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

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF THE DAYTON POWER AND LIGHT COMPANY D/B/A/ AES OHIO

The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") seeks rehearing from the Commission's June 16, 2021 Opinion and Order ("Order") on the following grounds:

1. The Commission correctly concluded that AES Ohio did not have significantly excessive earnings in 2018 and 2019. Order, ¶¶ 64-69. That decision was correct for the following additional reasons:

    a. proceeds from AES Ohio's Distribution Modernization Rider ("DMR") should be excluded from AES Ohio's earnings for 2018 and 2019;

    b. the Commission should recognize in AES Ohio's equity balance amounts that were written off in prior periods associated with AES Ohio's generation assets;

    c. the Commission should include in AES Ohio's equity balance $300 million in capital investments that AES made or committed to making in AES Ohio;

    d. the Commission should make adjustments to the Retrospective SEET calculation associated with the Tax Cuts and Jobs Act ("TCJA") and certain property taxes; and

    e. if the Commission includes AES Ohio's DMR proceeds in the Retrospective SEET calculation (it should not), then the Commission should subtract from AES Ohio's earnings the revenue that AES Ohio would have earned if the RSC had been in effect.

2. The Commission correctly held that the Rate Stabilization Charge ("RSC") is lawful. Order, ¶¶ 76-81. That decision is correct for an additional reason – R.C. 4928.143(C)(2)(b) required the Commission to implement the RSC after AES terminated its third Electric Security Plan ("ESP III") and reverted to ESP I, which included the RSC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO

I. THERE ARE ADDITIONAL REASONS SUPPORTING THE COMMISSION'S CONCLUSIONS

The Commission correctly concluded that (1) AES Ohio passed the SEET for 2018 and 2019 (Opinion and Order (June 16, 2021) ("Order"), ¶¶ 64-69); and (2) the RSC was lawful (Order, ¶¶ 76-81). AES Ohio would not ordinarily seek rehearing on those issues.

However, a recent decision by the Supreme Court of Ohio has created uncertainty regarding what AES Ohio needs to do to preserve alternative arguments supporting Commission decisions on appeal. Specifically, in a recent case, the utility made a variety of arguments regarding why it passed the significantly excessive earnings test ("SEET"). In re Determination of Existence of Significantly Excessive Earnings for 2017 under Elec. Sec. Plan of Ohio Edison Co., 162 Ohio St.3d 651, 2020-Ohio-5450, 166 N.E.3d 1191, ¶ 39-48.

The Commission expressly agreed with some of the arguments made by the utility, but did not address others. Id. The Court rejected the rational used by the Commission (id. at ¶¶ 22-28) and expressly refused to consider the utility's alternative arguments in support of the Commission's decision:

> "Ohio Edison made this argument in the ESP case, but the commission did not rely on it when it excluded the DMR revenue. Even though the commission ruled in Ohio Edison's favor, the company continued to argue that it was proper to exclude the revenue on these additional grounds.
>
> * * *
>
> We have previously explained that our practice is not to uphold a commission's decision based on a justification asserted by a party on appeal that is different from the justification the commission provided in its order."

Id. at ¶¶ 41, 47 (citations omitted). Accord: R.C. 4903.09 ("In all contested cases . . . the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact.")

AES Ohio is thus seeking rehearing on the issues of whether it passed the SEET in 2018 and 2019 and whether the RSC is lawful to preserve alternative arguments supporting the Commission's decisions on those issues so that AES Ohio may rely on those arguments as a reason that the Supreme Court should affirm the Commission's decisions.

II. THERE ARE ADDITIONAL REASONS SUPPORTING THE COMMISSION'S CONCLUSION THAT AES OHIO DID NOT HAVE SIGNIFICANTLY EXCESSIVE EARNINGS

As demonstrated below, in conducting the Retrospective SEET for 2018 and 2019, the Commission should make the following adjustments to AES Ohio's earnings and equity balance:

a. proceeds from AES Ohio's DMR should be excluded from AES Ohio's earnings for 2018 and 2019;

b. the Commission should recognize in AES Ohio's equity balance amounts that were written off in prior periods associated with AES Ohio's generation assets;

c. the Commission should include in AES Ohio's equity balance $300 million in capital investments that AES made or committed to making in AES Ohio;

d. the Commission should make adjustments to the Retrospective SEET calculation associated with the Tax Cuts and Jobs Act ("TCJA") and certain property taxes; and

e. if the Commission were to include AES Ohio's DMR proceeds in the Retrospective SEET calculation (it should not), then the Commission should subtract from AES Ohio's earnings the revenue that AES Ohio would have earned if the RSC had been in effect.

AES Ohio's "base case" for 2018 and 2019 is shown on Schedules 1 and 6 of AES Ohio's Exhibits, respectively. Significantly Excessive Earnings Test Schedules 1-10 ("AES Ohio Ex. 3"). Those schedules make the first four adjustments listed above (the fifth adjustment is an alternative to adjustment 1) and show that AES Ohio's ROE was 0.7% in 2018 and 2.0% in 2019, which ROEs are well below the Retrospective SEET thresholds. Order, ¶ 67.

The remaining Schedules in AES Ohio Ex. 3 show that AES Ohio would pass the Retrospective SEET even if only certain adjustments (or combinations of adjustments) were made. AES Ohio Ex. 3, Schedules 2-5, 7-10; Dec. 23, 2020 Supplemental Direct Testimony of R. Jeffrey Malinak ("AES Ohio Ex. 2"), pp. 25-26.

A. The DMR should be excluded from the Retrospective SEET

As shown below, AES Ohio's DMR revenue should be excluded from earnings considered in the Retrospective SEET analysis for three separate and independent reasons. If just that adjustment was made, AES Ohio Ex. 3 shows that AES Ohio's ROE was 3.3% in 2018 (Schedule 2) and 11.7% in 2019 (Schedule 7). Those ROEs are below the applicable SEET thresholds. Order, ¶ 67.

1. The DMR was not an "earned return"

AES Ohio Witness Garavaglia explained that the ESP III Stipulation included significant restrictions on AES Ohio's use of its revenue. Dec. 23, 2020 Direct Testimony of Gustavo Garavaglia M. ("AES Ohio Ex. 7"), p. 7. Specifically, AES Ohio was required to use all of its DMR revenue to make debt payments at AES Ohio and DPL Inc., to position AES Ohio to implement Smart Grid. Id. Further, to ensure that AES Ohio did not use the DMR revenue to

pay debt, but then use other revenue to pay dividends to AES, the ESP III Stipulation prohibited AES Ohio Inc. from making dividend or tax sharing payments to AES. Id. at 8.

AES Ohio Witness Garavaglia demonstrated that the DMR should not be considered "earned return" under R.C. 4928.143(F) because of those restrictions:

> **"Q. Were the DMR proceeds similar to other revenue that is typically earned by utilities?**
>
> A. No. Utilities are typically free to use the revenue that they earn for any lawful purpose. Utilities can dividend their revenue to shareholders; utilities can use their revenue to invest in infrastructure or to pay expenses. The [AES Ohio] DMR however, had restrictions on its use such that it could not be used for these purposes; instead, it was restricted to be used only to pay and reduce debt obligations. ESP III Stipulation at pp. 3-4. Therefore, the DMR proceeds were not similar to revenue that is typically earned by utilities.
>
> **Q. Was the DMR an 'earned return on common equity' (R.C. 4928.143(F)?**
>
> A. No. As discussed above, [AES Ohio] could not dividend or otherwise provide the DMR proceeds to AES or its shareholders. Instead, [AES Ohio] was required to use the DMR proceeds to make interest and principal payments at [AES Ohio] and DPL Inc. The DMR proceeds thus were not an 'earned return' because [AES Ohio]'s use of those funds was significantly restricted, and those proceeds could not be provided to AES or its shareholders.
>
> **Q. Do the restrictions in the ESP III Stipulation on making dividend or tax sharing payments to AES affect whether the DMR was an earned return?**
>
> A. Yes. The provisions in ESP III Stipulation, pp. 3-4 that precluded [AES Ohio] and DPL Inc. from making dividend or tax sharing payments to AES further confirm that the DMR was not an earned return. Specifically, the purpose of those provisions was to prevent [AES Ohio] from using DMR proceeds to pay debt while using other proceeds to make payments to AES. The prohibitions against making

> payments to AES thus reinforced the prohibition against providing DMR proceeds to AES, further confirming that the DMR proceeds were not an 'earned return.'"

AES Ohio Ex. 7, pp. 10-11 (Dec. 23, 2020 Garavaglia Test.).

The Commission concluded (¶ 65) that the DMR proceeds should be included in the SEET pursuant to the Supreme Court's decision that First Energy's DMR proceeds had to be included in its SEET. See In re Application of Ohio Edison Co., Cleveland Elec. Illuminating Co., and Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to 4928.143 in the Form of an Electric Security Plan, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 19. However, that decision is not applicable because First Energy could not and did not make this argument in that case.

Specifically, in 2019, a Supreme Court plurality held that FirstEnergy's DMR was not lawful because there were no "real requirements, restrictions, or conditions imposed by the commission for use of DMR funds." Id. FirstEnergy's DMR proceeds were audited, and the auditor concluded that those proceeds were placed in a pool so that the funds could "benefit[] non-Ohio regulated companies" and be "used to pay dividends." In re Ohio Edison, Case No. 17-2474-EL-RDR ("FirstEnergy DMR Audit"), Oxford Advisory Mid-Term Report (June 14, 2019), p. 19. FirstEnergy increased its dividend to its shareholders while receiving its DMR. Id. at pp. 36-37.

In contrast, AES Ohio's DMR funds were used exclusively to make debt payments for AES Ohio and DPL Inc., and AES has received no dividends from AES Ohio or DPL Inc. since 2012. AES Ohio Ex. 7, p. 8 (Dec. 23, 2020 Garavaglia Test.). The audit of AES Ohio's DMR confirmed those points. In re The Dayton Power and Light Company, Case No. 18-

264-EL-RDR ("AES Ohio DMR Audit"), Oxford Advisors Mid-Term Report (June 14, 2019), pp. 11-14.

Thus, unlike AES Ohio, FirstEnergy could not and did not argue to the Supreme Court that its use of its DMR proceeds was restricted and the DMR therefore did not constitute an "earned return." The Supreme Court's ruling that FirstEnergy's DMR proceeds should be included in the SEET does not address the issue presented here, so the Commission is free to find that AES Ohio's DMR revenue is not an earned return due to significant restrictions placed upon that revenue.

2. The DMR should be excluded from AES Ohio's earned return as an extraordinary and one-time item

The Commission found that the DMR was not an "extraordinary" charge and should thus be included in AES Ohio's revenue. Order at ¶ 65. The Commission has held that "for the SEET calculation, the earned return will . . . exclud[e] any non-recurring, special, and extraordinary items." In the Matter of the Investigation of the Development of the Significantly Excessive Earnings Test, Case No. 09-786-EL-ENC, Finding and Order (June 30, 2010), p. 18.

The DMR constitutes a "non-recurring" item that should be excluded from AES Ohio's earned return because the DMR was in place for only a limited amount of time. AES Ohio Ex. 7, p. 12 (Dec. 23, 2020 Garavaglia Test.). Specifically, the DMR was scheduled to last for three years. Id. The Commission terminated the DMR before those three years had passed. Id. The DMR was thus a non-recurring item that should be excluded from AES Ohio's earned return. Id. Indeed, the Commission acknowledged that "there is a strong presumption that all ESP charges are limited in duration to the length of the ESP"; thus, the DMR is non-recurring. Order at ¶ 65.

The DMR also constitutes a "special" and "extraordinary" item that should be excluded from AES Ohio's earned return. The DMR was approved under R.C. 4928.143(B)(2)(h), and was intended to allow AES Ohio to improve its financial integrity to incentivize AES Ohio to implement grid modernization. In re The Dayton Power and Light Company, Case No. 16-0395-EL-SSO, et al. ("ESP III"), Opinion and Order (Oct. 20, 2017), ¶¶ 36-38, 100.

The only other utility in the state that has had a similar charge was FirstEnergy. However, AES Ohio's DMR was materially different from FirstEnergy's DMR, for two reasons:

1. As demonstrated above, AES Ohio's use of its DMR funds was significantly restricted. AES Ohio Ex. 7, p. 7 (Dec. 23, 2020 Garavaglia Test.). As also demonstrated above, the Supreme Court plurality held that FirstEnergy's DMR was not lawful because there were no "real requirements, restrictions, or conditions imposed by the commission for the use of DMR funds." In re FirstEnergy, 2019-Ohio-2401 at ¶ 19.

2. In addition, the Court's plurality explained that the "critical problem" with FirstEnergy's DMR was that FirstEnergy was not "required" to make any investment to modernize the distribution grid. Id. at ¶ 18 (emphasis is original). In contrast, the Commission specifically held that AES Ohio was "required to implement the modernization plan." ESP III, Third Entry on Rehearing (Sept. 19, 2018), ¶ 22 (emphasis in original).

AES Ohio's DMR was thus unique in the state of Ohio. Further, Dr. Duann admitted that he was not aware of any similar rider for any other utility in the country. Tr. Vol. V at 882. Accord: AES Ohio Ex. 2, p. 38 (Dec. 23, 2020 Malinak Test.). The fact that the DMR was adopted pursuant to the terms of an ESP should not be dispositive of whether the charge is "extraordinary." Order ¶ 65. Such an analysis would swallow the entire concept of excluding "non-recurring, special and extraordinary items" because all charges subject to the SEET are established pursuant to an ESP.

Significantly, FirstEnergy argued to the Supreme Court that its DMR was an extraordinary item that should be excluded from the SEET, but the Court declined to consider that issue because the Commission did not expressly address that issue in its order. In re Determination of Existence of Significantly Excessive Earnings for 2017 under Elec. Sec. Plan of Ohio Edison Co., ("In re FirstEnergy SEET Application"), 162 Ohio St.3d 651, 2020-Ohio-5450, 166 N.E.3d 1191, ¶ 39-50. Whether AES Ohio's DMR is an "extraordinary" item that should be excluded from the Retrospective SEET is thus an open issue that this Commission may decide without violating any important regulatory principle or practice. This Commission should conclude that the DMR was an extraordinary item that should be excluded from the SEET.

3. The DMR was a capital charge that should be excluded from AES Ohio's earned return

As discussed above, AES Ohio's use of the DMR funds was severely restricted and dividend payments could not be made to AES during the term of the DMR. ESP III Stipulation, pp. 3-4. For these reasons, AES Ohio Witness Garavaglia explained that the DMR should also be excluded from AES Ohio's earned return because it was a capital charge:

> **"Q. Do you consider the DMR to be a capital charge?**
>
> A. Yes. As discussed above, the DMR proceeds were restricted to being used to pay and reduce debt, so that [AES Ohio] could borrow under reasonable terms to fund grid modernization. The DMR was thus targeted at altering [AES Ohio]'s capital structure and was therefore a capital charge.
>
> **Q. What conclusions do you draw from that fact?**
>
> A. I understand that the SEET statute allows the Commission to make appropriate adjustments related to a utility's capital structure. R.C. 4928.143(F). Since the DMR was a capital charge, it should not be treated as revenue and should be excluded from the SEET."

AES Ohio Ex. 7, pp. 12-13 (Dec. 23, 2020 Garavaglia Test.).

The plurality in the FirstEnergy SEET case expressly refused to decide the merits of this issue (In re FirstEnergy SEET Application, 2020-Ohio-5450, ¶ 33-36), so it is an open issue for the Commission. See also id. ¶ 112-13 (Kennedy, J., dissenting in part) (stating that the FirstEnergy DMR related to its capital structure, and the Commission had discretion to exclude the DMR revenue from earned return on that basis). The Commission is thus free to decide this issue and should exclude the DMR revenue from the SEET since the DMR was a capital charge.

B. AES Ohio's asset impairments should be included in its equity balance

As the Commission knows, AES Ohio's shareholders have invested billions of dollars in AES Ohio over the years. As the Commission also knows, due to a decline in the fair value of AES Ohio's generation assets, AES Ohio has written off over $1 billion of the value of those assets. AES Ohio Ex. 3, Schedule 3, Line 19; AES Ohio Ex. 3, Schedule 8, Line 21. That is money that AES Ohio's shareholders invested in AES Ohio that they will not be able to recover or earn a return on.

R.C. 4928.143(F) allows the Commission to make "adjustments for capital structure as may be appropriate." AES Ohio Witness Malinak explained that it would be "appropriate" for the Commission to include those write offs in AES Ohio's equity balance for the Retrospective SEET to reflect the return that AES Ohio's shareholders actually earned or their investments. AES Ohio Ex. 2, pp. 15-16 (Dec. 23, 2020 Malinak Test.) (emphasis in original) (footnotes omitted).

Indeed, in 2014, the Commission held that AES Ohio's divestiture of its generation assets constituted an "extraordinary event" and that the financial impact of that event

should be excluded from the SEET. In re The Dayton Power and Light Company, Case No. 13-2420-EL-UNC, Finding and Order (Sept. 17, 2014), p. 9.

Significantly, OCC Witness Duann testified:

"Q. Okay. I want to ask you a hypothetical. Suppose a shareholder makes an equity infusion of a million dollars into a utility, and the utility uses that million dollars to invest in the generation asset. If a utility then has – that's its only asset and it has $50,000 in earnings, my math is that would be a 5 percent ROE; is that right?

A. Okay. Let – let's come back a little bit. Say for a particular year when a utility has $1 million you say in equity?

Q. $1 million in equity and $50,000 in earnings.

A. Yes. And for that particular year that utility has return on equity of 5 percent.

* * *

Q. Second hypothetical, the utility has written off $900,000, taken an impairment on the assets, so there is $100,000 left in equity. The utility has the same asset, and in the year in question it again has $50,000 in earnings. In that situation, the utility's ROE would be 50 percent, right?

A. Well, it is – it – if that utility has written off that – that $900,000 so it's left will $100,000, yes, your rate of return would be 50 percent and that's what the accounting standards say.

* * *

Q. . . . Well, in this hypothetical question, the utility's ROE increased significantly simply because the utility had written of $900,000 worth of the equity associated with that asset, correct?

A. Yes. That's correct."

Tr. Vol. V at 889, 891-93 (emphasis added).

Dr. Duann conceded that one of the purposes of the SEET is to ensure that AES Ohio's shareholders do not receive an excessive return. Id. at 888. It makes no sense that a utility would be found to have excessive returns simply because the value of its assets declined in a prior period.

The impairment adjustment is shown on Schedules 3 and 8, which reflect that after just this adjustment is made, AES Ohio's ROE was 6.8% in 2018 and 8.5% in 2019. AES Ohio Ex. 3. Those ROEs are well below the applicable SEET thresholds. Order, ¶ 67.

C. The Commission should make adjustments associated with AES equity investments and tax law changes

This section demonstrates that the Commission should make the following adjustments in conducting the Retrospective SEET:

i. The Commission should include in AES Ohio's equity balance $300 million in investments that AES has made or plans to make in AES Ohio;

ii. The Commission should make adjustments to AES Ohio's earnings and equity balance associated with changes to certain tax laws.

Schedules 4 and 9 show that after just these adjustments are made, AES Ohio's ROE was 13.2% in 2018 and 13.9% in 2019. AES Ohio Ex. 3. Those ROEs are well below the applicable SEET thresholds. Order, ¶ 67.

1. The Commission should adjust AES Ohio's equity balance to include $300 million in AES equity investments

R.C. 4928.143(F) provides that in conducting the Retrospective SEET, the Commission must "[c]onsider[]" any "capital requirements of future committed investments in this state." The testimony of AES Ohio Witness Garavaglia shows that AES Ohio has committed capital investments in this state totaling $939 million over the next five years. AES

Ohio Ex. 7, p. 14 (Dec. 23, 2020 Garavaglia Test.). Those investments consist of $249 million for Smart Grid, $510 million in distribution investment, and $180 million in transmission investments. Id. To allow AES Ohio to make those capital investments, AES invested $150 million in AES Ohio in 2020, and plans to invest another $150 million in 2021. Id. at 8-9, 14-15.

The Commission did consider those equity investments, and cited them in support of its conclusion that refunds should not be issued despite the Commission's conclusion that AES Ohio's earnings exceeded the applicable SEET thresholds. Order, ¶ 68. AES Ohio agrees that to the extent that it is found to have earnings that exceeded the thresholds, then the planned investments should be considered and used to offset any refunds as the Commission did. In addition, however, the Commission should consider those investments as an adjustment to AES Ohio's equity balance for 2018 and 2019.

Specifically, Mr. Garavaglia's testimony shows that the Commission should include that $300 million in AES Ohio's equity balance:

> "**Q. Do you have a proposal regarding how the Commission should '[c]onsider[] . . . the capital requirements of future committed investments in this state' when conducting the SEET (R.C. 4928.143(F))?**
>
> A. Yes. The Commission should include the $300 million in AES equity investments in [AES Ohio]'s equity balances for 2018 and 2019.
>
> **Q. Why is that proposal reasonable?**
>
> A. As an initial matter, that $300 million is a capital requirement necessary to support the investments to which [AES Ohio] was committed in 2018-2019 (and remains committed to today). Further, given that the Commission is required to 'consider[]' capital requirements associated with 'future committed investments' when conducting the SEET,

> it is reasonable to include the equity investments associated with those capital requirements.
>
> The Commission should thus 'consider[] . . . future committed investments in this state' by including AES' equity contribution to [AES Ohio]'s equity balances in 2018 and 2019 in the SEET."

Id. at 17.

The Commission should thus "[c]onsider[]" AES Ohio's "future committed capital investments" and conclude that the $300 million in AES equity investments in AES Ohio should be included in AES Ohio's equity balance for 2018 and 2019.

2. The Commission should make tax adjustments in conducting the SEET

AES Ohio experienced a one-time $18 million tax event in 2019 associated with the TCJA. AES Ohio Ex. 7, pp. 18-19 (Dec. 23, 2020 Garavaglia Test.). AES Ohio Witness Garavaglia explains that the $18 million amount should be excluded from the SEET because: (1) it was a one-time extraordinary event; and (2) the earnings were caused by a change in tax laws, and thus were not caused by AES Ohio's ESP. Id. at 19; see R.C. 4928.143(F) (Commission should consider whether "adjustments" to ESP caused earnings). OCC Witness Duann conceded that he was not aware of any tax cut similar to the TCJA, and the TCJA effects on AES Ohio's earnings were not caused by the ESP statute. Tr. Vol. V at 894-95.

D. The Commission should exclude the RSC from AES Ohio's earnings

Schedules 5 and 10 include AES Ohio's DMR revenue for 2018 and 2019, but exclude revenue that AES Ohio would have earned if the RSC had been in place in those years. AES Ohio Ex. 3. Those Schedules show that after just that adjustment is made, AES Ohio's

ROE was 8.1% in 2018 and 13.5% in 2019. Id. Those ROEs are below the applicable SEET thresholds. Order, ¶ 67.

AES Ohio Witness Garavaglia explains why that adjustment is appropriate:

> "**Q. Why is that adjustment appropriate?**
>
> A. I understand that R.C. 4928.143(F) requires the Commission to determine whether any 'adjustments' made under the then-governing ESP resulted in significantly excessive earnings. I further understand that when determining the amount of such adjustments, the Supreme Court has stated that the Commission must determine whether significantly excessive earnings resulted from '"any change in rates when compared to the rates in the electric utility's preceding rate plan."' In re The SEET of Ohio Edison, 2020-Ohio-5450, ¶ 26 (quoting In re Investigation into the Development of the Significantly Excessive Earning Test, Pub. Util. Comm. No. 09-786-EL-UNC, at 15 (June 30, 2010)).
>
> Before the DMR was approved, [AES Ohio] was operating under ESP I, which included the RSC. In re DP&L's ESP I, Aug. 26, 2016 Finding and Order, ¶ 23 (Case No. 08-1094-EL-SSO). The elimination of the RSC from ESP I and the implementation of the DMR in ESP III thus constituted a 'change in rates when compared to the rates in [AES Ohio's] preceding rate plan,' so the difference between the DMR and the RSC is what should be included in the SEET."

AES Ohio Ex. 7, pp. 20-21 (Dec. 23, 2020 Garavaglia Test.).

If the Commission were to include the DMR in AES Ohio's earnings (it should not), then the Commission should exclude the RSC from AES Ohio's earnings because that was a "change in rates" when AES Ohio changed from ESP I to ESP III.

III. THERE ARE ADDITIONAL REASONS SUPPORTING THE COMMISSION'S DECISION THAT THE RSC WAS LAWFUL

R.C. 4928.143(C)(2)(b) establishes what the Commission is required do after a utility exercises its right to withdraw and terminate its ESP Application under R.C. 4928.143(C)(2)(b):

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

Accord: In re The Dayton Power and Light Company, Case No. 08-1094-EL-SSO, et al., ("ESP I") Finding and Order (Aug. 26, 2016), ¶ 20 ("Pursuant to R.C. 4928.143(C)(2)(b), if the utility terminates an ESP, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO."); In re The Dayton Power and Light Company, Case No. 12-426-EL-SSO, et al. ("ESP II"), Finding and Order, (Aug. 26, 2016), ¶ 14 ("The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to . . . accept the withdrawal of ESP II.").

The Commission was thus required to issue an order that continued the terms of AES Ohio's standard service offer that was in effect when the Commission approved ESP III, i.e., the rates in effect in ESP I pursuant to the August 26, 2016 Finding and Order issued in this case.

Since the RSC was in effect as part of ESP I when ESP III was approved, the Commission was required to reinstitute the RSC when ESP III was terminated. That is an additional reason supporting the Commission's conclusion that the RSC was lawful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: App for Rehearing Application for Rehearing and Memorandum in Support of The Dayton Power and Light Company d/b/a AES Ohio electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company