

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of : Case No. 20-0680-EL-UNC
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).

**MOTION OF THE DAYTON POWER AND LIGHT COMPANY
FOR ENTRY OF A PROTECTIVE ORDER RELATING TO CONFIDENTIAL
INFORMATION CITED IN THE DIRECT TESTIMONY OF MATTHEW I. KAHAL**

Pursuant to Ohio Adm.Code 4901-1-24(D), The Dayton Power and Light Company ("DP&L" or the "Company") moves for entry of a Protective Order to prevent The Office of the Ohio Consumers Counsel ("OCC") from publicly disclosing certain confidential, proprietary, and competitively sensitive trade secret information (the "Confidential Information") in the Confidential Version of the Direct Testimony of Matthew I. Kahal, which cites and quotes information from the Confidential Version of the Direct Testimony of R. Jeffrey Malinak.¹ The Confidential Information at issue is redacted in the publicly-available versions of Mr. Kahal's Direct Testimony, which OCC filed under seal pursuant to its October 22, 2020 Motion for Protective Order, and Mr. Malinak's Direct Testimony, which DP&L filed under seal pursuant to its April 1, 2020 Motion for Protective Order Relating to the Direct Testimony of Gustavo Garavaglia M. and R. Jeffrey Malinak. On October 23, 2020, OCC notified DP&L of its intent to publicly disclose the Confidential Information unless DP&L obtains a Protective Order from the Commission.

¹ DP&L provided the Confidential Version of Mr. Malinak's Direct Testimony to OCC pursuant to the April 28, 2020 Protective Agreement between DP&L and OCC.

The Confidential Information reveals sensitive financial information of DP&L, including the Company's projected revenues, earnings and profitability over the next three years, and its projected cost of environmental remediation at a facility owned by DP&L.² DP&L subjects the Confidential Information to reasonable efforts to maintain its secrecy, and the Confidential Information derives independent economic value from not being generally known to others persons who could obtain economic value from its disclosure or use. Nyhuis Aff., ¶ 9-10. The Confidential Information, thus, constitutes trade secrets under R.C. 1333.61(D), and should be protected from public disclosure under Ohio Adm.Code 4901-1-24(D). *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *6 (Dec. 7, 2011 Finding and Order) (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000)).

Moreover, the Commission should preclude OCC from disputing the protected nature of the Confidential Information. DP&L filed Mr. Malinak's testimony on April 1, 2020, subject to a motion for protective order. OCC did not oppose that motion, and never contested its confidential treatment until October 23, 2020, nearly seven months later. Under such circumstances, OCC has waived any challenge to its confidentiality.

² Redacted passages of Mr. Kahal's Direct Testimony containing the Confidential Information are attached as Exhibit A to the November 19, 2020 Affidavit of Karin Nyhuis ("Nyhuis Aff.") (attached to Motion as Exhibit 1).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE MOTION OF
THE DAYTON POWER AND LIGHT COMPANY FOR ENTRY OF A
PROTECTIVE ORDER RELATING TO CONFIDENTIAL INFORMATION
CITED IN THE DIRECT TESTIMONY OF MATTHEW I. KAHAL**

I. INTRODUCTION AND SUMMARY

Pursuant to Ohio Adm.Code 4901-1-24(D), DP&L moves for entry of a Protective Order to prevent OCC from publicly disclosing certain confidential, proprietary, and competitively sensitive trade secret information contained in the Direct Testimony of Matthew I. Kahal, which information was copied from the Confidential Version of the Direct Testimony of R. Jeffrey Malinak. The Confidential Information is redacted in publicly-available versions of their testimony, which were filed pursuant to DP&L's April 1, 2020 Motion for Protective Order Relating to the Direct Testimony of Gustavo Garavaglia M. and R. Jeffrey Malinak and OCC's October 22, 2020 Motion for Protective Order.

The Commission should order OCC to maintain the confidentiality of the Confidential Information because it constitutes trade secrets under Ohio law. R.C. 1333.61(D); *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *6 (Dec. 7, 2011 Finding and Order) (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000)). Moreover, the Commission should find that OCC has waived any challenge to the confidentiality of that information after failing to oppose DP&L's April 1, 2020 motion for protective order, and waiting nearly seven months to raise the issue.

II. THE CONFIDENTIAL INFORMATION CONSTITUTES PROTECTED
TRADE SECRETS UNDER OHIO LAW

The Confidential Information at issue reflects sensitive financial information of DP&L, including projections of the Company's potential revenues, earnings and profitability over the next three years, and the projected cost of environmental remediation at a facility owned by DP&L. Nyhuis Aff., ¶ 3. Specifically, OCC seeks to disclose: (1) DP&L's projected return on equity over the next three years, (2) DP&L's projected earnings over the next three years and information that could be used with publicly-available information to derive that amount, (3) certain projections of revenues, and (44) the projected cost of environmental remediation at a facility owned by DP&L. *Id.* All are protected trade secrets under Ohio law. R.C. 1333.61(D).

Section 4901-1-24(D) of the Ohio Administrative Code provides that the Commission may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information, "including where the information is deemed . . . to constitute a trade secret under Ohio law," and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. *Accord:* R.C. 4905.07 (providing that "[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public").

The Commission has a duty to protect trade secrets. *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *6 (Dec. 7, 2011 Finding and Order) ("Section 149.43, Revised Code, specifies that the term 'public records' excludes information which, under

state or federal law, may not be released. The Ohio Supreme Court has clarified that the 'state or federal law' exemption is intended to cover trade secrets.") (citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000)). The definition of a "trade secret" includes "any business information or plans [and] financial information" that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means" and is the subject of reasonable efforts to maintain its secrecy. R.C. 1333.61(D).

"A company's determination of its costs, overhead and volume of sales, and particularly its calculation of profit margins on customers' purchases may be the kind of information that the trade secret statute seeks to protect." *Kenker Box Co. v. Riemeier Lumber Co.*, 1st Dist. Hamilton Nos. C-990803 and C-990824, 2000 Ohio App. LEXIS 6198, at *10 (Dec. 29, 2000). *Accord: Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App. 3d 673, 683, 731 N.E.2d 1209 (8th Dist.1999) (holding that trial court should have ordered plaintiff to produce its "profitability information" to defendant subject to a protective order); *Vanguard Transp. Sys. v. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App. 3d 786, 789-90, 673 N.E.2d 182 (10th Dist.1996) (affirming trial court order that held that various information including "corporate financial information" constituted a trade secret).

This definition reflects state policy favoring the protection of trade secrets such as the Confidential Information. The Commission has issued protective orders in numerous prior proceedings to prevent the public disclosure of trade secrets, including forecasted financial information. *E.g., In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Pub. Util. Comm. No. 17-32-EL-AIR, *et al.*, 2018 Ohio PUC LEXIS 1268 (Dec. 19, 2018 Opinion and Order), ¶ 161-163 ("we note that the Commission has

previously granted protective treatment for portions of briefs filed under seal and testimony containing sensitive data, including information that appears to matters relating to competitive business information"); *In the Matter of the Application of Midwest Utility Consultants, Inc. for Certification as a Competitive Retail Natural Gas Aggregator/Broker*, Pub. Util. Comm. No. 09-893-GA-AGG, 2012 Ohio PUC LEXIS 103 (Jan. 30, 2012 Entry) (forecasted financial statements were trade secrets and granted protective treatment); *In the Matter of the Application of the Ohio Power Co. and Columbus S. Power Co. for Authority to Merge and Related Approvals, et al.*, Pub. Util. Comm. No. 10-2376-EL-UNC, *et al.*, 2011 Ohio PUC LEXIS 1325, at *22-23 (Dec. 14, 2011 Opinion and Order) (forecasted fuel expenditures were trade secrets and granted protective treatment); *In the Matter of the Joint Application of The Dayton Power and Light Company for Integration of an Energy Efficiency or Peak-Demand Reduction Program with Honda of Am. Mfg., Inc.*, Pub. Util. Comm. No. 10-2205-EL-EEC, 2011 Ohio PUC LEXIS 1313, at *2-5 (Dec. 7, 2011 Finding and Order) (release of trade secrets prohibited by state law). *Accord: Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 8.

Here, the Confidential Information constitutes "business information or plans, [and] financial information" that is confidential, proprietary and competitively sensitive trade secret information, and derives independent economic value from not being publicly available. R.C. 1333.61(D). DP&L maintains the Confidential Information subject to reasonable efforts to keep its secrecy, and the Confidential Information derives independent economic value from not being generally known to others persons who could obtain economic value from its disclosure or use. *Nyhuis Aff.*, ¶ 9-10.

DP&L could be harmed if its projected revenues, return on equity and earnings were publicly disclosed for three reasons. First, DP&L must retain the ability to attract capital on favorable terms in order to provide cost-effective service to its customers. *Id.* at ¶ 5. The projected revenues, return and earnings information contained in the un-redacted version of Mr. Kahal's Direct Testimony are not known to DP&L's bond holders, and DP&L anticipates issuing new debt to accomplish its Smart Grid investments as provided for in Pub. Util. Comm. No. 18-1875-EL-GRD, *et al.* *Id.* If the return and earnings information were publicly disclosed, it could interfere with DP&L's negotiations with prospective bond purchasers and, thus, could adversely affect DP&L's cost of debt. *Id.*

Second, DP&L is regulated by the U.S. Securities and Exchange Commission ("SEC"). If certain financial and other material information of DP&L is released that is not usually publicly disclosed by DP&L, like the information at issue here, it could require DP&L to broadly disseminate that information (usually by filing Form 8-Ks). *Id.* at ¶ 6. Public release of DP&L's projected revenues, return and earnings information could trigger DP&L's obligation to file a Form 8-K containing not only that information, but also additional projected financial information to the extent needed to make sure that any disclosed information is not materially misleading or incomplete. *Id.* Financial projections of revenues, returns, and earnings are not typically provided by DP&L in the Company's SEC filings. *Id.* The disclosure of such information in the Form 8-K could expose DP&L (DPL Inc. and AES) to increased litigation risk by investors and debt holders who rely on such information if those projections materially differ from actual results. *Id.*

Third, DP&L is a significant subsidiary of The AES Corporation ("AES"), which is also regulated by the SEC. *Id.* at ¶ 7. If DP&L's projected revenues, return and earnings

information were publicly disclosed, such disclosure could potentially affect AES's share price. *Id.*

Moreover, DP&L is presently negotiating with third parties regarding environmental remediation at a facility owned by DP&L. *Id.* at ¶ 8. Public disclosure of DP&L's anticipated cost of that remediation during those negotiations would be detrimental to DP&L's ability to negotiate the best price. *Id.*

Thus, there is independent value in not disclosing the information, which DP&L takes reasonable steps to avoid. *Id.* at ¶ 9-10. The Commission should protect it, as well. Ohio Adm.Code 4901-1-24(D).

III. OCC HAS WAIVED THE RIGHT TO CHALLENGE THE
CONFIDENTIALITY OF THE INFORMATION AT ISSUE

The Commission should issue a Protective Order protecting the Confidential Information from public disclosure for the separate and independent reason that OCC has waived the right to challenge its confidentiality. The Confidential Information was filed in this proceeding on April 1, 2020 as part of Mr. Malina's Direct Testimony. It was kept under seal by the Commission pursuant to DP&L's contemporaneous Motion for Protective Order Relating to the Direct Testimony of Gustavo Garavaglia M. and R. Jeffrey Malinak. OCC did not oppose that motion and later received the Confidential Information after entering into a Protective Agreement with DP&L on April 28, 2020. OCC then waited nearly seven months, *i.e.*, until October 23, 2020 to challenge the confidentiality of that information. Any challenge to the confidentiality of the Confidential Information was thus waived.

IV. CONCLUSION

For these foregoing reasons, DP&L requests that the Commission issue a Protective Order that affirms its protection of the Confidential Information from public disclosure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company for Entry of a Protective Order Relating to Confidential Information Cited in the Direct Testimony of Matthew I. Kahal, has been served via electronic mail upon the following counsel of record, this 19th day of November, 2020.

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EXHIBIT 1

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of : Case No. 20-0680-EL-UNC
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).

AFFIDAVIT OF KARIN NYHUIS

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

I, Karin Nyhuis, being first duly sworn and cautioned, state that I have personal knowledge of, and am competent to testify to, all of the following facts:

1. I am employed by AES U.S. Services, LLC and serve as Controller of the US Strategic Business Unit of The AES Corporation, which includes The Dayton Power and Light Company ("DP&L"). I am responsible for overseeing all accounting functions, all accounting departments, and the day-to-day financial accounting operations of DP&L.

2. I have reviewed the redacted excerpts of the Direct Testimony of Matthew I. Kahal ("Kahal Testimony") filed in the above-referenced proceeding by The Office of the Ohio Consumers' Counsel ("OCC") on October 22, 2020 that are attached to my affidavit as Exhibit A. I have also reviewed the un-redacted versions of those excerpts.

3. The information that is redacted in the Kahal Testimony constitutes confidential, proprietary, and competitively-secret financial information of DP&L, including its projected revenues, return on equity and earnings over the next three years; information that

could be compared against publicly-available information to ascertain DP&L's projected revenues, return on equity and earnings over the next three years; and the projected cost of environmental remediation at a facility owned by DP&L (collectively, the "Confidential Information").

4. DP&L could be harmed if its projected revenues, return on equity and earnings were publicly disclosed, for the following reasons:

5. First, DP&L must retain the ability to attract capital on favorable terms in order to provide cost-effective service to its customers. The projected revenues, return and earnings information contained in the un-redacted version of the Kahal Testimony are not known to DP&L's bond holders, and DP&L anticipates issuing new debt to accomplish its Smart Grid investments as provided for in Pub. Util. Comm. No. 18-1875-EL-GRD, *et al.* If the return and earnings information were publicly disclosed, it could interfere with DP&L's negotiations with prospective bond purchasers and, thus, could adversely affect DP&L's cost of debt.

6. Second, DP&L is regulated by the U.S. Securities and Exchange Commission ("SEC"). If certain financial and other material information of DP&L is released that is not usually publicly disclosed by DP&L, like the information at issue here, it could require DP&L to broadly disseminate that information (usually by filing Form 8-Ks). Public release of DP&L's projected revenues, return and earnings information could trigger DP&L's obligation to file a Form 8-K containing not only that information, but also additional financial information to the extent needed to make sure that any disclosed information is not materially misleading or incomplete. Financial projections of revenues, returns, and earnings are not typically provided by DP&L in the Company's SEC filings. The disclosure of such information in the Form 8-K

could expose DP&L (DPL Inc. and AES) to increased litigation risk by investors and debt holders who rely on such information if those projections materially differ from actual results.

7. Third, DP&L is a significant subsidiary of The AES Corporation ("AES"), which is also regulated by the SEC. If DP&L's projected revenues, return and earnings information were publicly disclosed, such disclosure could potentially affect AES's share price.

8. In addition, DP&L is presently negotiating with third parties regarding environmental remediation at a facility owned by DP&L. Public disclosure of DP&L's anticipated cost of that remediation during those negotiations would be detrimental to DP&L's ability to negotiate the best price.

9. Thus, confidentiality of the Confidential Information has independent economic value from not being generally known to and not being ascertainable by others, like the lenders and third-party environmental remediation contractors mentioned above, who could obtain economic value from disclosure or use of the Confidential Information.

10. DP&L makes reasonable efforts to keep the Confidential Information secret. The Confidential Information is not generally known within DP&L or AES affiliates providing services to DP&L, and is disseminated within those organizations only if there is a legitimate business need. The Confidential Information is not generally known outside of DP&L, and has been provided externally only pursuant to protective agreements, non-disclosure agreements, and legally-protected privilege. The Confidential Information would be nearly impossible to acquire or duplicate without access to the Confidential Information.

FURTHER AFFIANT SAYTH NAUGHT

DATED: November 19th, 2020

Karin M. Nyhuis
Signed on 2020/11/19 11:46:12 -8:00

BY: Karin Nyhuis

Sworn to before me and subscribed in my presence by Karin Nyhuis this 19th day of November, 2020.



Shanna Bowman
Signed on 2020/11/19 11:46:12 -8:00

Notary Public

EXHIBIT A

**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) Case No. 20-680-EL-UNC
Plan Passes the Significantly Excessive)
Earnings Test and More Favorable in the)
Aggregate Test in R.C. 4928.143(E).)

(PUBLIC VERSION)

**DIRECT TESTIMONY
OF
MATTHEW I. KAHAL**

**On Behalf of the
The Office of the Ohio Consumers' Counsel**
*65 East State Street, 7th Floor
Columbus, Ohio 43215*

OCTOBER 22, 2020

PUBLIC VERSION
Direct Testimony of Matthew I. Kahal
On Behalf of the Office of the Ohio Consumers' Counsel
PUCO Case No. 20-680-EL-UNC

1 DP&L utility customer (assuming 526,000 retail customers identified in Mr. Malinak's
2 testimony) along with the ongoing interest expense on that debt.

3
4 **Q9. WHAT FINDINGS DID DP&L REACH CONCERNING THE ESP VERSUS MRO**
5 **TEST AND THE PROSPECTIVE SEET THAT ARE SUPPOSED TO BE**
6 **CONSUMER PROTECTIONS?**

7 **A9.** The Utility presents its analysis under the statutory tests for the proposed ESP
8 continuation in the April 1, 2020 testimony of witness R. Jeffery Malinak. He presents
9 highly detailed, and in my opinion, rather opaque financial projections for DP&L and
10 DPL, Inc. for the time period 2020-2023 under several ESP and MRO scenarios. For the
11 ESP scenarios, this is shown with and without the \$79 million per year RSC. In addition,
12 he calculates a range of hypothetical Financial Integrity Charges ("FIC") that he claims
13 would be imposed on consumers by the PUCO in conjunction with the MRO alternative.
14 Specifically, he identifies two potential FICs that he would recommend be imposed on
15 consumers, both of which are far larger and vastly more expensive than the RSC, [REDACTED]
16 million per year and [REDACTED] million per year. Mr. Malinak finds that under the ESP (with
17 the RSC) the credit quality outcomes for DP&L and DPL, Inc. are generally acceptable,
18 and that DP&L's average earned ROE is within a reasonable range and would not be
19 considered to be significantly excessive.

20
21 As a result of his modeling exercise, he finds that the ESP I continuation through 2023
22 (with the RSC) produces lower customer rates than the MRO alternative. This is the

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Direct Testimony of Matthew I. Kahal
On Behalf of the Office of the Ohio Consumers' Counsel
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1 simple result of his assuming that under the MRO alternative, consumers would be
2 burdened by an FIC that is hundreds of millions of dollars more expensive than the RSC.
3 Further, although of much less importance, he asserts that there are several qualitative or
4 non-quantifiable benefits to the ESP I continuation relative to the MRO. Hence, he finds
5 that the ESP I continuation (with the RSC) passes the MFA test, and it would also
6 adequately address the financial integrity/credit quality concerns.

7
8 Mr. Malinak approaches the SEET issue by first arguing that the ROE threshold under
9 the SEET should be increased from the 12.0 percent authorized in ESP III to 16.6
10 percent. His financial modeling for ESP I (with the RSC) produces an average ROE for
11 DP&L much lower than that, about [REDACTED] percent. Thus, he argues that the proposed ESP I
12 would easily pass the prospective SEET.

13
14 ***Q10. DO YOU AGREE WITH MR. MALINAK'S MFA TEST AND PROSPECTIVE SEET***
15 ***RESULTS?***

16 ***A10.*** No, I do not. The essence of Mr. Malinak's MFA analysis is that the PUCO would
17 burden consumers under the MRO with a FIC vastly more expensive than the RSC that
18 DP&L itself deems to be satisfactory.³ This simply makes no sense. Moreover, since
19 making consumers pay the RSC is a highly improper departure from accepted ratemaking

³ In his MFA analysis Mr. Malinak correctly recognizes that the Utility's Standard Service Offer ("SSO") cost for customers not taking competitive generation service would be identical under both the ESP and MFA. This is because in both cases the SSO price would be determined by an identical auction process. (Malinak testimony, at 79).

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Direct Testimony of Matthew I. Kahal
On Behalf of the Office of the Ohio Consumers' Counsel
PUCO Case No. 20-680-EL-UNC

1 (10) Mr. Malinak has presented no persuasive reason why it is appropriate to
2 increase the SEET ROE threshold from 12 percent to 16.6 percent – a massive
3 increase that would make it more difficult for consumers to receive a refund in
4 a future SEET case. His proposal certainly cannot be justified by any market
5 data or change in DP&L's circumstances. The previously approved value of
6 12 percent should be retained.

7 (11) Mr. Malinak's use of projections for a simulation of the ESP I with the
8 RSC produces a 2020 to 2023 ROE of [REDACTED] for DP&L, which is to
9 suggest that DP&L would not be making enough profit compared to both the
10 12 percent and 16.6 percent thresholds. However, the RSC's revenue
11 contribution by itself (unrelated to any cost or investment) would provide a
12 ROE of at least 8 percent, before considering any contribution to earnings
13 from FERC transmission or PUCO regulated distribution service that will
14 increase the ROE. For this reason, along with recent past experience, it is
15 doubtful that ESP I would result in earnings below the 12 percent threshold.

16 (12) AES Corporation, if it chooses, can successfully address the DPL, Inc.
17 debt problem. It could do so by committing to pay all DPL, Inc. interest
18 expense on the non-utility debt (roughly \$36 million per year), effectively
19 guaranteeing that debt. A more comprehensive and cleaner solution would be
20 for AES to directly redeem and refinance all \$800 million of that debt. As a
21 practical matter, this has the effect of moving it from the DPL, Inc. balance
22 sheet to the AES Corporation balance sheet with no significant change in the

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1 order to present a range, but he does not express a preference between the two. The lower
2 value is [REDACTED] million per year ([REDACTED] million over four years, and the higher FIC value is
3 \$[REDACTED] million (\$[REDACTED] million over four years).

4
5 Mr. Malinak proceeds to identify other potential factors that could affect rates and
6 therefore should, in his opinion, be addressed as part of the Aggregate Price Test. These
7 other factors considered include a one-time [REDACTED] million environmental compliance cost
8 for [REDACTED] that would be collected under the ESP but apparently not the
9 MRO, the ESP's Infrastructure Investment Rider (for Smart Grid costs) and the
10 generation costs charged to SSO customers. He directly incorporates the environmental
11 charge into the Aggregate Price Test, favoring the MRO by the amount of that charge. He
12 argues that the cost of the Infrastructure Investment Rider does not affect the test because
13 an identical amount of those costs, while considerable, would be recovered in the MRO
14 alternative through a distribution base rate (or some other rate mechanism). Thus, he
15 testifies it has no effect on the Aggregate Price Test. He reaches a similar conclusion for
16 the generation supply rates for SSO customers. He correctly recognizes that under both
17 the ESP and MRO alternative generation supply would be acquired through a CBP in
18 compliance with PUCO rules, and there would be no difference in the supply cost
19 result.¹⁸ Armed with these assumptions, his Aggregate Price Test results are straight
20 forward. According to his analysis, the ESP I continuation provides substantial savings

¹⁸ Malinak testimony, at 79-80.

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1 relative to the two MRO alternatives over four years ranging from \$ [REDACTED] million to [REDACTED]
2 million.¹⁹

3
4 Note that these two amounts net out from the MRO cases the cost of the environmental
5 charge mentioned above that would exist under the RSP but would not be imposed under
6 the MRO. These results are transparently simple: ESP I prevails under this test because
7 the \$79 million per year RSC is substantially less than the FIC high and low values **that**
8 **he questionably assumes the PUCO would impose under an MRO.** His test results are
9 driven entirely by this one assumption.

10
11 Mr. Malinak also considers the possibility that the PUCO would approve a FIC to
12 accompany the MRO but not the range he developed – in fact it could approve an FIC
13 less than the \$79 million per year RSC. In such a case, the ESP I would not pass the
14 Aggregate Price Test. He responds to that possibility by asserting that if the PUCO were
15 to approve a FIC less than the RSC value, then relative to the ESP I case, DP&L's level
16 of reliability would suffer: "DP&L would be forced to make cuts to its O&M and capital
17 expenditures, which would negatively impact DP&L's ability to provide safe and reliable
18 service."²⁰

¹⁹ *Id.* at 80.

²⁰ *Id.* at 83.

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1 must be grossed up for income taxes. This explains why the lower bound FIC is so much
2 higher in dollar terms than the \$314 million RSC.

3 The upper bound FIC is massively higher than either the lower bound figure (just
4 described) or the RSC, and its calculation is also more complex. This higher FIC is
5 calculated as the dollar amount that would cover most of the construction budget during
6 the 2020-2023 time period plus the DPL, Inc. interest expense (apparently all of it),
7 minus the cash flow that DP&L could expect to experience absent any RSC or FIC.

8
9 ***Q28. WHY DO YOU FIND MR. MALINAK'S FIC RANGE VALUES TO BE***
10 ***UNREASONABLE?***

11 ***A28.*** Keep in mind these calculated values are his assumptions of the FIC amounts that the
12 PUCO would award under an MRO (if the FIC charge is even lawful under an MRO).²⁴
13 To begin with the dollar amounts would produce for DP&L absurdly high ROEs at
14 consumer expense. The lower bound FIC of \$[REDACTED] million per year, given the most current
15 equity balance for June 2020 mentioned earlier of \$640 million translates into a ROE of
16 [REDACTED] percent. This is just for the FIC by itself and assumes that DP&L does not generate a
17 single dollar of earnings from the rest of its distribution and transmission operations. If
18 those operations produced a 10 percent ROE, then the resulting DP&L ROE (FIC plus
19 normal operations) would be over [REDACTED] percent. The ROE for the high-end FIC is even
20 more extreme. The \$[REDACTED] million per year FIC with the \$640 million most recent actual

²⁴ In my discussion of this topic I am taking no position on whether an FIC amount added to or included in the MRO is even lawful. My testimony should not be interpreted as supporting any dollar amount of or even the concept of an FIC to accompany an MRO.

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1 equity balance is a [REDACTED] percent ROE. Again, if normal T&D operations provides a 10
2 percent ROE, then the DP&L total ROE would be nearly [REDACTED] percent.²⁵ These results are
3 simply not credible, and it is unreasonable to assume that the PUCO would approve
4 something like this at consumer expense (or to assume what would be the outcome of the
5 issue of the legality of such a charge).

6
7 A second set of reasons is that the RSC departs drastically from accepted regulatory
8 principles that I believe this Commission would follow. For example, the only reason
9 why the lower bound FIC exceeds the RSC (and it does so substantially) is because Mr.
10 Malinak assumes the FIC must provide revenues, at consumer expense, to “make up” for
11 the fact that AES refuses to provide DP&L with a financially beneficial and presumably
12 needed equity infusion. The PUCO would have to be convinced by DP&L in an MRO
13 filing that AES Corporation’s financial decisions dictate to the PUCO the magnitude of
14 the rate increase for an FIC that DP&L is entitled to receive from consumers. I cannot
15 imagine any Commission standing for that kind of parental intransigence and then
16 rewarding that intransigence with a rate increase to cover the parent’s financial obligation
17 at consumer expense. In any event, the PUCO should not be dictated to or controlled by
18 the actions or inactions of AES or DPL, Inc. The PUCO should protect consumers.

19
20 Moreover, AES Corporation’s denial of the equity infusion under the MRO scenarios
21 (part of the basis for the FIC) does not even make any logical sense. Mr. Malinak states

²⁵ Note that all of my after-tax earnings calculations assume an effective federal/state income tax factor of 1.2755.

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1 Finally, Mr. Malinak makes the interesting observation that the FIC would be charged
2 just to SSO customers and would result in an unsustainable “death spiral” as SSO
3 customers flee from the SSO cost, burdened with the FIC, that exceeds market. This is
4 another reason why his FIC values are totally unrealistic, and I cannot imagine them even
5 being proposed. Mr. Malinak’s Exhibit RJM-44A (the ESP income statement without the
6 RSC) identifies first year SSO revenues absent a FIC or RSC as being [REDACTED] million. This
7 means that the lower bound FIC of [REDACTED] million increases the bypassable SSO cost to
8 customers by about [REDACTED] percent, and the upper end [REDACTED] million charge increases it by
9 about [REDACTED] percent. Again, these charges would be completely unrealistic, and I cannot
10 imagine a rational utility proposing such a thing let alone the PUCO approving such
11 charges.

12
13 ***Q29. DO YOU HAVE ANY REASON TO QUESTION MR. MALINKA’S RELIANCE ON A***
14 ***\$79 MILLION-PER-YEAR RSC VALUE?***

15 ***A29.*** Yes. Mr. Malinak’s ESP scenario with the \$79 million per year RSC is really his “base
16 case” against which all other relevant scenarios are compared for purposes of both
17 assessing financial adequacy and conducting the statutory Aggregate Price Test.
18 Therefore, it is worth closely examining those results and how he arrived at them. In
19 addition to his various exhibits showing cash flows, credit metric ratios and the like, he
20 provides a much simpler exhibit that simply shows the ROEs that DP&L can expect to
21 earn under the extension of the RSC. This is his Exhibit RJM-29. This shows the ROEs
22 changing somewhat from year to year but averaging a relatively reasonable [REDACTED] percent

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1 over four years. While this may seem reasonable and reassuring on its surface, it is a very
2 troubling result. The RSC by itself provides about \$62 million of earnings (i.e., \$79
3 million/ 1.2755 tax factor = \$62 million). The \$62 million divided by the latest 2020
4 equity balance of \$640 million translates into a ROE of 9.7 percent. In other words, Mr.
5 Malinak's modeling of the base case ESP I finds that the RSC provides [REDACTED]
6 of DP&L's earnings, on average, over 2020- 2023. Of course, DP&L's equity balance is
7 likely to grow over the next three years. If one assumes that the average 2020-2023
8 equity balance averages, say, a healthy \$750 million, then the RSC would provide an
9 average ROE of 8.3 percent (i.e., \$62 million/ \$750 million = 8.3%).

10
11 When considering this result, I note that DP&L should also be receiving earnings from
12 DP&L's FERC transmission under which DP&L enjoys formula rates that will be
13 updated annually for cost of service. Based on FERC Form 1 data for 2019, I find that
14 transmission is roughly 15 percent of DP&L.²⁶ Thus, FERC transmission, if it earns a 10
15 percent ROE, this would contribute 1.5 percent to DP&L's total ROE. This means that
16 with a \$750 million average equity balance, the sum of the RSC contribution and
17 transmission would be 8.3% + 1.5% = 9.8%. Again, this exercise shows that Mr.
18 Malinak's modeling of ESP I with the RSC seems to assume that distribution service
19 (even after including the earnings contribution effects of the Infrastructure Investment
20 Rider) would imply an earnings contribution from distribution service [REDACTED]. All

²⁶ This is based on year-end 2019 net distribution plant of \$976 million (\$1,882 million gross - \$906 million depreciation) and net transmission plant of \$185 million (\$417million gross - \$232 million depreciation), implying transmission is about 16% of T+D net plant. Source: DP&L FERC Form 1, at pp 205-219.

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1 of this implies that in order to accept Mr. Malinak's modeling analysis as having validity,
2 one must accept the embedded assumption and result that PUCO regulated distribution
3 service's contribution to DP&L's earnings over this four-year period is extremely weak.
4

5 ***Q30. WHAT EXPLAINS THIS MODELING RESULT?***

6 ***A30.*** At the outset, as far as I can tell, this result of a [REDACTED] contribution to earnings for
7 distribution is not just for the RSC base case, but affects all of the scenarios used in the
8 Aggregate Price Test. The problem seems to arise from the study assumption that there
9 will be no distribution base rate case during 2020 – 2023. At page 26 of his direct
10 testimony when discussing the modeling input assumptions or projections he provided to
11 Mr. Malinak, Mr. Garavaglia states that during this study time period "DP&L does not
12 project to have a distribution rate case during 2020 – 2023."²⁷ The assumption of no
13 distribution rate case during the entire study period could explain the extremely poor
14 distribution earnings performance under all scenarios, but it might even be more distorted
15 under the MRO scenarios. At least under the base case ESP I scenario, Mr. Malinak and
16 Mr. Garavaglia assume that the Infrastructure Investment Rider will be providing
17 substantial revenues and earnings for the Utility. But that rider is absent under the MRO.
18 Mr. Malinak says that this is no problem because an identical amount of revenue would
19 be obtained through base rate cases, but his analysis seems to assume no base rate cases.

²⁷ Garavaglia Testimony at 26.

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1 ***Q31. WHAT DO YOU CONCLUDE FROM THIS?***

2 ***A31.*** Mr. Malinak asserts that the existing RSC provides DP&L with the financial integrity it
3 needs to maintain or improve its credit ratings and carry out its ambitious capital
4 spending plan, as proposed. However, his analysis is far too pessimistic because it finds
5 essentially [REDACTED] from distribution service, a perverse result driven by
6 the assumption that no base rate case would take place regardless of the Utility's
7 distribution earnings. As a result, he cannot show that the \$79 million RSC is needed,
8 either in part or in full. Rather, the solution to the currently asserted credit quality
9 weakness for DP&L over the next several years is not the RSC but obtaining additional
10 revenues from a conventional rate case, plus AES meeting its obligations to support DPL,
11 Inc. and DP&L as is its responsibility. Utility customers must not be required to pay in
12 rates, either through an RSC or FIC, for the DPL, Inc. interest expense as that debt is not
13 part of utility service.

14
15 Mr. Malinak's Aggregate Price Test result depends upon the acceptance of his
16 assumption that the PUCO would impose on SSO customers a FIC charge vastly greater
17 than the \$79 million RSC. For the reasons discussed above, I very much doubt the PUCO
18 would do that (and it should not do that). It would violate regulatory principles and would
19 not be feasible. It should be noted that the total of the DPL, Inc. interest expense (the real
20 issue in this case) is about \$36 million per year for long-term debt, as I show in Section

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1 PUCO's merger order. However, in this case, the Utility seeks to shift the commitments
2 and responsibilities articulated in the merger case to DP&L customers.

3
4 ***Q33. CAN THE CONCERNS OVER FINANCIAL INTEGRITY AND CREDIT QUALITY***
5 ***RAISED IN THE UTILITY'S FILING BE ADDRESSED WITHOUT THE RSC OR***
6 ***FIC?***

7 ***A33.*** Yes, they can. DP&L on a stand-alone basis can operate successfully. It does not need an
8 ESP or an RSC, nor absent an ESP—under an MRO—would it need a FIC. The [REDACTED]
9 [REDACTED] earnings shown by Mr. Malinak absent the RSC are merely the result of
10 assuming away the possibility of additional, cost of service revenues through a standard
11 base rate case. If the Company were to pursue that, which it can do any time, there is no
12 reason to believe its financial integrity and credit quality would not be maintained.

13
14 Of course, I recognize that DP&L is not standalone, but is presently encumbered by DPL,
15 Inc. and its more than \$800 million of long-term debt not supported by any assets and its
16 \$36 million per year plus of interest expense. These are the responsibility of AES
17 Corporation which clearly has the wherewithal to fully address the DPL, Inc. drag on the
18 Utility. It can do so by committing to pay the DPL, Inc. interest expense (rather than
19 improperly charging ratepayers for that cost). A more long-term solution would be to
20 move some or all of that long-term debt off the balance sheet of DPL, Inc. and onto its
21 own balance sheet by redemption and refinancing.

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1 significantly in excess of the return on common equity that is likely to be earned by
2 publicly traded companies, including utilities, that face comparable business and financial
3 risk....” In other words, DP&L must show that the ESP I continuation is not likely to
4 breach the SEET ROE threshold. Mr. Malinak’s analysis of the SEET test focuses on two
5 elements. First, he recommends that the PUCO adopt a ROE threshold for DP&L’s SEET
6 of 16.6 percent, and his testimony explains the basis for that threshold. Second, he
7 references his financial projections for the ESP/RSC scenario discussed earlier for 2020 –
8 2023. Those projections indicate a ROE that averages ■ percent, although there are
9 some year-to-year fluctuations. Since this ROE (as well as individual year figures) are
10 well below the 16.6 percent – or even using a much lower threshold value – he concludes
11 that ESP I is very unlikely to exceed the threshold and that it therefore passes the SEET
12 standard.

13
14 ***Q37. TURNING TO THIS FIRST ELEMENT OF HIS TEST, HOW DID HE***
15 ***DETERMINE THAT THE PROPER THRESHOLD SHOULD BE 16.6 PERCENT?***

16 ***A37.*** Mr. Malinak begins by gathering peer group data on publicly-traded electric utility
17 companies using data from the *Value Line Investment Survey* and a broad proxy group of
18 companies included in the exchange traded fund (ETF) referred to as XLU. He examines
19 actual earned ROEs for the time period 2016 – 2019 and ROE projections extending out
20 five years. He states that this information supports a benchmark of 10.4 percent.³⁰ He
21 multiplies this benchmark by 1.5 to provide a premium and then adds another 100 basis

³⁰ Exhibit RJM-21.

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1 There is no merit to increasing the ROE threshold due to the risk associated with DP&L's
2 operations or ESP I. Despite the concerns raised by Utility witnesses, DP&L remains a
3 very low risk delivery service utility. Mr. Garavaglia recommends adding a substantial
4 premium for DP&L due to the fact that DP&L no longer can use various cost recovery
5 riders associated with ESP III and due to its lower than average credit ratings.³² These
6 alleged disadvantages are the Utility's own doing. It voluntarily walked away from the
7 riders granted in ESP III, and its credit rating issues are the result of the business
8 decisions of its ultimate parent, AES Corporation, which chose to finance the merger and
9 coal plant investments with massive amounts of debt. These are not valid reasons for
10 adding a large premium to the SEET ROE threshold, which ultimately could be a
11 consumer burden.

12
13 ***Q39. WHETHER THE ROE THRESHOLD IS 16.6 PERCENT AS MR. MALINAK***
14 ***RECOMMENDS OR 12.0 PERCENT AS YOU RECOMMEND, DOES THE ESP I***
15 ***CONTINUATION PASS THE SEET TEST?***

16 ***A39.*** I do not believe that the Utility has met its burden of proof demonstrating that it has done
17 so. Mr. Malinak's position is that ESP I, with the RSC, will produce earnings that are
18 roughly in the range of about [REDACTED] percent, a figure well within either the 12.0 percent or
19 the 16.6 percent threshold. Thus, he finds that ESP I comfortably passes the SEET test
20 required by the PUCO.³³

³² Garavaglia Testimony at 5-7.

³³ Malinak testimony, at 88.

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1 In order for that to be correct, however, his financial projections for ESP I (with the RSC)
2 must be reasonable. They are not. As I noted in some detail in Section IV of my
3 testimony, his ESP/RSC scenario embeds an unwarranted assumption that O&M
4 expenses will escalate sharply over the next several years and DP&L will embark on an
5 ambitious capital spending program. Despite these major cost of service increases, over
6 this entire time period the Utility will not file a rate case – even though there is no “stay
7 out” requirement or commitment, meaning DP&L can file a base rate case any time it
8 wants. The result of this no rate case assumption is that in his projections distribution
9 service provides [REDACTED] earnings. If one relaxes that
10 puzzling assumption and allows for some reasonable level of earnings – even if it is
11 somewhat less than the currently-authorized 10.0 percent – then the modeled ROE for the
12 ESP scenario would increase dramatically. Earlier I showed that the RSC by itself would
13 provide a ROE contribution of about 8.3 percent (assuming a \$750 million equity balance
14 on average), and FERC transmission could be expected to contribute about 1.5 percent.
15 Thus, the expected ROE at zero distribution earnings is about 9.8 percent. If distribution
16 could provide a contribution to total company earnings of say 4 percent, then the total
17 ROE would be in the 13 to 14 percent range, well above a reasonable SEET threshold of
18 12.0 percent. If distribution provided a ROE contribution of 8 percent, then the total ROE
19 would approach 17 percent, slightly above even Mr. Malinak’s highly inflated threshold
20 of 16.6 percent.

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Case No(s). 20-0680-EL-UNC

Summary: Motion MOTION OF THE DAYTON POWER AND LIGHT COMPANY FOR ENTRY OF A PROTECTIVE ORDER RELATING TO CONFIDENTIAL INFORMATION CITED IN THE DIRECT TESTIMONY OF MATTHEW I. KAHAL electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company