would make any such equity infusion. Indeed, in its initial comments, DP&L merely describes the equity infusion as "planned,"[12] but does not provide any specifics to that plan, such as when exactly the alleged infusion will occur. If it does not occur, DP&L will have much lower equity, and consequently, a much higher ROE. As noted by OCC, when equity decreases, the ROE increases, since ROE is simply a ratio of income to equity.[13]

Second, DP&L includes speculative grid modernization expenditures in its calculations.[14] These expenditures have not occurred, despite DP&L previously collecting a distribution modernization rider (DMR).[15] DP&L's witness claims that DP&L faces aging infrastructure, yet fails to mention why DP&L failed to upgrade its infrastructure during the period it collected funds specifically designated for grid modernization.[16]

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11 See DP&L's Comments at 8; OCC's Comments at 18; Malinak Testimony at 45.

12 DP&L's Comments at 12-13.

13 See OCC's Comments at 18.

14 See DP&L's Comments at 16; Honda/Dayton Comments at 27; Malinak Testimony at 45-47.

15 See Testimony of Gustavo Garavaglia M. at 11 (April 1, 2020) (noting that the Commission authorized DP&L to collect a DMR from an October 20, 2017 order, until invalidating the DMR over two years later) (Garavaglia Testimony).

16 *Id*. at 2-4.

Additionally, the Supreme Court of Ohio has opposed allowing EDUs to recover increased rates from customers based on noncommittal grid modernization plans.[17] In *Ohio Edison Co.*, the Court invalidated FirstEnergy's DMR, reasoning that the DMR "does not require the companies to take any action in exchange for receiving the DMR funds" and that "there are no discernable consequences or repercussions if FirstEnergy fails to" make the promised implementation and deployment of grid modernization programs.[18]

Here, DP&L attempts to justify its Blended ESP I in the same way FirstEnergy attempted to justify its DMR. Whereas FirstEnergy made promises that it planned to invest in grid modernization in order to collect an unlawful DMR from consumers, DP&L makes promises that it plans to invest in grid modernization in order to project an artificially low ROE, allowing DP&L to pass SEET review and collect significantly excessive earnings from consumers. Again, removing speculative "planned" expenditures from the calculation will result in a significantly lower ROE.

Overall, the Commission should reject DP&L's projected ROE calculations. These calculations rely on unmade equity infusions and unrealized capital expenditures, which serve to artificially deflate DP&L's projected ROE. Removing these unsupported assumptions from DP&L's projected ROE will result in a more realistic projection.

B. Blended ESP I is Less Favorable in the Aggregate than a Hypothetical MRO.

Kroger reiterates its initial comments and supports comments by other stakeholders that the Blended ESP I is less favorable in the aggregate than a hypothetical MRO. In its initial

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17 See *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906.

18 *Id.* at ¶¶ 14-22.

comments,[19] DP&L touts several purported qualitative and quantitative advantages of Blended ESP I over a hypothetical MRO. In reality, these purported advantages do not exist.

DP&L overstates the quantitative advantages of the Blended ESP I by assuming entitlement to a massive, unjustified FIC under a hypothetical MRO.[20] As discussed in Kroger's initial comments, DP&L does not adequately support this assumption.[21] Other stakeholders also raised concerns with this incorrect assumption; and Kroger here echoes those concerns.[22]

DP&L bases its assumption on a previous case, in which the Commission held that a DMR may be *available* under a hypothetical MRO under a different set of facts than the one in the present case.[23] DP&L asserts that without the unlawful RSC, it would experience sufficient cash flow issues to cause financial distress.[24] However, as other parties have noted, DP&L has not demonstrated a financial emergency.[25] This circular logic cannot justify a FIC. Invalidating *any* unlawful rider or charge will result in decreased cash flows for an EDU. Allowing an EDU to implement a FIC to fully compensate an EDU for loss of an unlawful rider would have the effect of leaving an unlawful rider in place and changing only the name. The EDU would be compensated for the loss of something it was not entitled to in the first place. Yet that is exactly what DP&L proposes in calculating its alleged FIC under a hypothetical MRO.[26]

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19 See DP&L's Comments.

20 DP&L's Comments at 9-12.

21 See Kroger's Comments at 4-5, 10-11.

22 See IEU's Comments at 7-15; OCC's Comments at 4-10; Honda/Dayton's Comments at 12-20; Initial Comments of Interstate Gas Supply, Inc. at 13-21 (July 1, 2020) (IGS' Comments); Initial Comments of the Ohio Hospital Association at 3-4 (July 1, 2020) (OHA's Comments).

23 See DP&L's Comments at 9-10.

24 See Garavaglia Testimony at 13; Malinak Testimony at 50-51.

25 See Honda/Dayton's Comments at 16-18; IEU's Comments 11-13.

26 See Honda/Dayton's Comments at 22-24 ("DP&L's calculation of the financial integrity charge is unrelated to the amount of funding DP&L needs to avert an emergency or survive to the next case.").

When calculating the amount of the alleged FIC, DP&L does not identify the amount necessary to address any emergency that threatens DP&L's financial integrity pursuant to R.C. 4928.142(D). Instead, DP&L looks at the amount that would allow DP&L to recover the full amount it would under the unlawful RSC.[27] DP&L attempts to justify an unjustified charge by relying on cash flows under that charge.

DP&L also asserts that the FIC would be higher than the RSC by calculating the amount necessary to reach the same cash flow levels without the "planned" equity infusion under Blended ESP I.[28] The inexplicable decision to invest under an ESP, but not a MRO, will invariably result in higher cash flows for DP&L, even if the charges are exactly the same. Therefore, by calculating the FIC by looking at the projected cash flow under Blended ESP I, and refusing to invest the same under a MRO, DP&L and its parent, AES, ensure their alleged FIC will cost more by design. Under DP&L's theory, a lower FIC would certainly be possible if AES made the same "planned" investment under the MRO. As a result, DP&L failed to demonstrate *why* it would be entitled to a FIC under a hypothetical MRO in *this* case, or why such a FIC would be anywhere near the level DP&L claims.

Blended ESP I is also less favorable in the aggregate than a hypothetical MRO on qualitative terms. In its initial comments, DP&L makes several claims about the purported qualitative advantages of Blended ESP I, none of which stand up to scrutiny. First, DP&L alleges that under Blended ESP I, AES will make two $150 million equity infusions (totaling $300 million), whereas under a hypothetical MRO, AES would only make a single $150 million equity

27 See DP&L's Comments at 11-12.

28 See DP&L's Comments at 11-12.

infusion.[29] However, AES has not committed to this additional investment; it merely "plans" to do so.[30] Once again, DP&L and AES have manipulated the MFA test, by choosing to invest under one plan, but not the other. Kroger supports OCC's Comments on this issue—DP&L attempts to make Blended ESP I more favorable by *saying* it will make an investment, even though it may never actually make that investment.[31] Furthermore, allowing DP&L to manipulate the MFA test through noncommittal investment promises makes any objective analysis impossible.

Second, DP&L asserts that an ESP is more advantageous because it contains SEET protection.[32] Kroger supports the comments of other intervenors that note that the SEET protections under an ESP are insufficient to protect customers and are inherently less favorable than a MRO.[33] While customers can theoretically recover significantly excessive charges under SEET review, they rarely do so in practice.[34] Additionally, customers will only recover significantly excessive—not merely excessive—earnings, and only following a complex SEET review. On the other hand, under a MRO, customers pay a competitive price in the first instance. Given the choice between paying higher prices and potentially receiving refunds in a year or more, or simply paying market prices, customers would invariably choose the latter.

Finally, DP&L states that a bypassable FIC is less favorable than the nonbypassable RSC because it would encourage consumers to shop to avoid the FIC. Kroger reiterates its initial comments on the matter.[35] A nonbypassable charge forces customers who purchase their electricity

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29 DP&L's Comments at 12-13.

30 *Id*.

31 OCC's Comments at 11-12.

32 DP&L's Comments at 13.

33 See OCC's Comments at 12-14; IEU's Comments at 17; OHA's Comments at 4.

34 See OCC's Comments at 13.

35 See Kroger's Comments at 11-12.

generation services from a CRES provider to subsidize DP&L. That is not more favorable than a bypassable charge.

C. The Commission Should Invalidate the RSC.

In its initial comments, DP&L argues that the Commission should continue the RSC, even if DP&L's Blended ESP I fails the MFA test or SEET review.[36] DP&L alleges it would face cash flow issues without the RSC.[37] As discussed above, the Commission should invalidate the RSC due to the Supreme Court of Ohio's series of decisions invalidating similar financial stability charges as illegal transition revenue.[38]

Instead of attempting to justify the fact that the RSC unlawfully collects transition revenue, DP&L attempts to sidestep that crucial fact by arguing that the RSC originated as a POLR charge.[39] However, DP&L no longer provides POLR service to customers.[40] As Honda of America Mfg., Inc. and the City of Dayton noted in their comments, DP&L did not attempt to present any evidence that it faced ongoing POLR costs in its previous two ESP applications.[41] In this case, despite claiming DP&L faces POLR risks, DP&L does not provide any evidence as to the *amount* of risk it faces.[42] Therefore, even if the unlawful RSC *were* tied to POLR risks (which it is not), the proper level of recovery under the RSC would be tied to the level of POLR risk DP&L can demonstrate—

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36 DP&L's Comments at 16-19.

37 *Id*.

38 *See In re Columbus S. Power Co.*, 147 Ohio. St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734; *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

39 Garavaglia Testimony at 13, Malinak Testimony at 65-66.

40 See Kroger's Comments at 9; see also IGS' Comments at 28.

41 Honda/Dayton's Comments at 7.

42 See Malinak Testimony at 65-66.

which is to say, none. Furthermore, even if DP&L *did* face POLR costs, tying the RSC to those costs would permit double recovery, since such costs are now included in another rider.[43]

In its initial comments, DP&L attempts to pivot yet again, and this time tries to justify the RSC on financial integrity grounds.[44] DP&L cannot presently justify the RSC by claiming it is necessary for DP&L's financial integrity. First, the RSC illegally collects transition revenues. When DP&L applied to replace the original version of ESP I with ESP II, the Commission allowed DP&L to replace the RSC with the similar SSR.[45] Subsequently, the Court struck down the SSR for illegally collecting transition revenues.[46] The RSC and the SSR serve essentially the same function. Second, as discussed above, DP&L has not demonstrated a financial emergency that would allow the RSC to be justified under current circumstances were DP&L to apply for it today. Instead, DP&L only provides unsupported opinion testimony that loss of the unlawful RSC would decrease cash flow.[47] Third, allowing EDUs to substitute unlawful charges with financial stability charges, on the grounds that losing revenue from unlawful charges damages the EDU, would make it functionally impossible to rescind any unlawful charge. Invalidation of any rider, lawful or unlawful, will cause decreased cash flow. Allowing EDUs to recover that cash flow through a replacement FIC would amount to leaving the unlawful charge in place and changing the name. If decreasing cash flow creates problems and an emergency does in fact exist, DP&L's recourse is to file a new ESP, file a rate case, or seek emergency rate relief under R.C. 4909.16.

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43 Kroger's Comments at 9.

44 DP&L's Comments at 16-19.

45 *In re The Dayton Power and Light Co. for Approval of its Electric Security Plan*, Case No. 12-0426- EL-SSO, et al., Opinion and Order (Sept. 4, 2013).

46 *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.

47 See DP&L's Comments at 17-18.

Since DP&L is unable to justify the lawfulness of the RSC on transition revenue, POLR, or financial integrity grounds, the Commission should remove the RSC from Blended ESP I, or any replacement ESP or MRO.

III. CONCLUSION.

As set forth above, DP&L's Blended ESP I results in a less favorable outcome in the aggregate for consumers, and allows DP&L to recover significantly excessive earnings from consumers. Accordingly, for the foregoing reasons and the reasons set forth in Kroger's initial comments, the Commission should consider Kroger's comments in finding that DP&L failed to satisfy its burden of proof under R.C. 4928.143 and concluding that DP&L's Blended ESP I fails both the SEET review and the MFA test.

Respectfully submitted,

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