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 DAYTON POWER AND LIGHT COMPANY

PUBLIC VERSION

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TABLE OF CONTENTS

PAGE

I. INTERVENORS DO NOT CONTEST THE KEY POINTS OF DP&L'S CASE

The Initial Comments of The Dayton Power and Light Company ("DP&L") demonstrated three points: (1) DP&L's current Electric Security Plan ("ESP I") passes the more favorable in the aggregate ("MFA") test in R.C. 4928.143(E); (2) DP&L's ESP I passes the significantly excessive earnings test ("SEET") in R.C. 4928.143(E); and (3) even if ESP I were to fail either test, the Commission should not invalidate the Rate Stabilization Charge ("RSC").

The intervenors make a wide range of arguments in their Initial Comments, which the Commission should reject for the reasons shown below. The Commission should, in particular, take note of the key points in DP&L's case that the intervenors do not contest. The undisputed key points are:

1. Commission precedent establishes that it would approve a Financial Integrity Charge ("FIC") under a Market Rate Offer ("MRO") if a utility was at the "ragged edge" of investment grade. *In re DP&L*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order (Oct. 20, 2017) at ¶ 91.

2. DP&L is at, or below, the ragged edge of investment grade. Garavaglia Test., p. 10.

3. Intervenors make only inconsequential challenges to DP&L's projections and exhibits. Malinak Test., RJM 1-45C.

4. DP&L would be in a dire financial situation without an FIC in an MRO or the RSC in the ESP I. Malinak Test., pp. 50-51, 60-61.

5. DP&L and DPL Inc. are inextricably linked. Garavaglia Test., pp. 13-14, 17-22.

6. The utilities in XLU exchange fund are a proper proxy group, which earned a return on equity ("ROE") of 10.4% over the relevant period. Malinak Test., p. 85.

II. DP&L's ESP I IS MORE FAVORABLE THAN AN MRO

As demonstrated in DP&L's Initial Comments (pp. 8-14), ESP I is expected to be more favorable in the aggregate than a hypothetical MRO over the 2020-2023 forecast period for three reasons:

(a) An FIC of [redacted] would be approved under an MRO, which exceeds the $79 million RSC;

(b) DP&L could recover [redacted] in environmental clean-up expenses under an MRO, but cannot under ESP I;

(c) ESP I has numerous non-quantifiable benefits that would not be available under an MRO.

A. AN MRO WOULD INCLUDE AN FIC

The Commission has previously held that it would approve an FIC under an MRO if a utility was at or below the "ragged edge" of investment grade. *In re DP&L*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order (Oct. 20, 2017) at ¶ 91 ("Here, it is well established that DP&L and DPL Inc.'s credit ratings were respectively, at and even below the 'ragged edge' of investment grade . . . . Thus, it is likely that the Commission would grant relief in response to a hypothetical application under R.C. 4928.142(D)."); *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 356 ("We believe that a potential downgrade to below investment grade could be construed as an 'emergency that threatens the utility's financial integrity' under R.C. 4928.142(D)."). *Accord*: *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, *et al.*, Opinion and Order on Interim Rate Relief (Aug. 23, 1988) at pp. 8-9. DP&L's credit ratings are currently at or below the ragged edge of investment grade, and are on negative outlook. Garavaglia Test., p. 10.

Undeterred by that clear Commission precedent and those undisputed facts, intervenors argue that the Commission could not or would not approve an FIC under an MRO. In evaluating the intervenors' arguments, it is critical that the Commission keep in mind that the intervenors largely ignore that Commission precedent, and none of them dispute that DP&L's credit ratings are at or below the ragged edge of investment grade. Their failure to distinguish that Commission precedent or refute those facts is fatal to their arguments here.

As demonstrated below, the Commission should reject the arguments that the intervenors do make, and conclude that it would approve a [redacted] FIC under an MRO.

1. An FIC Under an MRO Would Be Lawful

Intervenors argue that an FIC would not be lawful under the MRO statute for a variety of reasons. As an initial matter, R.C. 4928.142(D)(4) specifically allows the Commission to "adjust" DP&L's most recent SSO price "to address any emergency that threatens the utility's financial integrity." The MRO statute thus plainly authorizes such a charge.

1. Phasing is still required under the MRO statute: R.C. 4928.142(D) requires that rates bid under the MRO be phased in with DP&L's most recent rates over time. OCC (pp. 5-6) argues that phasing does not "make sense in today's regulatory climate," and there is "no basis" to make the adjustments in Division (D). The Commission should reject that argument because Division (D) uses the mandatory word "shall," and the Commission cannot ignore that mandatory phasing because the Division purportedly no longer "make[s] sense." *State ex rel. Cincinnati Bell Tel. Co. v. PUC*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶ 31 ("[T]he word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage.") (quotation marks and citations omitted). *Accord*: *Bostock v. Clayton County, Georgia*, ___ U.S. ___, 2020 U.S. LEXIS 3252, at * 44 (June 15, 2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.").

Indeed, OCC's argument reveals another reason that the Commission should conclude that ESP I is more favorable than an MRO because it is not clear how the Commission "shall" implement phasing. Specifically, given that DP&L no longer owns generation assets that are used to supply its SSO load and its SSO is instead supplied via a competitive bidding process, it is not clear how DP&L's most recent rates could be phased into the rates that would be bid under Division (D), as required by the statute.

2. Whether DP&L owns generation assets is irrelevant: OCC (p. 6) argues that the Commission cannot make the adjustments in Division (D) because DP&L no longer owns generation assets that are used to supply its SSO load. The Commission should reject that argument because there is nothing in the text of Division (D) that limits the Commission's ability

to make adjustments to the prior SSO price based upon whether or not the utility owns generation assets. The General Assembly could have included such a requirement, but did not do so.

3. Previous fact finding by Commission does not help OCC: OCC (p. 7) cites the Commission's September 2013 decision in DP&L's ESP II case (Case No. 12-426-EL-SSO) for the proposition that the Commission has held that it would not approve an FIC under an MRO. The Commission should conclude that that precedent does not help OCC for two reasons.

First, the Commission has held more recently that it would approve an FIC under an MRO. *In re DP&L*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order (Oct. 20, 2017) at ¶ 91; *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶¶ 356-57.

Second, in ESP II, the Commission – without discussing whether DP&L was at the "ragged edge" of investment grade -- determined that based on the record before it, DP&L could have made O&M reductions, sought a distribution rate increase, or taken other steps to improve its financial position in finding that the Service Stability Rider ("SSR") would not be available under an MRO. *In re DP&L*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept. 4, 2013) at p. 49. In the intervening seven years, DP&L and DPL Inc. in fact did take those steps and other significant measures to improve its financial position. Garavaglia Test., pp. 22-25. OCC cannot rely on a stale factual finding to overcome the Commission's repeated and more recent holding that an FIC under an MRO is available if a utility is at or below the "ragged edge" of investment grade.

Third, in ESP II, the Commission ultimately concluded that "qualitative benefits" of ESP II exceeded the quantitative costs of the SSR that the Commission approved in that case. In particular, the Commission concluded that DP&L needed the SSR to allow it to provide "adequate, reliable and safe retail electric service," and the qualitative benefits of safe and reliable service exceed the costs of the SSR. *In re DP&L,* Case No. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept. 4, 2013) at p. 51.

Similarly here, DP&L cannot provide safe and reliable service without the FIC under an MRO (Malinak Test., pp. 50-51; Garavaglia Test., pp. 15-16), and the qualitative benefits of safe and reliable service exceed the value of the RSC. Malinak Test., p. 83. The Commission should thus conclude that the qualitative benefits of safe and reliable service exceed the costs of the RSC, and the ESP would pass the MFA test, even if that older precedent applied. *Id.*[1]

4. An FIC would not constitute a transition charge: OCC (pp. 8-9) asserts that an FIC would be a transition charge, and would be unlawful. The Commission should reject that argument for the following reasons:

First, OCC does not cite to the statutory definition of transition costs or explain how an FIC would satisfy that definition. A transition cost must be "directly assignable or allocable to retail generation service provided to electric consumers in this state." R.C. 4928.39(B). *Accord*: *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.2d 734, at ¶ 23-25 (finding that AEP's RSR collected the equivalent of

[1] OCC (pp.7-8) also cites the Commission's Sept. 4, 2013 Opinion and Order in AEP's ESP case in Case No.. 12-426-EL-SSO, However, as OCC acknowledges, that decision was made on the same grounds as DP&L's ESP II decision, and is not applicable for the reasons discussed in the text.

transition revenue because the rider was designed to guarantee a certain rate of return on generation assets). As OCC (and others) pointed out, under an MRO, DP&L would acquire generation through an auction and pass the costs through to customers. R.C. 4928.142. That process has nothing to do with DP&L's need for an FIC under an MRO. The FIC range of the [redacted] was calculated without reference to any "generation service." Malinak Test., pp. 53-54. An FIC thus would not relate to generation service and would not constitute a transition charge.

Second, DP&L has transferred, sold or closed all of its Ohio generation assets. Garavaglia Test., pp. 23-24. An FIC under an MRO thus would not relate to "generation service" under R.C. 4928.39(B) for that additional reason.

Third, if the Commission were to conclude that an FIC under an MRO was barred by R.C. 4928.38 (as a transition charge) but was authorized under R.C. 4928.142(D)(4) (as an FIC), then the Commission should conclude that R.C. 4928.142(D)(4) controls because it was enacted after R.C. 4928.38. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); *Summerville v. City of Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute . . . prevails"); *Stutzman v. Madison County Bd. of Elections*, 93 Ohio St. 3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").

Fourth, while R.C. 4928.141(A) bars the recovery of "transition costs"[2] and was enacted at the same time as R.C. 4928.142(D)(4), specific statutory terms control over general ones. *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 182, 480 N.E.2d 758 (1985) ("It is a well-established rule of construction that specific provisions prevail over general provisions.") (citing *Schisler v. Clausing*, 66 Ohio St. 2d 345, 347, 421 N.E.2d 1291 (1981)). Since R.C. 4928.142(D)(4) specifically authorizes the recovery of an FIC, the Commission should conclude that it controls over the general prohibition in R.C. 4928.141(A) of the recovery of transition costs.

5. The Commission has not approved a prior MRO for DP&L: OCC (pp. 9-10) argues that the adjustments in R.C. 4928.142(D) are not applicable because those adjustments apply to the "first application" filed for an MRO, and DP&L filed and later withdrew an MRO application in Case No. 12-426-EL-SSO. The Commission rejected that exact argument in that case:

> "The Commission finds that rehearing on FES's assignment of error on this issue should be denied. We are not persuaded by FES that DP&L has already filed its first application for an MRO. The facts of this case do not demonstrate that DP&L has filed its 'first application' under R.C. 4928.142. The Commission made no determinations on the completeness of the application, no evidentiary hearing was held on the application, and the Commission made no legal or factual findings on the merits of the application. Instead, DP&L voluntarily withdrew its MRO application before any of these events could take place.

[2] Notably, R.C. 4928.141(A) bars "previously authorized allowances for transition costs," and not "the receipt of transition revenues or any equivalent revenues" as in R.C. 4928.38 (emphasis added). Thus, R.C. 4928.141(A) does not bar receipt of revenue "equivalent" to transition revenue. The Supreme Court of Ohio recognized the distinction between the two types of revenue in *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608. In that case, the Court found that AEP's RSR collected only the "equivalent" of transition revenue, as opposed to express transition revenue, *i.e.* "revenue associated with costs that were stranded during the transition to market following S.B. 3." *Id.* at ¶ 21. OCC does not even attempt to argue that the FIC would constitute such an express transition charge.

> Further, R.C. 4928.142(D) protects customers by requiring that the portion of SSO load to be competitively bid start at 10 percent for the first year and gradually increase thereafter. We believe that it would violate the intent of the General Assembly for the Commission to find that a utility that submitted an application for an MRO into a docket, and then subsequently withdrew it before the Commission could consider it, could deprive consumers of the statutory protections found in R.C. 4928.142(D). Therefore, because DP&L has not filed its first application under R.C. 4928.142, an MRO for DP&L would be subject to the provisions of R.C. 4928.142(D) and only 10 percent of the load would be sourced through a competitive bid in the first year rather than 100 percent as FES assumes."

In re DP&L, Case No. 12-426-EL-SSO, *et al.*, Second Entry on Rehearing (Mar. 19, 2014) at ¶ 49.

OCC argues (pp. 9-10) that the Commission should reconsider that precedent because the MRO statute "does not say 'first application upon which the PUCO makes legal or factual findings on the merits.'" While the MRO statute does not use those exact words, it does use words that have the same meaning, consistent with the Commission's interpretation and ruling.

Specifically, R.C. 4928.142(D) states that "[t]he first application filed . . . shall require" competitive bidding with certain adjustments (emphasis added). As the Commission knows, applications cannot "require" anything – only a Commission order approving an application can impose requirements. The competitive bidding and adjustments in Division (D) apply to the "first application" that "require[s]" competitive bidding -- meaning the application had to have been approved. DP&L's MRO application in Case No. 12-426-EL-SSO was not only never approved by the Commission, but was, in fact, withdrawn by DP&L; thus the application did not "require" that competitive bidding be implemented.

2. **DP&L Is Facing a Financial Emergency**

The testimony of DP&L witness Malinak shows that DP&L would be in a financial emergency in an MRO without an FIC, even assuming that DP&L made no dividend payments to DPL Inc. Malinak Test., pp. 50-51. DP&L and DPL Inc. are linked financially, and DP&L would suffer additional financial harm if DPL Inc. falls into in financial distress. Garavaglia Test., pp. 13-14, 17-22.

OCC (p. 8) argues that DP&L does not face a financial emergency during the 2020-2023 forecast period based upon amounts that DP&L earned in 2018-2019. However, DP&L's past earnings are not relevant here. Under the ESP statute, the Commission is required to decide whether ESP I is "expected" to pass the MFA test "during the remaining term" of the ESP. R.C. 4928.143(E). OCC does not dispute the reasonableness of DP&L's projections or that DP&L would experience a financial emergency without an FIC under an MRO.

IGS (pp. 14-19) argues that DP&L would not face a financial emergency, but IGS misstates DP&L's case. Specifically, IGS tells the Commission that:

> "[DP&L's] proof consists of two steps. In Step One, DP&L claims that it would face a credit ratings drop that would lead to reductions in service quality. Malinak Testimony at 50-57 and 66-78. In Step Two, the Commission would approve a financial integrity charge for the same reason it did in DP&L's ESP III case when it cited solely the possibility that DP&L's credit rating would degrade if it did not receive a cost-free cash infusion in the form of a distribution modernization rider. Garavaglia Testimony at 10-11."

IGS Comments, p. 15. Similarly, Honda/Dayton (pp.16-17) argue that a downgrade by credit agencies and interest savings are not enough to justify an emergency to warrant a financial integrity charge.

Their descriptions of DP&L's "proof" misstates DP&L's case, which goes far beyond credit ratings and interest savings. The testimony of DP&L witness Malinak contains a detailed showing of DP&L's financial integrity without an FIC under an MRO. Malinak Test., pp. 50-51. Included in that summary is the fact that DP&L's "[redacted] operating cash flow would fall well short of the [redacted] of capital expenditures," and that DP&L would need to "increase its borrowing on the revolver to [redacted]." *Id.* That evidence is contained on the pages IGS cited; IGS just chose to ignore it. DP&L witness Garavaglia similarly explained why the Commission would approve an FIC under an MRO. Garavaglia Test., pp. 9-25. DP&L's "proof" is summarized in DP&L's Initial Comments, and is much broader than IGS states.

IGS (p. 16) cites page 50 of DP&L witness Malinak's testimony for the proposition that "DP&L would continue to have positive cash flows." That is a misrepresentation of the testimony. On that page, Malinak says that DP&L would have [redacted] "operating cash flow" but would not have enough cash to cover capital expenditures. DP&L would thus have significantly negative cash flows.

IGS (p. 19) also asserts that the financial relationship between DP&L and DPL Inc. shows "a violation of ring fencing the Commission has previously approved." But IGS does not identify any corporate separation statute, rule, plan provision or other item that the Commission "previously approved" that DP&L has purportedly violated. The financial relationship between DP&L and DPL Inc. is simply a matter of economic reality, and not a violation of any ring fencing requirements.

Honda/Dayton (pp. 19-22) assert that DP&L's projections of its grid modernization expenditures are "speculative," and thus do not demonstrate that an FIC would be needed under an MRO. While it is true that DP&L does not know with certainty what will happen in the future, under R.C. 4928.143(E), the Commission must compare the "expected results" of ESP I to a hypothetical MRO. While the Commission may approve a different amount of Smart Grid investments for DP&L, DP&L's projected grid modernization expenditures were the best estimates at the time by DP&L's engineers. The estimates are based on their knowledge and experience, and therefore are not "speculative."

Honda/Dayton (p. 20) argue that DP&L previously stated that its plan to implement grid modernization was contingent on the DMR-E being approved. Circumstances have clearly changed since then, and DP&L plans to implement grid modernization so long as the RSC remains and the IIR is implemented.

IGS (p. 22) argues that an MRO would place DP&L [redacted] deeper in debt. That is an additional reason to conclude that ESP I is more favorable than an MRO.

IEU (pp. 12-13) asserts that DP&L will have [redacted], and that DP&L's plan to invest [redacted] in capital over the period is not reasonable because it is an investment to "improve" the grid not a necessity to maintain safe and reliable service. Similarly, Honda/Dayton (pp. 19-22) argue that DP&L's desire to conduct significant investment in grid modernization does not establish an emergency. The Commission should reject those arguments for the following reasons:

First, IEU, Honda, and Dayton ignore the facts that (1) DP&L has made minimal investments in its distribution system for years (Malinak Test., p. 75); (2) DP&L's equipment is very old and in need of being replaced (Garavaglia Test. p. 3); (3) DP&L's service quality has begun to decline (see DP&L's Initial Comments, p. 4); (4) DP&L is the only Ohio utility that has not implemented grid modernization, so its customers are not getting the same benefits and service as other Ohio residents (Garavaglia Test., pp. 3-4, 15-16); and (5) grid modernization will provide significant net benefits to customers, including improved reliability, reduced usage and lower bills, economic incentives, and other benefits (Case No. 18-1875-EL-GRD, *et al.*, Schedules and Workpapers (December 21, 2018) at WP-A, WP-B, WP-C). DP&L needs to make significant investments in its system, and the amounts identified in DP&L's filing are amounts that are reasonably needed.

Second, DP&L's projection includes [redacted] in "base capital investments" per year, totaling [redacted] over the projected period. Garavaglia Test., p. 15. DP&L's operating cash flow would [redacted].

Third, DP&L witness Malinak explains that eliminating Smart Grid investments would not resolve DP&L's financial integrity issues, but rather would exacerbate them:

> "Q. Would DP&L and DPL be able to avoid financial distress if the RSC is not approved and grid modernization is not pursued?
>
> A. No. In the short run, DP&L and DPL would be in financial distress without the RSC, as discussed above. Over the long run, grid modernization is projected to improve the financial strength of DP&L and DPL by contributing to their revenues and cash flows. Without those contributions, DP&L and DPL will be worse off in the long-run. So cancelling grid modernization while also eliminating the RSC will cause significant financial distress in the short-

> run, while removing a source of improved financial condition in the long run."

Malinak test., p. 47. (That answer discusses ESP I without an RSC. The results under ESP I without an RSC are very similar to the results of an MRO without an FIC. Malinak Test., pp. 50-51, 60-61).

IEU (pp. 11-15) relies heavily on the Commission's decision in In re Akron Thermal, Case No. 09-453-HT-AEM, *et al.*, Opinion & Order (Sept. 2, 2009), but that case is not on point. In that case, Akron Thermal, Limited Partnership ("ATLP") leased assets from the City of Akron to provide steam and hot water to its customers. *Id.* at 2. ATLP filed an application for emergency rate relief.

The evidence showed that ATLP's financial emergency was caused by two principal factors:

1. the departure of a large customer, which represented 30% of its business (*id.* at 23); and

2. ATLP was providing service to large customers at rates that were significantly below tariff rates, pursuant to contracts that had never been submitted for approval by the Commission (*id.* at 21).

The Commission concluded that ATLP had satisfied the elements of an emergency rate case (*id.* at 13), and went on to evaluate whether emergency relief was in "the interests of the public" (*id.* at 14). The Commission concluded that granting emergency relief was not in the best interests of the public for the following reasons:

> "We believe that, pursuant to Section 4909.16, Revised Code, the interests of the public will not be served by approving the requested rate increase application. We also believe that granting this rate increase, even for a temporary period of time, will not benefit the company. The application places the burden on ATLP's tariff customers, who will bear an increasing share of rate increases, while customers with special arrangements, some of which have backup energy systems or access to an alternative energy supplies, negotiate rates less than ATLP's tariff rates. Essentially, these special arrangement customers hold ATLP hostage against increases to their rates, where such increases would help to ensure that all customers bear a reasonable proportionate share of ATLP's revenue shortfall. As noted by Staff, the long-term picture under ATLP's current business model cannot be sustained. While we are necessarily concerned with the health of all public utilities, the evidence demonstrates that the City has entered into a contract with another entity that stands ready to provide the same service provided by ATLP in the event ATLP seeks to abandon service."

Id. at 25. (IEU (p.15) assert that the reason the Commission denied ATLP's application was the "death spiral," but the Commission did not cite to the death spiral when explaining its reasoning.)

The Commission should conclude that unlike ATLP, an FIC for DP&L under an MRO would be in the public interest for the following reasons: First, DP&L needs an FIC under an MRO to allow it to provide safe and reliable service. Malinak Test, pp. 50-51; Garavaglia Test., pp. 15-16. <u>Second</u>, ATLP leased the assets it used to provide service, and another entity was available to operate those assets. *Id.* at 2, 23. The Commission thus observed that "The productive assets of ATLP, essentially its rate base, are all principally leased from the City of Akron. This is one of the structural problems that prevents ATLP from functioning as a business concern that is compatible with regulation." *Id.* at 22-23. In contrast, DP&L owns its assets, and there is not another entity that is available to operate them if DP&L cannot do so. <u>Third</u>, a significant cause of ATLP's financial distress was below-tariff contracts that the Commission had never approved. *Id.* at 22-23. DP&L is not in that same situation. <u>Fourth</u>, at least some of

ATLP's customers could switch to gas heating. *Id.* at 7, 15. DP&L's customers do not have similar options.

3. The Amount of the FIC under an MRO is Reasonable

IEU (p. 13) asserts that DP&L's "projections make no effort" to include a base distribution rate case or FERC transmission rate case. Honda/Dayton (p. 19) make a similar assertion. [redacted].

OEG (pp. 1-2) asserts that any FIC under an MRO should be small to avoid a "death spiral." However, a small FIC would not solve DP&L's financial integrity issues; DP&L needs an FIC in the range of [redacted]. Malinak Test., pp. 50-54.

Honda/Dayton (p. 22) assert that it makes no sense to calculate an FIC as the amount needed to make up for the loss of $150 million AES equity investment and the $79 million RSC. Malinak Test., p. 53 (an FIC would equal [redacted] under that method). That is simply not true. As the Commission knows, DP&L is currently in a perilous financial situation, and has been so for many years. *See* DP&L Initial Comments., pp. 3-8. It is reasonable to conclude that if DP&L filed for an MRO, then the Commission would, at a minimum, approve an FIC that would allow DP&L to maintain its current financial position.

Honda/Dayton (p. 26) argue that DP&L's position in this case would lead to a "flood" of other utility cases. The Commission should reject that argument for a host of reasons, including: (1) the other Ohio utilities have significantly different circumstances than DP&L; (2) the Commission makes its decisions based on the evidence before it and not based on another utility's experiences; (3) Honda and Dayton are located in DP&L's service territory, and will not be affected by other utilities' cases; (4) as DP&L has repeatedly shown, ESPs offer substantial benefits over MROs even with the availability of financial integrity charges under R.C 4928.142(D); and (5) there are not enough Ohio utilities to create a "flood" of new cases.

4. The Commission Should Reject the Intervenors' Arguments Regarding DPL Inc.

DP&L's Initial Comments (pp. 5-6) demonstrated that DP&L's financial condition is linked to the financial integrity of DPL Inc. The intervenors make a variety of arguments regarding whether the Commission should consider the financial integrity of DPL Inc., which the Commission should reject for the following reasons:

1. DP&L would be in financial distress without an FIC: Honda/Dayton (pp. 17-18), IGS (pp. 21-22), OMAEG (p. 5) argue that DPL Inc.'s financial difficulties are the cause of DP&L's need for a FIC under an MRO. As an initial matter, that is not so: DP&L's Initial Comments (pp. 3-11) thoroughly demonstrated that DP&L was in financial distress. Among other points, the testimony of DP&L witness Malinak shows that DP&L would experience a financial emergency under an MRO without an FIC even if DP&L paid no dividends to DPL Inc. Malinak Test., pp. 50-51.

It is true that if DP&L made no dividend payments to DPL Inc., then DPL Inc. would be under severe financial distress (Malinak Test., pp. 51-52), which would have adverse financial effects on DP&L (Garavaglia Test., pp. 13-14, 17-22).

2. An FIC would not constitute an "acquisition premium": IEU (pp. 7-8) and Honda/Dayton (p. 15) assert that an FIC under an MRO would be used to pay debt at DPL Inc. associated with the AES/DPL Inc. merger, and would constitute an "acquisition premium." *In re*

AES Corporation, Case No. 11-3002-EL-MER, Stipulation and Recommendation (Oct. 26, 2011) at ¶ 4 stated:

> "Applicants agree 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."

The Commission has previously rejected the argument that DP&L's DMR would recover an acquisition premium. *In re DP&L*, Case No. 16-395-EL-SSO, *et al.*, Third Entry on Rehearing (Sept. 19, 2018) at ¶¶ 24-26. The Commission should again reject that argument for the following reasons:

First, Webster's Dictionary defines a "premium" as "a high value or a value in excess of that normally or usually expected." Webster's Ninth New Collegiate Dictionary, at 928 (1989). Neither IEU nor Honda/Dayton claim that AES paid an amount above fair market value to acquire DPL Inc. The Commission should conclude that no acquisition premium was paid in that transaction. Market conditions have changed since 2011, but that does not mean a premium was paid.

Second, the testimony of DP&L witness Malinak shows that DP&L would need an FIC under an MRO even if DP&L made no dividend payments to DPL Inc. Malinak Test., pp. 50-51. Thus, even assuming that AES paid an acquisition premium to acquire DPL Inc. (which it did not), the FIC is not a charge to collect an acquisition premium.

Third, AES acquired DPL Inc. for approximately $4 billion, and placed approximately $1 billion in debt upon DPL Inc. associated with that transaction. Since the merger, $1.1 billion in debt at DP&L and DPL Inc. has been paid off. Garavaglia Test., p. 25. If one believes any premium was paid by AES, the Commission should conclude that such purported premium has been paid off.

Honda/Dayton (p. 15) also assert that an FIC under an MRO would recover costs associated with the merger closing, but they never explain how that could be so. Costs associated with the merger closing would be legal and financial fees, and Honda/Dayton do not explain how an FIC would recover those types of costs.

3. Change of control: Honda/Dayton (pp. 17-18) argue that if DPL Inc. defaulted on its debt, then the change of control that DP&L witness Garavaglia describes (Garavaglia Test., pp. 17-22) would require Commission approval under R.C. 4905.402(B). While it is possible that DPL Inc.'s lenders would be required to make a filing under that section to take control of DP&L after a DPL Inc. default, there is no reason to believe that the Commission would reject such an application.

4. Dividend payments: Honda/Dayton (p. 16) state that "DP&L has not established the existence of an emergency" because "DP&L's projections assume large dividend payments to DPL Inc." However, DP&L actually assumes no dividends to DPL Inc. in the MRO with no FIC scenario. Malinak Test., pp. 50-51. In any event, the evidence shows that DP&L will suffer if DPL Inc. experiences financial distress. Garavaglia Test., pp. 13-14, 17-22.

5. AES competition: IGS (p. 22) argues that an FIC for DP&L would allow AES to "compete unfairly." As an initial matter, it is common that utilities have parents that also own competitive businesses. In addition, that argument ignores the fact that AES has not been paid a dividend or received a tax-sharing payment since 2012, and the unpaid tax-sharing obligations were converted to equity. Garavaglia Test., p. 23. Further, AES has invested $150

million in DP&L this year and plans to invest another $150 million next year. *Id.* at 25. AES is thus not receiving cash from DP&L to use elsewhere. Finally, the Commission could condition an FIC on it being used only to pay DP&L or DPL Inc. debt.

B. <u>DP&L COULD RECOVER ENVIRONMENTAL EXPENDITURES UNDER AN MRO</u>

Another reason that ESP I is more favorable than an MRO is that the MRO statute would allow DP&L to recover costs "to comply with environmental laws and regulations" (R.C. 4928.142(D)(4)), which are not recoverable under an ESP (R.C. 4928.143). DP&L could recover [redacted] in environmental costs at Hutchings under an MRO, which would not be recoverable under an ESP. Malinak Test., p. 80.

1. <u>R.C. 4928.142(D)(4) is DP&L's legal authority</u>: OCC (pp. 10-11 and n.35), Kroger (p. 12) and OMAEG (p. 12) argue that DP&L has failed to meet its burden of proof because the testimony of DP&L witness Malinak did not cite the statute that would allow DP&L to recover environmental expenses under an MRO. There is, of course, no requirement that a witness cite a statute, and those intervenors surely knew which statute he was relying upon: R.C. 4928.142(D)(4).

2. <u>All environmental costs are recoverable</u>: IEU (pp. 15-16) and IGS (pp. 22-24) assert that DP&L's environmental costs would not be recoverable under Division (D)(4) because DP&L generation assets are no longer being used to supply the SSO. However, the statute contains no such restrictions regarding SSO supply. Hutchings has been used over most of its life to provide generation service to DP&L's customers, and clean-up costs for Hutchings would be recoverable under Division (D)(4). Indeed, Division (D)(4) requires that the costs be "prudently incurred" but does not require the assets "be used and useful." The

General Assembly knows how to impose a "used and useful" requirement (*e.g.*, R.C. 4909.15(A)(1)), and the fact that it did not do so in Division (D)(4) shows that none exists.

3. OCC's prior arguments all fail: OCC (p. 11) incorporates its prior arguments about an FIC into its argument about environmental costs. As shown above in Section II.A., those arguments were all flawed.

C. DP&L'S ESP I HAS NON-QUANTIFIABLE BENEFITS THAT AN MRO WOULD NOT HAVE

This section demonstrates that the Commission should reject the intervenors' arguments regarding the non-quantifiable benefits of DP&L's ESP I over an MRO.

1. AES investments: AES plans to invest $150 million in DP&L in 2021 under an ESP, but not under an MRO, which is a benefit of ESP I. Garavaglia Test., pp. 26-27; Malinak Test., p. 81.

Dayton/Honda (p. 25) assert that the investment was considered as a quantifiable benefit. While AES' plans to invest $150 million in DP&L in 2021 under an MRO are included in DP&L's calculations (Malinak Test., p. 57), that investment provides incremental benefits to DP&L's financial condition and integrity (*id.* at 81), so it is appropriately considered as a non-quantifiable benefit.

OCC (p. 11) asserts that this benefit deserves no weight, since it is not enforceable. However, AES has already invested $150 million in DP&L this year, so it is committed to its plan. The statute requires that the Commission compare "expected results" of ESP I versus an MRO (R.C. 4928.143(E)), and that investment is an expected result.

IEU (p. 16) asserts that AES already has a binding commitment to inject equity into DP&L to maintain a 50% equity capital structure pursuant to the AES/DPL Inc. merger case. However, the Commission granted DP&L a waiver of that purported requirement, and authorized DP&L to file an application to extend that waiver, which DP&L has done. *In re DP&L*, Case No. 13-2420-EL-UNC, Finding and Order (Sept. 17, 2014) at p. 18; *In re DP&L*, Case No. 13-2420-EL-UNC, Application to Maintain an Adjusted Capital Structure (Mar. 31, 2017).

IGS (pp. 25-26) asserts that the "benefit comes with too many strings attached." The equity investment is a benefit expected under ESP I, but not under an MRO, so it should be considered.

2. SEET: A second benefit of ESP I over an MRO is the possibility of a refund to customers under the SEET in R.C. 4928.143(F). Malinak Test., p. 81.

OCC (pp. 12-14) claims that the SEET in R.C. 4928.143(F) is not a real benefit because there have been "very few" instances where refunds have been issued. IEU (p. 17), OHA (pp. 3-4) and IGS (p. 26) make similar assertions. While DP&L's projections show that it is not expected to have significantly excessive earnings during the forecast period (Malinak Test., pp. 84-89), at least one intervenor believes that "the RSC certainly has the potential to cause this ESP to produce significantly excessive earnings." IEU Comments, p. 20 (emphasis added). Regardless of current projections or past instances of refunds, the existence of the SEET in R.C. 4928.143(F) is a real benefit of ESP I.

3. An MRO is irreversible: Another benefit of ESP I is that the decision to approve an MRO is irreversible. R.C. 4928.142(F); Malinak Test., p. 81. IEU (p. 17) asserts

that this is not a real benefit because an ESP is a device to "hold ratepayers hostage to requests for nonbypassable charges." OCC (p. 14) and IGS (p. 26) make similar comments. However, the Commission has repeatedly found ESPs to be more favorable than MROs. *E.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, *et al.*, Opinion and Order (Apr. 25, 2018) at ¶ 270; *In re Duke Energy Ohio, Inc.*, Case No. 14-841-El-SSO, *et al.*, Opinion and Order (Apr. 2, 2015) at pp. 96-97. Retaining the option to approve future ESPs is a real benefit. OEG (pp. 4-5) described how ESPs are "inherently more favorable" than MROs.

4. Bypassable FIC: An FIC under an MRO may have to be bypassable. R.C. 4928.142(D)(4). It may thus lead to too few customers paying the FIC. Malinak Test., p. 82. The RSC is nonbypassable, and thus spread over more customers, which is a benefit. *Id.*

OCC (p. 15) and IGS (p. 27) assert that making the FIC bypassable will not necessarily cause all SSO customers to switch. While that it is true, making the FIC charge bypassable would increase the incentive of customers to switch, which would result in rate increases for a smaller group paying the FIC. Malinak Test., p. 82.

IEU (p. 17) Kroger and OMA assert that the ability to avoid the FIC would be a benefit of the MRO. That may be true for members of those organizations that are shopping, and would not be effected by the FIC being allocated just to SSO customers. It would not be a benefit to SSO customers and the Commission must view the MRO holistically for all customers, not just those sophisticated commercial customers that are shopping.

5. Gradualism: Another benefit of the ESP is that rate increases would be more gradual, due to the IIR. Malinak Test., p. 82. Other Riders similar to DP&L's former Distribution Investment Rider that also provide gradualism benefits may also be available in

future ESPs. R.C. 4928.143(B)(2)(h). OCC (p. 15), Honda/Dayton (p. 25), IEU (p. 18) and IGS (pp. 27-28) assert that customers are better off if utilities seek to recover capital expenditures in a rate case. Nevertheless, avoiding rate shock is desirable, and the existence of the IIR will mitigate rate shock. Single-issue infrastructure riders such as the IIR also reduce costs, regulatory lag, and administrative burdens associated with perennial rate cases.

D. DP&L'S ESP I IS REQUIRED TO INCLUDE AN RSC

Honda/Dayton (pp. 3-12) begin their brief by arguing that the RSC is no longer legally justified, and that it should be rejected. Kroger (pp. 7-9) and OMA (pp. 7-8) make similar arguments. In a similar vein, OHA (pp. 2-3) argues that the Commission should weigh the financial impact of customers paying the RSC. But these arguments attempt to apply standards/tests that do not exist under R.C. 4928.142. The issue in this case is whether ESP I as it currently exists passes the MFA test and SEET in R.C. 4928.143(E), and if not, what the remedy should be. The Commission has already decided that DP&L can collect the RSC. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Second Finding and Order (Dec. 18, 2019) at p. 11. As asserted by OHA (pp. 1-2), this argument is more appropriately determined in the applications for rehearing that are set forth in the underlying ESP I docket. DP&L will respond to arguments regarding the lawfulness of the RSC in Section IV.A. of these comments.

III. ESP I PASSES THE SEET

DP&L is projected to earn an ROE of [redacted] during the 2020-2023 forecast period. Malinak Test., p. 84. DP&L's testimony further demonstrated that:

(a) The ROE earned by the applicable proxy group was 10.4%. Malinak Test., p. 85.

(b) The proxy group ROE should be multiplied by 1.5 to get an initial SEET threshold of 15.6%. *Id.*

(c) 100 basis points should be added to that initial threshold due to DP&L-specific risk factors and circumstances, to arrive at a final SEET threshold of 16.6%. Garavaglia Test., pp. 3-8; Malinak Test., p. 85.

The projected [redacted] ROE that DP&L will earn is below the SEET 16.6% threshold, so ESP I passes the SEET in R.C. 4928.143(E). DP&L demonstrates below that the Commission should reject the arguments of the intervenors regarding the SEET.

1. The Commission should not use a 12% SEET threshold: OCC (pp. 16-17), Kroger (p. 5) and OMAEG (p. 13)[3] argue that the Commission should use a 12% SEET threshold that the Commission established in DP&L's ESP II case. In that case, the Commission "authoriz[ed] an SSR to achieve an ROE target of 7 to 11 percent." *In re DP&L*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept. 4, 2013) at p. 25. Further, "to ensure that DP&L does not reap disproportionate benefits from the ESP as a result of the approved SSR, the Commission f[ound] that a [SEET] threshold of 12 percent should be established." *Id.* at 26.

The Commission should conclude that its decision in ESP II is inapplicable here for the following reasons:

First, in ESP II, the Commission approved the SSR as a financial integrity charge that targeted an ROE of 7% to 11%. *Id.* at 25. Since the SSR was designed to target an ROE

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[3] Kroger (p. 5) and OMAEG (p. 13) tell the Commission that DP&L "argued" for a 12% SEET threshold in DP&L's "last" SEET case. However, they cite to a 2014 SEET case in which DP&L's witness cited to the 12% SEET threshold that the Commission set in ESP II. May 15, 2014 Test. of C. Forestal, p. 8 (Case No. 14-831-EL-UNC) (attached to DP&L's Application). DP&L thus did not "argue[]" for a 12% SEET threshold.

range up to 11%, it made sense to establish a SEET threshold of 12%. Here, in contrast, the RSC is not a financial integrity charge and is not designed to allow DP&L to earn a targeted ROE range. *See* Initial Comments of Honda/Dayton, p. 5, n. 7. The Commission's reasoning in ESP II is thus inapplicable.

Second, R.C. 4928.143(E) requires the Commission to determine whether DP&L's projected ROE "is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies including utilities, that face comparable business and financial risk." Simply selecting a 12% ROE threshold because it was a number that the Commission used in the past would violate R.C. 4928.143(E) because it does not employ the necessary analysis of comparable companies. Even if the Commission were to accept a 12% ROE threshold, DP&L's projected earnings fall well below that amount. Malinak Test., p. 84.

2. The planned AES equity investments should be included: OCC (pp. 17-19) argues that the Commission should exclude AES' planned equity investments from the SEET, because AES has not made a "firm commitment" to make those investments. The Commission should reject that argument for the following reasons:

First, the $150 million investment for 2020 has already been made.

Second, the Commission is required to determine the ROE that DP&L is "substantially likely" to earn during the forecast period. R.C. 4928.143(E). DP&L witness Garavaglia explains that AES plans to invest an additional $150 million in 2021 (Garavaglia Test., pp. 26-27), and returns on DP&L's Smart Grid investment can be recovered through DP&L's IIR. DP&L has filed a Smart Grid Plan, in which it has asked the Commission to implement Smart Grid and authorize recovery of its expenditures. *In re DP&L*, Case No. 18-

1875-EL-GRD, *et al.*, Application (Dec. 21, 2018). It is "substantially likely" that the Commission will allow recovery of Smart Grid investment through the IIR by 2021, so the Commission should include the planned $150 million investment by AES in 2021 in the SEET.

For these same reasons, the Commission should reject the Honda/Dayton (pp. 27-28) argument that DP&L's projections are speculative as it relates to Smart Grid investment, cost of debt, equity, and depreciation. As just discussed, the statute requires a prospective look, which necessitates projections of what is "substantially likely." As demonstrated above, it is "substantially likely" that DP&L will make Smart Grid investments with reciprocal depreciation, change the cost of debt and inject equity. R.C. 4928.143(E). Therefore, they should be included in the SEET.

3. <u>The Commission should make a 100 basis point adjustment</u>: Honda/Dayton (p. 29), IEU (p. 20, n.66), Kroger (pp. 6-7) and OMAEG (pp. 13-14) argue that the Commission should not make a 100 basis point adjustment to the SEET ROE threshold. They argue that DP&L does not face unusual risks or have unusual circumstances, and that any risks or circumstances applicable to DP&L would be accounted for in the proxy group because it faces similar risks and circumstances. Not true.

The proxy group consists of utilities that are included in the XLU exchange fund. Malinak Test., p. 85. DP&L faces the following risks and circumstances that the proxy group is not likely to face, which justify a 100 basis point adjustment:

1. DP&L plans to invest [redacted] during the 2020-2023 forecast period to improve its aging infrastructure and implement smart grid.

2. DP&L's ultimate parent company, The AES Corp. has invested $150 million in DP&L, and plans to invest $150 million in DP&L next year.

3. DP&L's credit ratings show that DP&L is more risky than a typical utility.

4. DP&L faces risks that other Ohio utilities do not face, since it is not currently collecting a Distribution Investment Rider, a Decoupling Rider, or an Uncollectable Rider.

5. The termination of ESP III has resulted in a loss of approximately [redacted] in annual cash flow for DP&L.

6. Due to DP&L's perilous financial condition, COVID 19 creates risks for DP&L that utilities that are in better financial condition do not face.

7. Cost containment measures that have been implemented at DP&L mean that DP&L is already very lean, and subject to greater operational risks than a typical utility.

Garavaglia Test., pp. 3-8. The inclusion of a 100 basis point adder is consistent with Commission precedent. *In re Columbus Southern Power Co.*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011) at pp. 25-27.

Kroger (p. 7) and Honda/Dayton (p. 29) argue that the increased risks that DP&L faces are the result of DP&L's decision to withdraw from ESP III and implement ESP I. While DP&L made that decision, it allowed DP&L to implement the RSC. DP&L would have been at even greater risks if it had not terminated ESP III; thus, warranting an even higher SEET threshold.

4. An ROE is different from a SEET threshold: Kroger (p. 5 and n.17) and OMAEG (p. 13 and n.43) argue that DP&L's SEET threshold is unreasonable because the Commission approved a ROE of 9.84% in a prior distribution rate case for another utility. IEU similarly argues that DP&L has a 9.999% ROE approved in its recent rate case. However, as the Commission knows, the purpose of the SEET threshold is to determine whether a utility will earn

an ROE that is significantly in excess of an ROE earned by competing companies. R.C. 4928.143(E). The fact that the other utility passed the SEET because it earned an actual ROE below its approved ROE does not mean that the approved ROE was the SEET threshold. Kroger, OMAEG and IEU are comparing apples to oranges.

IEU (p. 20) assert that DP&L "has the potential" to violate the SEET because the RSC will increase DP&L's ROE. However, the projections show that DP&L will not violate the SEET during the forecast period, even with the RSC. Malinak Test., p. 84-89. IEU's calculations are based on stale historical information, rather than based on projections of future earnings, as required by R.C. 4928.143(E).

IV. THE COMMISSION SHOULD NOT INVALIDATE THE RSC

DP&L's Initial Comments (pp. 16-19) demonstrated that even if the Commission were to conclude that ESP I failed either the MFA test or the SEET, the Commission should not eliminate the RSC because DP&L would not be able to provide safe and reliable service without it. DP&L demonstrates below that the Commission should reject the intervenors' arguments that the RSC should be eliminated if the Commission concludes that DP&L fails either test.

A. THE RSC IS LAWFUL

1. The Intervenors Ignore the Plain Language of the Governing Statute

OCC (pp. 21-22), OEG (p. 2), Honda/Dayton (pp. 3-12), Kroger (pp. 9-10) and OMAEG (pp. 8-9) argue that the RSC is not lawful, and should be eliminated. The principal defect in the intervenors' argument that the RSC is not lawful is that they ignore the plain language of R.C. 4928.143(C)(2)(b), which establishes what the Commission was required ("shall") to do after DP&L exercised its right to terminate ESP III:

> "If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, <u>the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer</u>, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." (Emphasis added.)

The Commission thus implemented ESP I (including the RSC) less than a year ago after DP&L terminated ESP III. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Second Finding and Order (Dec. 18, 2019) at ¶¶ 29-35 (holding that DP&L had right under R.C. 4928.143(C)(2)(b) to implement the RSC); *Accord*: *In re DP&L*, Case No. 12-426-EL-SSO, *et al.*, Finding and Order (Aug. 26, 2016) at ¶ 14 ("The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to . . . accept the withdrawal of ESP II.").

"Shall" is mandatory. *E.g., Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971). The Commission did what it was required to do after DP&L terminated ESP III -- issue a new Order continuing the provisions, terms, and conditions of ESP I (including the RSC). *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Second Finding and Order (Dec. 18, 2019) at pp. 9, 26-40.

The intervenors ignore the mandatory language of R.C. 4928.143(C)(2)(b). They do not contest that the RSC was a term of DP&L's prior SSO. They do not contest that the word "shall" is mandatory or explain how or why the Commission could have ignored that word. (In fact, OCC filed a motion in that case asserting that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" <u>required</u> the Commission "to implement ESP I after withdrawal." *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates (Dec. 4, 2019) at p. 13.

The intervenors also ignore the fact that after DP&L initially withdrew ESP II and reverted to ESP I, the Commission held that it was obligated to implement the terms of ESP I, including the RSC. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Finding and Order (Aug. 26, 2016) at ¶ 23; Third Entry on Rehearing Dec. 14, 2016) at ¶¶ 31-35.

Significantly, despite ignoring R.C. 4928.143(C)(2)(b) in their arguments, several intervenors have admitted elsewhere that R.C. 4928.143(C)(2)(b) required the Commission to implement ESP I. For example, in OCC's Merit Brief that it filed with the Supreme Court in DP&L's ESP II case (Supreme Court Case No. 2017-241), OCC told the Court:

> "The language in the statute is not optional. The word 'shall' is to be construed as mandatory, unless clear and unequivocal legislative intent connotes that it receives a construction other than its ordinary usage.
>
> With no evidence that the legislative intent was for a different construction, the court must construe 'shall' as mandatory. <u>The General Assembly used the word 'shall' leaving the PUCO no choice but to return to 'the utility's most recent standard service offer</u>.'"

In re DP&L, Sup. Ct. Case No. 2017-241, Merit Brief of Appellant The Office of the Ohio Consumers' Counsel (May 16, 2017) at p. 19 (citations omitted) (emphasis added). That argument was exactly right -- the Commission had no discretion but to return to the most recent SSO.

Similarly, OMA and Kroger stated in their merit briefs:

> "R.C. 4928.143(C)(2)(b) provides that if a utility terminates its ESP application the '[C]ommission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs * * *.' <u>There is no uncertainty with that provision</u>. By statute, the Commission is

> limited to authorizing a return to the utility's most recent ESP together with necessary fuel-cost adjustments. Where a statute is unambiguous, it must be enforced according to its terms. Applying that interpretive principle, the Commission should have concluded that its powers under R.C. 4928.143(C)(2)(b) were limited to authorizing DP&L to implement the provisions, terms, and conditions of its ESP I after a lawful withdrawal . . ."

In re DP&L, Sup. Ct. Case No. 17-0204, Merit Brief of Appellants The Kroger Company and The Ohio Manufacturers' Association (May 15, 2017) at p. 19 (citations omitted) (emphasis added). Again, that was exactly right.

2. *Res Judicata* and Collateral Estoppel Bar the Intervenors' Arguments

The Commission also has held that the intervenors were barred by R.C. 4903.10 and the doctrines of *res judicata* and collateral estoppel from challenging the RSC. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Second Finding & Order (Dec. 18, 2019) at ¶ 34. Specifically, on February 24, 2009, DP&L filed a Stipulation with the Commission in ESP I, which was signed by Honda, Dayton, OCC, OMA, OHA and Kroger (among others). *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Stipulation and Recommendation (Feb. 24, 2009) at pp. 21-22. That Stipulation contained the RSC. *Id.* at ¶ 3. The Commission approved that Stipulation. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Opinion & Order (June 24, 2009) at p. 13.

Section 4928.143(C)(2)(b) was enacted in 2009 when those parties signed that ESP I Stipulation. They were on notice that DP&L had the right to reinstate ESP I if the Commission were to modify and approve subsequent ESPs.

No party to the ESP I case sought rehearing of the Commission's decision approving the ESP I Stipulation, and no party appealed that decision. A party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

Those parties are also barred from challenging the lawfulness of the RSC by the doctrines of *res judicata* and collateral estoppel. "The doctrine of *res judicata* encompasses the two related concepts of claim preclusion, also known as *res judicata* or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. . . . Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." *Id.* (emphasis added) (citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. . . . Issue preclusion applies even if the causes of action differ." *Id.* at ¶ 7 (citation omitted). "[T]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (citation omitted). *Accord: Nat'l Amusements, Inc. v. City of Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'") (citation omitted). "[T]he doctrine of *res judicata* is applicable to defenses which, although not raised, could have been raised in the prior action." *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982) (emphasis added).

Here, the intervenors had the opportunity in 2009 to litigate whether the RSC was lawful in ESP I. Instead, they signed a Stipulation and agreed to the RSC, knowing that DP&L would have the right under R.C. 4928.143(C)(2)(b) to reinstate ESP I including the RSC if the Commission modified a future DP&L ESP application. The fact that DP&L exercised that right does not grant them a new opportunity to re-litigate the issue. The intervenors are thus barred by R.C. 4903.10, *res judicata* and collateral estoppel from challenging the RSC now.

Dayton/Honda (pp. 9-10) argue that res judicata and collateral estoppel do not apply, since DP&L no longer bears any POLR risk. However, as demonstrated above, the Commission was required to implement the RSC. Further, as demonstrated below, DP&L does still bear those risks.

3. The Intervenors Ignore Two Rulings by the Court That the RSC Is Lawful

Continuing their pattern of ignoring controlling law that is adverse to their position, the intervenors also ignore the two Supreme Court cases that have held that DP&L's RSC is lawful. *Constellation NewEnergy, Inc. v. PUC*, 104 Ohio St.3d 350, 2004-Ohio-6767, 820 N.E.2d 885, ¶¶ 39-40; *Ohio Consumers' Counsel v. PUC*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶ 17-26.

Specifically, the RSC (also called the Rate Stabilization Surcharge ("RSS") in earlier cases) was established six years and two cases before the ESP I case. In 2003, it was included in a Stipulation and Recommendation that was approved by the Commission. *In re*

DP&L, Case No. 02-2779-EL-ATA, *et al.*, Stipulation and Recommendation (May 28, 2003) at p. 13, ¶ IX.E. That Stipulation provided that the RSC would be implemented in a subsequent case. *Id.* An intervenor in that 2003 case appealed that Commission decision to the Supreme Court, and argued that the RSC was not lawful. The Court rejected that argument:

> "The commission specifically found: 'An RSS is reasonable and legally sustainable * * *. As to the issue of whether the RSS should apply to all customers, whether or not they purchase their generation from DP&L, the Commission would note, initially, that representatives of all customer groups agreed, in the stipulation, with charging the RSS to all customers. In addition, the Commission finds it is reasonable for DP&L to argue that it will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS. While the Commission is not finding that the costs specified in the stipulation as the basis for the RSS are POLR costs, the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers.'
>
> Constellation disputes both of the justifications the commission gave for approving the RSS mechanism. However, Constellation's arguments lack substance and are unconvincing. The record supports the commission; it does not support Constellation. <u>Thus, we find no error in the commission's findings as to the RSS mechanism</u>."

Constellation, 2004-Ohio-6767, ¶ 39-40 (emphasis added).

The RSC was later implemented in a 2005 Commission case, which was also resolved via a Stipulation and Recommendation that was approved by the Commission. *In re DP&L*, Case No. 06-276-EL-AIR, *et al.*, Stipulation and Recommendation (Nov. 3, 2005) at p. 5, ¶ I.C. OCC appealed that Commission decision to the Supreme Court, but the Court again held that the RSC was lawful:

> "OCC maintains that the commission erred when it approved a distribution-service rate increase to compensate DP&L for costs that are purely generation-service costs. <u>The commission's</u>

> approval of the rate and amount is in conformity with applicable law. . . .
>
> In the MDP-extension stipulation in 2003, DP&L proposed a rate-stabilization surcharge, which was intended to allow DP&L to increase rates in order to recover increases in generation-related costs for fuel, for actions taken in compliance with environmental and tax laws and for physical security and cyber security. These increased costs were to be collected from all customers, whether they purchased generation service from DP&L or from another supplier. With respect to those customers who do not take generation service from DP&L, the rate-stabilization surcharge would compensate DP&L for the risks and costs that DP&L will incur as a POLR. See R.C. 4928.14(C).
>
> * * *
>
> . . . Accordingly, the PUCO's order is affirmed with regard to the amount of the charge . . ."

Ohio Consumers' Counsel, 2007-Ohio-4276, ¶¶ 17-18, 26 (emphasis added).

Honda/Dayton (p. 11) cite *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, but their reliance on that decision is misplaced. In that case, the Court found that "no evidence supports the commission's characterization of [AEP's POLR] charge as based on cost." *Id.* ¶ 29. However, the Court made clear that it expressed "no opinion" on whether AEP could support its POLR charge with actual evidence:

> "On remand, the commission may revisit this issue. To be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non-cost-based POLR charge is reasonable and lawful. Alternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs. However the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."

Id. ¶ 30 (emphasis added).

Unlike the AEP POLR charge, the Court twice found that DP&L's RSC was supported by the evidence and was lawful. *Constellation NewEnergy*, 2004-Ohio-6767, ¶¶ 39-40; *Ohio Consumers' Counsel*, 2007-Ohio-4276, ¶¶ 17-26. The *In re Application of Columbus S. Power* case is thus inapplicable.

4. <u>The RSC Is Not an Unlawful Transition Charge</u>

OEG (p. 2), OMAEG (pp. 6-7) and Kroger (pp. 7, 10) argue that the RSC is an unlawful transition charge under *In re the Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734. The Commission just recently rejected that argument. *In re DP&L*, Case No. 08-1094-EL-SSO, *et al.*, Second Finding and Order (Dec. 18, 2019) at pp. 13-14. The Commission should again reject that argument for the following separate and independent reasons.

<u>First</u>, the Court has held that a change in law does not bar the application of *res judicata*. *Nat'l Amusements, Inc.*, 53 Ohio St.3d 60, syllabus: ("Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of *res judicata*. Since the doctrine of *res judicata* serves important public and private interests, exceptions to the doctrine's application should be narrowly construed."). *Accord: Doe v. Trumbull Cty. Children Services Bd.,* 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986) (change in controlling decisional law does not support Civ. R. 60(B) motion for relief from judgment; "[t]o hold otherwise would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.'") (citation

omitted). The fact that *In re Application of Columbus S. Power* was issued after ESP I initially was approved thus does not bar the application of *res judicata* in this case.

Second, R.C. 4928.38 bars a utility from recovering "transition revenue or any equivalent revenues." The Supreme Court has described transition costs as follows:

> "Transition costs (also referred to as stranded costs) are costs incurred by the utility before retail competition began that will not be recoverable through market-based rates. . . . In general, these are generation costs that the utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have switched to another generation provider."

In re Application of Columbus S. Power Co., 2016-Ohio-1608 at ¶ 15 (emphasis added; citation omitted).

POLR risk did not exist before deregulation, and thus is not a cost "incurred by the utility before retail competition began." *Id.* The RSC cannot be a transition charge.

Nor is the RSC "equivalent" to a transition charge under R.C. 4928.38. The Court has stated that "S.B. 3 allowed electric utilities to receive transition revenues to aid them in making the transition to a fully competitive generation market." 2016-Ohio-1608, at ¶ 22 (emphasis added). The Court held that a charge was equivalent to a transition charge when the charge was "a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market" by protecting the utility from expected increases in customer shopping. *Id.* ¶ 23 (emphasis added).

A charge is thus "equivalent" to a transition charge if it compensates a utility for costs the utility would experience in transitioning to "a fully competitive generation market" --

i.e., declining plant value, customer switching, lower prices. In a fully-competitive market, a supplier does not have a statutory obligation to provide service to customers of another supplier if that other supplier defaults. In contrast, DP&L has a statutory obligation to provide generation to all customers, including customers of competitive suppliers. R.C. 4928.141(A). The RSC compensates DP&L for risks associated with that POLR obligation.

In other words, transition costs are costs like declining plant value or switching customers that a utility experiences in a fully competitive market. There is a key distinction between Ohio's generation market and a "fully competitive market" because DP&L has an obligation to serve customers of competitive suppliers if those suppliers default. R.C. 4928.141(A). The RSC compensates DP&L for those risks, and thus is not a transition charge.

Third, in holding that an ESP charge that constitutes a transition charge was unlawful, the Supreme Court refused to consider whether the "notwithstanding" clause in R.C. 4928.143(B) barred the transition charge argument, because no party raised that argument. *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶¶ 38-40, ¶ 38, n.3.

The Court later held that the "notwithstanding" clause in R.C. 4928.143(B) barred parties from arguing that otherwise lawful ESP charges were transition charges. *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement*, 155 Ohio St. 3d 326, 2018-Ohio-4698, 121 N.E.2d 320, ¶ 19. *In re Ohio Power* thus establishes that the RSC is lawful "notwithstanding" the arguments of the intervenors that it is a transition charge.

5. The RSC Is a POLR Charge

Honda/Dayton (pp. 12-14) argue that the RSC is a POLR charge, not an FIC. DP&L agrees. However, DP&L's financial integrity would be jeopardized without the RSC. Malinak Test., pp. 60-61. The same is true of DP&L's distribution rates -- they are not an FIC, but DP&L's financial integrity would be jeopardized without them.

B. DP&L STILL PROVIDES POLR SERVICE

OCC (pp. 21-23), Kroger (pp. 6, 9), OMAEG (pp. 7-8) and Honda/Dayton (p. 6) argue that DP&L no longer has a POLR risk, since 100% of DP&L's SSO load is currently provided by suppliers that were the winning bidders at auctions to serve that load. However, when DP&L withdrew its ESP II application under R.C. 4928.143(C)(2)(a), the Commission rejected that exact argument because DP&L was still subject to POLR risk:

> "The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, <u>DP&L retains its obligation, over the long term, to serve as provider of last resort</u>. . . . R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of ESP I. The Commission stated in its December 19, 2012, Entry in this case, '[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.' ESP I Case, Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of ESP I. ESP I Case, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the

> Commission has already determined the RSC is a provision, term, or condition of ESP I; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

In re DP&L, Case No. 08-1094-EL-SSO, *et al.*, Finding and Order (Aug. 26, 2016) at ¶ 23.

In addition to the reasons cited by the Commission, the Commission should conclude that DP&L is still subject to POLR risk for the following reasons.

First, the auctions are conducted periodically, and there is no guarantee that they will continue or that any suppliers will bid. DP&L thus bears a POLR risk that it will have to provide generation service to some or all of its customers if there are not enough bidders at auction.

Second, there is also a risk that winning bidders will default on their obligation to provide generation service to SSO customers. Generation service within the SSO is provided to customers at a fixed price, and there is a risk that winning bidders will default when demand and market prices spike. DP&L would then be required by R.C. 4928.141(A) to supply generation to those customers, which imposes a POLR risk on DP&L. (The collateral posted by winning bidders may be inadequate because it is only for 30 days, and because the winning bidders could default when market prices are at an extreme peak.)

Third, for customers that have switched -- i.e., do not take SSO service -- they have the right to return to SSO service. R.C. 4928.141(A). They are likely to exercise that right if market prices are high and they are unable to sign a favorable contract with a competitive supplier or are on a variable rate with a competitive supplier; in that instance, it may be cheaper for them to return to the fixed-price generation service under the SSO. Those customers should then be served by the winning bidders from prior auctions, but as demonstrated in the prior two paragraphs, there are risks that (a) there will be no such winning bidders; or (b) the winning bidders will not be able or willing to supply the additional generation required for the returning customers, or will default on their obligations. In those instances, DP&L would be obligated to procure generation to serve those customers, which imposes POLR risks upon DP&L. (Again, the collateral may be inadequate for the reasons discussed above.)

The Supreme Court of Ohio has acknowledged that POLR obligations impose risks on a utility. *Constellation NewEnergy, Inc.*, 2004-Ohio-6767, ¶ 39, n. 5 ("POLR costs are those costs incurred by [the utility] <u>for risks</u> associated with its legal obligation as the default provider, or electricity provider of last resort, for customers who shop and then return to [the utility] for generation service") (emphasis added); *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788, at ¶ 23. ("Under Ohio law, customers may purchase generation service from a competitive supplier. If such a supplier fails to provide service, 'the supplier's customers * * * default[] to the utility's standard service offer * * * until the customer chooses an alternative supplier.' R.C. 4928.14. This obligation to stand ready to accept returning customers make the utility the 'provider of last resort,' or 'POLR.'") (citations omitted).

OCC (pp. 21-22), Honda/Dayton (p. 6), Kroger (p. 9) and OMAEG (pp. 7-8) argue that DP&L is no longer subject to POLR risk since it no longer owns generation assets, but that argument demonstrates a fundamental misunderstanding of POLR risk. As demonstrated above, a POLR risk exists because DP&L has a statutory obligation to provide generation if there are no other providers. R.C. 4928.141. DP&L has POLR risk whether it owns generation assets or not. Indeed, DP&L's POLR risk is higher now that it no longer owns generation assets, since

DP&L cannot access that generation to satisfy its statutory obligations if a winning bidder or CRES defaults, or use that generation as a hedge to offset the risk.

Honda/Dayton (pp. 7-8) and IGS (p. 8) assert that the Commission has implemented competitive bidding rules that are designed to mitigate POLR risks. However, as demonstrated above, those rules do not eliminate the risk. DP&L is still subject to significant POLR risk if the winning bidder defaults, pursuant to R.C. 4928.141.

The Commission should thus reject the argument by the intervenors that DP&L no longer has a POLR obligation and risk.

C. GRID MODERNIZATION WILL PROVIDE NET BENEFITS TO CUSTOMERS

OCC (p. 21) asserts that DP&L should abandon its plans to implement grid modernization. The Commission should reject that argument for two reasons:

First, the return that DP&L would earn on its Smart Grid investments is needed to allow DP&L to return to being a financially-sound utility. Malinak Test., p. 47. Eliminating Smart Grid does not solve DP&L's financial integrity issues; it exacerbates them. *Id.*

Second, DP&L anticipates that the Commission will approve its Smart Grid plan only if the Commission concludes that the plan provides net benefits to customers. Abandoning Smart Grid thus is not in customers' best interests.

Third, DP&L is the only major electric utility in the state of Ohio that has not implemented grid modernization for its customers. It is important for the state, not just DP&L's customers, to implement grid modernization.

D. **DP&L'S RELIABILITY METRICS DEMONSTRATE DP&L'S NEED FOR THE RSC OR FIC**

OCC (p. 20) argues that DP&L's reliability metrics have been "comparable" to other Ohio utilities from 2013 to 2019, and there is thus "no reasonable basis" for DP&L to claim that it needs the RSC to provide reliable service. IGS (p. 16) makes a similar argument as to the FIC under an MRO. The Commission should reject that argument because DP&L has been collecting the SSR, DMR or the RSC during that period. OCC does not explain how DP&L could have provided safe and reliable service during that period without those charges, or how DP&L could provide safe and reliable service into the future without the RSC. The evidence shows that DP&L could not do so. Malinak Test., pp. 60-61; Garavaglia Test., pp. 15-16. Further, DP&L's past performance is not necessarily an accurate reflection of future performance, especially given DP&L's limited investments over an extended period of time. Malinak Test., pp. 75-78. This is further indicated by the fact that DP&L's reliability metrics have begun declining. DP&L Initial Comments, p. 4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments of The Dayton Power and Light Company, has been served via electronic mail upon the following counsel of record, this 16th day of July, 2020.

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