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
In the Matter of the Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2)	:	Case No. 18-1876-EL-WVR
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
In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018	:	Case No. 19-1121-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019	:	Case No. 20-1041-EL-UNC
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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO 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

I. INTRODUCTION AND SUMMARY

Following months of complex negotiations among diverse stakeholders, The Dayton Power and Light Company ("DP&L" or the "Company"), the Staff of the Commission, and 18 other parties submitted a Stipulation and Recommendation ("Stipulation") proposing resolution of four significant proceedings: DP&L's grid modernization plan (Case Nos. 18-1875-EL-GRD, *et al.*); the Company's forward-looking significantly-excessive-earnings test and more-favorable-in-the-aggregate test case (Case No. 20-0680-EL-UNC); and its pending retrospective significantly-excessive-earnings test ("SEET") cases for 2018 (Case Nos. 19-1121-EL-UNC) and 2019 (Case No. 20-1041-EL-UNC).

Six weeks later and one day after supporting testimony was due, the Supreme Court of Ohio reversed a Commission order that found Ohio Edison passed its retrospective SEET for 2017 after excluding revenue from FirstEnergy's Distribution Modernization Rider ("FE DMR"). *In re Determination of Existence of Significantly Excessive Earnings for 2017 under the Elec. Sc. Plan of Ohio Edison Co.* ("*Ohio Edison*"), Slip Opinion No. 2020-Ohio-5450, ¶ 21 (reversing *In re Ohio Edison et al.*, Case No. 18-857-EL-UNC, Opinion and Order (Mar. 20, 2019). The Court ruled that the Commission unreasonably excluded that revenue "without statutory authorization" when the Commission found only that Ohio Edison would face "an unnecessary element of risk" if the FE DMR revenue were included in the SEET. *Id*. The Court did not conclude that Ohio Edison failed its 2017 SEET; instead, the Court remanded the case and instructed the Commission to determine the proper threshold for measuring whether Ohio Edison had significantly excessive earnings, "whether any adjustments under R.C. 4928.143(F) are appropriate," and whether "any other determinations . . . are necessary to resolve this matter." *Id*. at ¶ 65.

Shortly after that decision, the Commission recognized, sua sponte, that the applications in DP&L's retrospective SEET cases had excluded revenue from the Company's similarly-named but substantively-different Distribution Modernization Rider ("DMR"). Dec. 4, 2020 Entry, ¶ 16. Exclusion of such revenue from the SEET was established in the March 14, 2017 Amended Stipulation and Recommendation ("ESP III Stipulation"), together with a 12% SEET threshold, as part of the Company's third Electric Security Plan (Case No. 16-395-EL-SSO). DP&L excluded that revenue in reliance on the Commission's approval of the ESP III Stipulation, as well as its approval of the Company's 2017 retrospective SEET application, which likewise excluded DMR revenue. *In re DP&L*, Case No. 18-873-EL-UNC, Opinion and Order (July 31, 2019). In light of *Ohio Edison*, the Commission found it reasonable for parties to file supplemental testimony "regarding how the [retrospective] SEET test should be conducted." Dec. 4, 2020 Entry, ¶ 16. DP&L and The Office of the Ohio Consumers' Counsel ("OCC") timely did so.

Despite the Commission's invitation for testimony to address a new legal landscape while the record in thus proceeding remains open, OCC asks the Commission to strike vast swaths of DP&L's testimony for doing just that. Jan. 4, 2021 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 ("Motion"). OCC asserts (p. 2) that DP&L's testimony is beyond the scope of the *Ohio Edison* decision. The Commission should reject that argument for three separate and independent reasons:

1. OCC claims that DP&L should issue $150 million in refunds in this case, due to changes in the law under *Ohio Edison*. The Commission should not

limit DP&L's ability to show why it passes the SEET, particularly when such a refund would have disastrous financial effects upon DP&L.

2. In *Ohio Edison*, ¶ 65, the Court specifically instructed the Commission to "consider[] whether any adjustments under R.C. 4928.143(F) are appropriate." (Emphasis added.) DP&L's request that the Commission consider other adjustments in thus consistent with *Ohio Edison*.

3. In any event, the specific adjustments that DP&L proposes relate to specific adjustments that the Court considered in *Ohio Edison*, and should be considered for that additional reason.

II. THERE IS GOOD CAUSE FOR THE RECORD TO INCLUDE DP&L'S SUPPLEMENTAL TESTIMONY

The Commission recognized that supplemental testimony would be beneficial to determine how the retroactive SEET should be conducted in these proceedings in light of *Ohio Edison*. Dec. 4, 2020 Entry, ¶ 16. That testimony was due more than two weeks in advance of the evidentiary hearing in this proceeding, and before any depositions had taken place. OCC took that opportunity to argue that DP&L owes more than $150 million in refunds. Duann Testimony, pp. 14, 20. OCC contends that the Commission should exclude DMR revenue under *Ohio Edison. Id*.

OCC takes the words "narrowly focused" out of context from the rest of the Entry, which expressly "permit[ted] 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*." *Id*. at ¶ 16 (emphasis added). The Entry made no mention

of limiting testimony to whether DP&L's DMR revenue should be excluded from the SEET under R.C. 4928.143(F). (OCC at pp. 2, 5). The Entry merely limited new testimony to how the retrospective SEET should be conducted in light of new precedent. The Commission should not further limit such testimony in response to OCC's Motion.

When DP&L filed its retrospective SEET applications, the Company easily passed the SEET by simply excluding the DMR from its earnings. Garavaglia Testimony, p. 5. Therefore, it was unnecessary for DP&L to present any other adjustments to the SEET described in the testimony of Witnesses Garavaglia and Malinak at that time. *Id*. DP&L did not waive any adjustments or arguments relating to the application of SEET, particularly under a legal standard that did not exist at the time, a significant change of circumstances despite OCC's attempts (p. 5) to characterize it otherwise.

The Commission has authority to govern its own proceedings and can even "reopen a proceeding at any time prior to the issuance of a final order." Ohio Adm.Code 4901-1-34. Here, the evidentiary hearing has not even begun. Moreover, even in *Ohio Edison*, the Court remanded the case for determination of the proper threshold and whether any adjustments under R.C. 4928.143(F) should be made.

An order by the Commission that DP&L refund $150 million would have disastrous financial effects upon DP&L. The Commission thus should allow DP&L to address any and all adjustments that show that DP&L passes the SEET.

III. THE COMMISSION SHOULD FOLLOW THE ROADMAP FOR BUILDING A RECORD THAT *OHIO EDISON* ESTABLISHED

OCC concedes (p. 3) that the *Ohio Edison* Court refused to consider several arguments raised by Ohio Edison and the Commission because those arguments were not properly before the Court, either because they had been waived below or were not expressly addressed in the Commission's Opinion and Order. In rejecting those arguments on procedural grounds, the Court provided a roadmap for how the Commission should build a record in SEET cases. While OCC would have the Commission ignore that roadmap and lock DP&L into a pre-*Ohio Edison* record, the Commission should not ignore the Court's guidance.

The Court overturned the Commission order for excluding FE DMR revenue from Ohio Edison's SEET analysis on the sole basis that the revenue "would introduce an unnecessary element of risk to the Companies and undermine the [DMR's] purpose of providing credit support." *Ohio Edison* at ¶ 20. However, the Court went on to consider whether there were other grounds for excluding FE DMR revenue.

First, the Court considered the Commission's argument that removing the DMR from SEET was "an adjustment for improving the company's capital structure appropriately to support the large commitments needed for grid modernization." *Id*. at ¶ 33. But, because the Commission did not say it was making an adjustment for capital structure when it removed the FE DMR revenue and since Ohio Edison did not make that argument, the Court did not consider its merits. *Id*. at ¶¶ 34-36.

Second, the Court considered Ohio Edison's argument that since no other company has a mechanism like the FE DMR, removal of its revenue was necessary for the Commission to conduct a valid comparison based on "comparable risk" under R.C. 4928.143(F).

Ohio Edison at ¶ 37. But, because the Commission never mentioned the comparable-risk clause in the retrospective SEET statute, the Court refused to accept the argument.

Third, the Court considered Ohio Edison's arguments that the FE DMR revenue was an "extraordinary item" and was "associated with an[] additional liability or write-off of regulatory assets due to implementing" its Electric Security Plan. *Ohio Edison*, ¶ 40. Since the Commission did not expressly or implicitly accept that argument, the Court refused to do so. *Id*. at ¶ 44. The Court cautioned that it would not consider arguments by any party that "has deprived the commission of an opportunity to correct the error." *Id*. at ¶ 48.

All of these issues touch on the proper application of the retrospective SEET under R.C. 4928.143(F). DP&L should not be deprived of due process by preventing it from building a record to address the new legal landscape that now exists under this recent precedent.

Significantly, the Court instructed the Commission to "consider[] whether <u>any</u> adjustments under R.C. 4928.143(F) are appropriate." *Ohio Edison*, ¶ 65 (emphasis added). DP&L's request that the Commission consider other adjustments under R.C. 4928.143(F) is thus entirely consistent with *Ohio Edison*. The Commission now has an opportunity to pass on these issues with record support that the Commission, itself, invited. Dec. 4, 2020 Entry, ¶ 16. The Commission should not indulge OCC's desire to limit that record.

IV. THE ADJUSTMENTS DEMONSTRATED BY DP&L WITNESSES <u>GARAVAGLIA AND MALINAK ARE JUSTIFIED BY *OHIO EDISON*</u>

Finally, the Commission should reject OCC's Motion because the testimony of DP&L Witnesses Garavaglia and Malinak address issues directly raised in *Ohio Edison*, and thus fall within the scope of the Commission's call for testimony.

First, as shown in the testimony of Witness Garavaglia, the DMR is not an "earned return on common equity" under R.C. 4928.143(F) because DP&L's use of the revenue was significantly restricted and the proceeds could not be used to make any payments to The AES Corporation, including dividends and tax sharing payments. Garavaglia Testimony, pp. 10-11. The *Ohio Edison* Court did not address the merits of this argument, as FirstEnergy's DMR did not contain similar restrictions. *In re Application of Ohio Edison Co*., 157 Ohio St.3d 73, 2019-Ohio-2401, ¶ 19.

Witness Garavaglia also demonstrates (pp. 11-12) that the DMR was a non-recurring, special, and extraordinary item and, thus, should be excluded from SEET consistent with the *In the Matter of the Investigation of the Development of the Significantly Excessive Earnings Test*, Case No. 09-786-EL-ENC, Finding and Order, p. 18, which the *Ohio Edison* Court cited with approval. *Ohio Edison*, ¶ 26. *Accord*: Malinak Testimony, p. 14. While Ohio Edison raised that issue in its 2017 SEET proceeding, the Court refused to consider it because the Commission never expressly adopted that justification for excluding the FE DMR revenue. *Id*. at ¶ 44. The Commission now has an opportunity to do so.

Witness Garavaglia further shows (pp. 12-13) that the DMR was targeted at altering DP&L's capital structure and, thus, is appropriately excluded under R.C. 4928.143(F) (allowing "such adjustments for capital structure as may be appropriate"). Again, although such an adjustment was raised in *Ohio Edison*, the Court did not consider that argument because the Commission "never said it was making an adjustment for capital structure when it removed the DMR revenue." *Ohio Edison*, ¶ 34. Again, the Commission now has an opportunity to do so.

Witness Malinak further demonstrates (pp. 41-44) why adjustments should be made to DP&L's reported common equity base given historical write-downs of investments made by DP&L in generation assets. Ohio Edison similarly argued that the Commission relied on the write-off of assets in excluding the DMR. *Ohio Edison*, at ¶ 40. The Court, however, refused to consider that argument because the Commission did not address it. *Id*. at ¶ 44. It now can.

Witness Garavaglia shows (pp. 13-17) that adjustments should be made for committed capital investments. R.C. 4928.143(F) ("Consideration also shall be given to the capital requirements of future committed investments in this state."). *Accord*: Malinak Testimony, pp. 45-46. The Court expressly declined to consider that adjustment in *Ohio Edison* because "Ohio Edison . . . did not argue in this appeal that the [FE] DMR revenue should be excluded from the SEET either as an adjustment for the company's capital structure or due to its capital requirements for future committed investments." *Ohio Edison*, ¶ 50 ("Hence, it is improper for us to consider these arguments at this time."). The argument has now been raised before the evidentiary hearing of this proceeding and can be addressed here.

Witness Garavaglia (pp. 18-19) finally shows that the Commission should adjust DP&L's earnings for tax consequences, since those items were not caused by adjustments to DP&L's ESP. The *Ohio Edison* Court considered whether earnings not caused by an ESP should be included in the SEET. *Ohio Edison*, ¶ 24.

Thus, the issues raised byWitnesses Garavaglia and Malinak tie directly to issues in the *Ohio Edison* decision. Accordingly, they are within the scope of the Commission's request

for 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*." Dec. 4, 2020, ¶ 16.

V. DP&L IS NOT BARRED FROM DISTINGUISHING ITS DMR FROM FIRSTENERGY'S SIMILARLY-NAMED RIDER

DP&L is not, as OCC contends (p. 7), barred from demonstrating the many differences between its DMR and the FE DMR 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." *Office of Consumers' Counsel v. Pub. Util. Com.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985). Here, although the Commission has previously held that DP&L's DMR was not lawful under R.C. 4928.143(B) and, thus, could not be collected,[1] DP&L has not litigated – and the Commission has not decided – whether the dissimilarities between DP&L's DMR and the FE DMR justify different treatment under the retrospective SEET of R.C. 4928.143(F), which is inherently an individualized utility-by-utility inquiry. The Commission should reject this attempt to disregard un-litigated, material differences between the riders as it relates to that analysis.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the January 4, 2021 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.

[1] *In re DP&L*, Case No. 16-395-EL-SSO, Supplemental Opinion and Order (Nov. 21, 2019).

Respectfully submitted,

/s/ Michael J. Schuler
Michael J. Schuler (0082390)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to 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 has been served via electronic mail upon the following counsel of record, this 7th day of January, 2021:

Steven L. Beeler
Robert A. Eubanks
Thomas G. Lindgren
OFFICE OF THE OHIO ATTORNEY GENERAL
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
steven.beeler@ohioattorneygeneral.gov
robert.eubanks@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov

Counsel for Staff of the Public Utilities Commission of Ohio

Matthew R. Pritchard
Rebekah J. Glover
McNees Wallace & Nurick LLC
21 E. State Street, 17th Floor
Columbus, Ohio 43215
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com

Counsel for Industrial Energy Users-Ohio

Christopher Healey
William J. Michael
Amy Botschner O'Brien
Angela O'Brien
OFFICE OF THE OHIO CONSUMERS' COUNSEL
65 E. State Street, 7th Floor
Columbus, Ohio 43215
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
angela.obrien@occ.ohio.gov

Michael D. Dortch
Justin M. Dortch
KRAVITZ, BROWN & DORTCH, LLC
64 E. State Street, Suite 200
Columbus, Ohio 43215
mdortch@kravitzllc.com
jdortch@kravitzllc.com

Counsel for Office of the Ohio Consumers' Counsel

Steven D. Lesser
N. Trevor Alexander
Mark T. Keaney
Kari D. Hehmeyer
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street, Suite 2600
Columbus, OH 43215-6164
slesser@beneschlaw.com
talexander@ beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@ beneschlaw.com

Counsel for the City of Dayton and Honda of America Mfg., Inc.

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Counsel for Ohio Energy Group

Kimberly W. Bojko
Jonathan Wygonski
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
bojko@carpenterlipps.com
wygonski@carpenterlipps.com

Counsel for Ohio Manufacturers' Association Energy Group

Devin D. Parram
Dane Stinson
Jhay T. Spottswood
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
dparram@bricker.com
dstinson@bricker.com
jspottswood@bricker.com

Counsel for The Ohio Hospital Association

David C. Rinebolt
OHIO PARTNERS FOR AFFORDABLE ENERGY
P.O. Box 1793
Findlay, Ohio 45839

Counsel for Ohio Partners for Affordable Energy

Angela Paul Whitfield
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
paul@carpenterlipps.com

Counsel for The Kroger Co.

Stephanie M. Chmiel
Kevin D. Oles
THOMPSON HINE LLP
41 S. High St., Suite 1700
Columbus, Ohio 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for University of Dayton

Madeline Fleisher
DICKINSON WRIGHT PLLC
150 E. Gay Street, Suite 2400
Columbus, Ohio 43215
mfleisher@dickinsonwright.com

Counsel for Smart Thermostat Coalition

Joseph Halso
SIERRA CLUB
ENVIRONMENTAL LAW PROGRAM
1536 Wynkoop Sttreet, Suite 200
Denver, Colorado 80202
joe.halso@sierraclub.org

Richard C. Sahli
RICHARD SAHLI LAW OFFICE, LLC
981 Pinewood Lane
Columbus, Ohio 43230
rsahli@columbus.rr.com

Counsel for Sierra Club

Christine M.T. Pirik
Madeline Fleisher
DICKINSON WRIGHT PLLC
150 E. Gay Street, Suite 2400
Columbus, Ohio 43215
cpirik@dickinsonwright.com
mfleisher@dickinsonwright.com

Counsel for Mission:data Coalition

Caroline Cox
ENVIRONMENTAL LAW & POLICY CENTER
21 W. Broad St., Suite 800
Columbus, Ohio 43215
ccox@elpc.org

Nikhil Vijaykar
ENVIRONMENTAL LAW & POLICY CENTER
35 E. Wacker Dr. Suite 1600
Chicago, Illinois 60601
nvijaykar@elpc.org

Counsel for Environmental Law & Policy Center

Miranda Leppla
Trent Dougherty
Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org

Counsel for Ohio Environmental Council

Robert Dove
Kegler Brown Hill + Ritter Co., L.P.A.
65 E. State Street, Suite 1800
Columbus, Ohio 43215
rdove@keglerbrown.com

Counsel for Natural Resources Defense Council

Michael J. Settineri
Gretchen L. Petrucci
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street
Columbus, Ohio 43215
mjsettineri@vorys.com
glpetrucci@vorys.com

Drew Romig
Armada Power, LLC
230 West Street, Suite 150
Columbus, Ohio 43215
dromig@armadapower.com

Counsel for Armada Power, LLC

Dylan F. Borchers
Kara H. Herrnstein
Jhay T. Spottswood
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
dborchers@bricker.com
kherrnstein@bricker.com
jspottswood@bricker.com

Counsel for Chargepoint, Inc.

Mark A. Whitt
Lucas A. Fykes
WHITT STURTEVANT LLP
88 E. Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Counsel for Direct Energy, LP

/s/ Christopher C. Hollon
Christopher C. Hollon

1471497.1

Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to 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 Mr. Christopher C. Hollon on behalf of The Dayton Power and Light Company