BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid.	))))	Case No. 18-1875-EL-GRD
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In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods.	)))	Case No. 18-1877-EL-AAM
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In the Matter of the Application of The Dayton Power and Light Company for a Finding that its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and the More Favorable in the Aggregate Test in R.C. 4928.143(E).	))))))	Case No. 20-680-EL-UNC

MOTION TO STRIKE THE DIRECT TESTIMONY OF GUSTAVO GARAVAGLIA M. AND THE SUPPLEMENTAL DIRECT TESTIMONY OF R. JEFFREY MALINAK
BY
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BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") moves to strike portions of the Direct Testimony of Gustavo Garavaglia M.[1] (the "Garavaglia Testimony") and the Supplemental Direct Testimony of R. Jeffrey Malinak[2] (the "Malinak Testimony"). The portions identified below should be struck because these witnesses' testimony goes far beyond the allowable scope of such testimony under the PUCO's December 4, 2020 Entry[3] and presents proposed evidence that could, with reasonable diligence, have been presented earlier in the proceedings.

The PUCO Entry that allowed for additional testimony was limited. The PUCO found it reasonable to permit parties to submit separate, supplemental testimony "regarding how the SEET test should be conducted in light of the Supreme Court of Ohio's recent decision in *In re Ohio Edison*."[4] That Entry afforded parties an opportunity to file what the PUCO characterized as "narrowly-focused supplemental testimony."[5]

The Entry called for "narrowly-focused" testimony because the referenced *Ohio Edison* ruling by the Supreme Court of Ohio was narrowly focused on a single issue: whether a utility's "distribution modernization rider" or "DMR" revenues must be included when calculating a utility's profits for purposes of the profits review test[6] (the "significantly excessive earnings test," or "SEET"). The Court ruled that such revenues must be included when determining the profits allowed under a utilities' electric security plan. Period. The Court did not rule on the SEET threshold or on the appropriateness of other adjustments to earnings.

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[1] Direct Testimony of Gustavo Garavaglia M. (Dec. 23, 2020).

[2] Supplemental Direct Testimony of R. Jeffrey Malinak (Dec. 23, 2020).

[3] Entry (Dec. 4, 2020).

[4] *Id.* ¶ 16.

[5] *Id.*

[6] R.C. 4928.143(F) (establishing the significantly excessive earnings test).

And while the remand from the Court in the *Ohio Edison* SEET case does require the PUCO to determine for Ohio Edison the earnings threshold, and consider adjustments, that remand scope is not controlling or applicable to DP&L's cases. Rather, the PUCO in this case properly sought to limit testimony on how the profits test should be applied given the Court's ruling. That PUCO directive means that DP&L was supposed to address whether and how its modernization revenues should be included in the profits review given the Court's ruling.

Rather than follow the PUCO's Entry, DP&L filed two pieces of testimony that are anything but narrowly focused. For one, DP&L filed nearly 100 pages of testimony plus more than 60 pages of supporting attachments and exhibit.[7] But more problematic is the substance of the Garavaglia and Malinak testimony. Most of this testimony has nothing at all to do with the *Ohio Edison* ruling and the question of whether DP&L's DMR revenues must be included for purposes of the SEET.

Instead, DP&L has used this testimony as a "do-over" of its entire 2018 and 2019 SEET cases, developing new theories for why customers should not get a refund by making all manner of adjustments to the SEET calculations that have nothing to do with the DMR or the *Ohio Edison* ruling. And DP&L seeks a redo of the SEET threshold now that including the DMR revenues in the profits test would produce refunds for customers.

If DP&L thought this additional evidence was appropriate (earnings adjustments and new earnings threshold), DP&L could have presented it when it filed its SEET applications in the relevant cases back in May 2019 (when DP&L filed its application in Case No. 19-1121-EL-UNC regarding the 2018 SEET test and testimony in support of that application) and in May

[7] *See* Malinak Testimony (62 pages of testimony and 51 pages of exhibits); Garavaglia Testimony (31 pages of testimony); Exhibit Schedules 1-10 (Dec. 23, 2020) (an additional 10 pages of exhibits sponsored by both witnesses) (the "Schedules").

2020 (when DP&L filed its application in Case No. 20-1041-EL-UNC regarding the 2019 SEET test and testimony in support of that application). Or DP&L could have included these types of adjustments as part of the settlement that it filed in these consolidated cases. DP&L could have, with reasonable diligence offered such testimony earlier in the proceeding. But it did not and now seeks a third bite at the apple.

Within months of DP&L's filing of its 2018 SEET case, OCC filed its Ohio Edison appeal.[8] DP&L filed its 2019 SEET case and supporting testimony just days after the oral argument in the Ohio Edison case.

DP&L could have, but chose not to, present its alternative theories about adjustments, and earnings threshold to account for the possibility of the Court overturning the PUCO on the SEET appeal. It had at least three opportunities to do—but did not. The PUCO should not allow DP&L another bite at the apple. The PUCO should preclude DP&L from presenting additional evidence, unrelated to issues decided by the Court, all to the detriment of consumers who deserve a refund in the two profits review cases.

The PUCO's December 4, 2020 Entry gave parties an opportunity to address the narrow issue that was affected by the Court's *Ohio Edison* ruling, namely, including DP&L's DMR revenues for the 2018 and 2019 SEET tests. The Entry was in no way an invitation for DP&L to revamp its cases and propose numerous new legal and factual theories that are completely unrelated to the DMR and the issues the Court ruled on in *Ohio Edison*. Thus, and for the reasons explained in the attached memorandum in support, the PUCO should strike the following:

[8] OCC's Notice of Appeal in Ohio Edison was filed on July 15, 2019. *See* Ohio Supreme Court Case No. 2019-0961.

From the Garavaglia Testimony:

1. Page 2, lines, 14-21,
2. Page 3, lines 1-2, lines, 7-10, lines 11-22
3. Page 4, lines 4-21
4. Page 5, lines 1-4
5. Page 6, line 2-13
6. Page 9, line 3 through page 20, line 10
7. Page 21, line 15 through page 26, line 6
8. Page 30, line 7 through page 31, line 11

From the Malinak Testimony:

1. Page 5, line 17 through page 6, line 18
2. Page 8, line 5 through page 10, line 8 ending with the words "Schedules 4 and 9"
3. On the table on Page 10, the columns for Scenarios 1, 2, 3, and 4; and the rows for "Exclude the DMR from earnings for SEET purposes," "Add back pre-2018 extraordinary asset impairments," "Adjust for one-time Property earnings/losses," and "Add $300 million in future equity investment by AES."
4. Page 11, line 5 through Page 18, line 13
5. Page 19, line 2 through Page 21, line 2
6. Page 21, line 3, the characters "3-"
7. Page 23, lines 3-18

8. Page 23, line 21 through line 22 ending with the words “13.9 percent in 2019”
9. Page 25-26, all lines on all tables related to Scenarios 1, 2, 3, and 4
10. Page 33, line 1 through Page 46, line 20
11. Page 47, line 5 through Page 48, line 7
12. On the table on Page 49, the columns for Scenarios 1, 2, 3, and 4; and the rows for “Exclude the DMR from earnings for SEET purposes,” “Add back pre-2018 extraordinary asset impairments,” “Adjust for one-time Property earnings/losses,” and “Add $300 million in future equity investment by AES.”
13. On the table on Page 50, the rows for Scenarios 1, 2, 3, and 4
14. Page 51, line 1 through page 58, line 3
15. Page 59-60, all lines on all tables related to Scenarios 1, 2, 3, and 4
16. Page 61, lines 1-14
17. Page 61, line 17 beginning with “in Scenario 3” through line 18 ending with the words “13.9 percent in 2019”

From the Schedules:

1. Schedules 1, 2, 3, 4, 6, 7, 8, and 9

Collectively, the portions of this testimony and schedules that OCC seeks to strike shall be referred to as the “Expanded Legal and Factual Theories.”

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The PUCO's December 4, 2020 Entry allowed parties an opportunity to file "narrowly-focused" testimony on a single issue: the impact of the Supreme Court of Ohio's ruling in *In re*

Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan for Ohio Edison Co.[9] on the PUCO's assessment of whether DP&L's 2018 and 2019 profits were significantly excessive. The Court ruled that FirstEnergy's distribution modernization rider revenues must be included in its annual profits review. Because DP&L's distribution modernization rider is substantially identical to FirstEnergy's—a fact that the PUCO has already established—*Ohio Edison* is controlling.

Rather than follow the PUCO's Entry, DP&L instead twisted the Entry into an opportunity to reconfigure both its 2018 and 2019 profits review cases and the settlement agreement submitted in this case. Make no mistake, DP&L's new testimony presents numerous new legal and factual theories to lower its profits (on paper) to deprive customers of refunds they deserve under the Court's decision in *Ohio Edison*.

DP&L's new legal and factual theories (allowing additional adjustments to earnings and a revised earnings threshold) were not at issue and were not considered by the Court in *Ohio Edison*. They should not be allowed to be offered here under the guise of DP&L responding to the Court's *Ohio Edison* ruling. It would be unfair, highly prejudicial, and unreasonable to allow DP&L to present new evidence that could, with reasonable diligence, have been presented earlier on at least three occasions.

The PUCO's decision to permit parties to address the impact of *Ohio Edison* was reasonable. DP&L's abuse of that decision was not.

The PUCO should strike the Expanded Legal and Factual Theories from DP&L's supplemental testimony as outlined in detail in OCC's Motion.

[9] Slip Opinion No. 2020-Ohio-5450 (hereinafter *Ohio Edison*).

I. THE *OHIO EDISON* DECISION

In *Ohio Edison*, the Court considered a challenge by OCC to a PUCO ruling that excluded FirstEnergy's distribution modernization rider revenues from the profits review test under Ohio law (known as the significantly excessive earnings test or SEET). The PUCO had earlier ruled (erroneously) that for purposes of determining whether customers get a refund for profits that are too high, distribution modernization rider revenues would not be counted.

On appeal, OCC argued, among other things, that "the commission was required to consider whether the DMR—as an adjustment to the ESP—resulted in excessive earnings."[10] The Court succinctly concluded: "OCC is correct."[11] It continued: "the DMR constitutes an 'adjustment' under R.C. 4928.143(F) and the commission was *required* to include the DMR when determining whether the plan resulted in excessive earnings."[12] Thus, the Court held that "the commission's action in this case—removing DMR revenue from the calculation used to determine whether the ESP resulted in excessive earnings—violated R.C. 4928.143(F)."[13]

And while the PUCO and Ohio Edison made numerous arguments about what types of adjustments are permitted under the statute, the Court refused to consider those arguments because they were not the basis for the PUCO ruling under appeal.[14] In other words, they were not properly before the Court, and the Court made no ruling on the merits of these arguments.

[10] *Ohio Edison*, 2020-Ohio-5450, ¶ 25.

[11] *Id.* ¶ 26.

[12] *Id.* ¶ 27 (emphasis added).

[13] *Id.* ¶ 28.

[14] *Id.* ¶¶ 34-36, 38, 47-48.

II. ARGUMENT

A. By introducing the Expanded Legal and Factual Theories, DP&L's testimony violates the PUCO's December 4, 2020 Entry and harms customers.

The December 4, 2020 Entry summarizes the Supreme Court of Ohio's *Ohio Edison* ruling:

> [T]he Court concluded that the Commission's decision to exclude revenue resulting from FirstEnergy's Distribution Modernization Rider (DMR), which had been approved as part of the ESP, was not reasonable. More specifically, the Court stated that "the commission's interpretation of R.C. 4928.143(F)—that it allows the exclusion of DMR revenue from the SEET—is not reasonable." Accordingly, the Court reversed the Commission's orders and remanded the case for further review. Further, the Court instructed the Commission to "conduct a new SEET proceeding in which it includes the DMR revenue in the analysis, determines the SEET threshold, considers whether any adjustments under R.C. 4928.143(F) are appropriate, and makes any other determinations that are necessary to resolve [the] matter" on remand.[15]

The Entry then notes that "[e]ach of the applications, and the submitted supporting testimony, exclude the Company's DMR revenues from the necessary calculations."[16] Thus, the PUCO found it "reasonable to permit the parties to submit separate, supplemental testimony regarding how the SEET test should be conducted in light of the Supreme Court of Ohio's recent decision in *In re Ohio Edison*. ... [T]he parties may file this narrowly-focused supplemental testimony on or before December 23, 2020."[17]

The implications of the December 4, 2020 Entry are clear. DP&L filed its SEET applications, its testimony in this case, and its proposed settlement before *Ohio Edison*. DP&L's applications, supporting testimony, and its settlement provided for exclusion of its DMR revenues from the profits review calculations. The *Ohio Edison* rejected precisely the same

[15] Entry ¶ 15.

[16] *Id.* ¶ 16.

[17] *Id.*

exclusion for FirstEnergy. In light of this controlling authority, parties were given an opportunity to address the impact of *Ohio Edison* on the current cases.

DP&L's testimony goes well beyond this issue, however. Rather than addressing the narrow issue of including DMR revenues in the SEET, DP&L re-designed its entire 2018 and 2019 SEET cases. It introduced numerous new issues that have nothing to do with whether DMR revenues should be included in the SEET. Some of the most egregious such examples are the following.

DP&L acknowledged in its 2018 SEET application that the applicable SEET threshold for the DMR is 12.0%: "the Company's adjusted ROE excluding DMR revenues for calendar year 2018 is ... well below the 12 percent SEET threshold."[18] In its testimony supporting that application, DP&L's witness stated, "the appropriate threshold against which to compare DP&L's earnings for 2018 in order to establish that significantly excessive earnings did not occur is 12%."[19]

Now, in its supplemental testimony, however, DP&L's witnesses support a substantially higher SEET threshold, potentially as high as 23.4%.[20] But this has nothing to do with the DMR or *Ohio Edison*. The opportunity to file supplemental testimony given *Ohio Edison* did not open the door for DP&L to change its already-filed position on the appropriate SEET threshold. Notably, there is nothing in Mr. Malinak's testimony that explains why this adjustment could not have been offered earlier in any of the proceedings where testimony on SEET was offered. There has been no change of circumstances as to the appropriate SEET threshold, as that was not at issue in *Ohio Edison*.

[18] *See* Case No. 19-1121-EL-UNC, Application at 1.

[19] Direct Testimony of Craig A. Forestal at 7 (May 15, 2019) (attached to the Application filed on the same date).

[20] *See* Malinak Testimony at 60 (Table showing 1.5x Approach, Scenarios 3, 4, and 5).

DP&L offers other new legal and factual positions that are unrelated to *Ohio Edison*. DP&L witness Garavaglia, for example, testified that the PUCO should include, for purposes of calculation DP&L's return on equity in 2018 and 2019, a $150 million equity contribution that DP&L's parent entity (AES) made *in 2020* and a $150 million equity contribution that AES *might make* in 2021.[21] Because this would increase the value of DP&L's equity, it would lower the return on equity (because the total equity is in the denominator when calculating ROE). Leaving aside the legal and factual absurdity of the claim that equity contributions (if made in 2020 or 2021) should be retroactively added to past years, this adjustment has nothing to do with *Ohio Edison* or the issue of including the DMR revenues in the SEET calculation. If DP&L felt that this was an appropriate adjustment, it could have included it in its SEET applications, but it chose not to.

DP&L witness Malinak similarly testifies that DP&L "wrote off most of its generation asset investments" before 2018.[22] He then recommends that these write-offs be added to DP&L's equity for 2018 and 2019, thus artificially lowering DP&L's return on equity in those years, making it less likely that DP&L had significantly excessive earnings.[23] As with the other proposed adjustments, this adjustment has no relation whatsoever to the DMR or *Ohio Edison*. If DP&L felt that this was an appropriate adjustment, it could have included it in its 2018 SEET application, its 2019 SEET application, or in the Settlement. But once again, DP&L chose not to. And again, there is nothing in Mr. Malinak's or Garavaglia's testimony that explains why this

[21] Garavaglia Testimony at 13.

[22] Malinak Testimony at 15.

[23] *Id.* at 15-16. Furthermore, this asset write-offs were already reflected in the report earnings of DP&L prior to 2018 and they should not be written-off again in 2018 and 2019.

adjustment could not have been offered earlier in any of the proceedings where testimony on the SEET was offered.

The theme tying this all together is that DP&L could have proposed all these adjustments before when it filed testimony three separate times on SEET.[24] It chose not to. It should not get a second bite at the apple, let alone a third bite, simply backpedaling now because it is faced with the fact that it may have to provide refunds to customers, given the Court's ruling in *Ohio Edison.*

B. The PUCO has already ruled that DP&L's distribution modernization rider is substantially identical to FirstEnergy's, so to protect consumers, DP&L's supplemental testimony attempting to distinguish the two should be barred by res judicata.

The doctrines of *res judicata* and collateral estoppel "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."[25] In a recent order regarding DP&L's electric security plan, the PUCO ruled that OCC and others were barred from challenging DP&L's rate stabilization charge because that issue had already been decided in an earlier proceeding.[26] Just as the PUCO barred OCC's arguments, it should strike DP&L's supplemental testimony where such testimony seeks to relitigate issues that DP&L already litigated in its most recent electric security plan case.

A substantial portion of DP&L's new testimony is devoted to its attempts to distinguish *Ohio Edison* on the grounds that DP&L's distribution modernization rider is different from

[24] OCC does not concede that any of these adjustments would be lawful or reasonable, as none of them are valid under applicable SEET laws.

[25] *In re Application of Dayton Power & Light Co. to Establish a Standard Service Offer*, Case No. 08-1094-EL-SSO, Second Finding & Order ¶ 32 (Dec. 18, 2019).

[26] *Id.* ¶ 34.

FirstEnergy's. But in making these comparisons, DP&L is attempting to relitigate issues that were already litigated in its most recent electric security plan—issues that were decided in favor of consumers and against DP&L.

In the ESP case, DP&L argued that its distribution modernization rider was different from FirstEnergy's for five different reasons: (i) DP&L is required to pursue grid modernization whereas FirstEnergy was not, (ii) there were restrictions on DP&L's use of distribution modernization rider funds, (iii) DP&L, unlike FirstEnergy, could be subject to a penalty for failing to pursue grid modernization, (iv) DP&L was required to pursue specific grid modernization projects, and (v) DP&L's distribution modernization rider, unlike FirstEnergy's, was part of a settlement.[27] The PUCO rejected all of these arguments, stating that they "miss the forest for the trees."[28] As the PUCO recognized, FirstEnergy's and DP&L's distribution modernization riders were "fundamentally similar," namely, they were both "nonbypassable riders, established to promote the financial integrity of EDUs."[29] The PUCO went even further, noting that even if DP&L were to modify its DMR, it "would do nothing to address [the] fundamental point" that it is an unlawful charge to promote DP&L's financial integrity, just like FirstEnergy's distribution modernization rider.[30]

Despite this ruling, DP&L's witnesses have recycled these very same arguments to assert that *Ohio Edison* does not apply to DP&L because DP&L's distribution modernization rider is different. For example, just as DP&L argued in the ESP case, DP&L witness Garavaglia claimed that DP&L's rider is "much different" from FirstEnergy's because DP&L is required to pursue

[27] Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 94 (Nov. 21, 2019).

[28] *Id.* ¶ 102.

[29] *Id.* ¶¶ 107-08.

[30] *Id.* ¶ 108.

grid modernization whereas FirstEnergy was not.[31] As another example, DP&L witnesses Garavaglia and Malinak both focus on the restrictions on DP&L's use of distribution modernization rider funds, which DP&L argued distinguished its DMR from FirstEnergy's in the ESP case.[32]

The PUCO has affirmatively ruled that FirstEnergy's distribution modernization rider was the same as DP&L's. When the Supreme Court of Ohio overturned FirstEnergy's rider, the PUCO determined that this was binding precedent as to DP&L's rider and ordered it removed from DP&L's electric security plan. The most recent *Ohio Edison* ruling is no different. What the Court ruled regarding FirstEnergy's distribution modernization rider—that those revenues must be included in the profits test (SEET)—must similarly apply to DP&L. DP&L is barred by *res judicata* from relitigating the issue of whether DP&L's DMR is different from FirstEnergy's DMR.

As such, any testimony claiming that DP&L's DMR revenues can be excluded from the profits review (SEET test) should be struck. They are plainly at odds with controlling Ohio Supreme Court precedent (*Ohio Edison*). DP&L cannot avoid the impact of *Ohio Edison* by claiming that its DMR is different from FirstEnergy's. The PUCO has already ruled on that issue—and ruled that the two are the same.

[31] Garavaglia Testimony at 10.

[32] Garavaglia Testimony at 7-8; Malinak Testimony at 11-12, 37, 40.

C. If DP&L's testimony on the Expanded Legal and Factual Theories is allowed to stand (which should not be allowed), then OCC should have an opportunity to file testimony refuting DP&L's new legal and factual theories, none of which were offered in these cases prior to the filing of the supplemental testimony.

At no point in these proceedings before its December 23, 2020 did DP&L assert the Expanded Legal and Factual Theories: not in its 2018 SEET application, not in its 2019 SEET application, not in the Settlement,[33] not in the testimony in support of the Settlement.

In the Settlement that DP&L negotiated with various parties in this case, "the Signatory Parties who have intervened or moved to intervene in Pub. Util. Comm. Case Nos. 19-1121-EL-UNC and 20-1041-EL-UNC recommend that the Commission approve DP&L's applications in those cases conditioned on the Commission's approval of this Stipulation without modification." Thus, the Settlement incorporates by reference the positions taken in DP&L's applications in those cases. An examination of what is included in those applications is therefore warranted.

In the 2018 SEET application (Case No. 19-1121-EL-UNC), DP&L stated, "As supported in testimony by Company Witness Craig Forestal, the Company's adjusted ROE excluding DMR revenues for calendar year 2018 is 3.5%, well below the 12 percent SEET threshold."[34] This demonstrates two things. First, as part of the Settlement, DP&L committed to a 12% SEET threshold for the 2018 SEET calculation. And second, as part of the Settlement, DP&L committed to the calculation of its return on equity for 2018 as set forth in the testimony of Craig Forestal in that case.

In the 2019 SEET application (Case No. 20-1041-EL-UNC), DP&L stated, "As supported in testimony by Company Witness Karin Nyhuis, the Company's adjusted ROE

[33] Stipulation and Recommendation (Oct. 23, 2020).

[34] Case No. 19-1121-EL-UNC, Application at 1 (May 15, 2019).

excluding DMR revenues for calendar year 2019 is 11.6%. This amount is below the SEET threshold." As with the 2018 SEET case, this demonstrates that as part of the Settlement, DP&L committed to the calculation of its return on equity for 2019 as set forth in the testimony of Karin Nyhuis in that case.

Because the Settlement incorporates DP&L's SEET applications and supporting testimony, OCC's testimony opposing the Settlement addressed the issues raised in those applications and testimony. For example, OCC witness Duann explained why the DMR revenues should be included in the profits review and provided his expert opinion on the appropriate SEET threshold.[35]

But now, through the filing of its supplemental testimony and the introduction of the Expanded Legal and Factual Theories, DP&L proposes to start over, throwing its prior SEET applications away, disavowing the testimonies of Craig Forestal and Karin Nyhuis (neither of whom DP&L intends to call as witnesses in this case), and replacing them with all new proposals and calculations, substantially revamping DP&L's legal and factual theories.

DP&L cannot have it both ways. The Settlement says that DP&L and the signatory parties want the PUCO to approve DP&L's 2018 and 2019 SEET applications as filed. OCC, in opposing the Settlement, addressed those applications and the testimony filed in support of those applications. Nothing in those applications includes any of the myriad adjustments and changes proposed by DP&L witnesses Garavaglia and Malinak (other than excluding the DMR from the SEET, which has now been found unlawful under *Ohio Edison*). The PUCO should not allow DP&L to now abandon those applications and supporting testimony under the guise of reacting

[35] *See generally* Direct Testimony of Daniel J. Duann, Ph.D. on Behalf of the Office of the Ohio Consumers' Counsel (Dec. 17, 2020).

to the *Ohio Edison* ruling. The changes that DP&L proposes are all self-serving manipulations aimed at artificially lowering its return on equity, not good-faith efforts to react and respond to the Court's *Ohio Edison* ruling.

If the PUCO does not strike the Expanded Legal and Factual Theories from DP&L's supplemental testimony, then due process demands, at a minimum, that OCC be allowed to file supplemental testimony refuting the many new claims raised by the Expanded Legal and Factual Theories.[36]

III. CONCLUSION

The *Ohio Edison* ruling is favorable to consumers because it requires the PUCO to include DP&L's distribution modernization rider revenues when assessing DP&L's 2018 and 2019 profits under the SEET. Parties were given an opportunity to file testimony addressing the impact of the *Ohio Edison* ruling. But rather than heed the PUCO's direction to file "narrowly-focused" testimony, DP&L scrapped its entire 2018 and 2019 SEET applications, discarded its testimony in those cases, and filed voluminous testimony on issues that have nothing to do with *Ohio Edison* or the sole issue in that case: including DMR revenues in the SEET. The PUCO should strike the Expanded Legal and Factual Theories and leave intact only those portions of DP&L's supplemental testimony that truly attempt to address the narrow question of how the *Ohio Edison* ruling should be applied to DP&L's 2018 and 2019 SEET assessments. Allowing DP&L to introduce the many new issues raised in the Malinak and Garavaglia testimony is highly prejudicial to OCC and the consumers it represents, particularly where DP&L bears the burden of proof and has now made substantial eleventh hour modifications to its case.

[36] *See In re Application of [FirstEnergy] to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Entry (Dec. 9, 2015) (where utility amended a previously filed stipulation, parties were given a new opportunity to pursue discovery and file additional testimony).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served on the persons stated below via electronic transmission this 4th day of January, 2021.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Motion to Strike the Direct Testimony of Gustavo Garavaglia M. and the Supplemental Direct Testimony of R. Jeffrey Malinak by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher