BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan | : | Case No. 16-0395-EL-SSO |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs | : | Case No. 16-0396-EL-ATA |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13 | : | Case No. 16-0397-EL-AAM |

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# THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS THE DISTRIBUTION MODERNIZATION RIDER

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## TABLE OF CONTENTS

## I. INTRODUCTION AND SUMMARY

As the parties diligently prepare for next month's evidentiary hearing, Industrial Energy Users-Ohio ("IEU") demands that the Commission decide – before it considers any evidence – whether the Distribution Modernization Rider ("DMR") as proposed by The Dayton Power and Light Company ("DP&L") is reasonable and lawful. Nov. 21, 2016 Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider and memorandum in Support ("Motion"). The Commission should deny IEU's Motion as procedurally improper or, alternatively, on the merits.

The Motion is procedurally improper because it asks the Commission (p. 12) to deny the DMR pursuant to Civ.R. 12(B)(6), i.e., for an alleged "failure to state a claim upon which relief can be granted." First, such threshold motions are not permitted in Standard Service Offer ("SSO") proceedings by statute, regulation, or caselaw.[1] Second, such motions are not entertained in Ohio courts after discovery and shortly before trial. Moreover, the Commission is required to hold a hearing in all SSO cases. Ohio Rev. Code § 4928.141(B) ("The Commission shall set the time for hearing of a filing under section . . . 4928.143 of the Revised Code . . . .") (emphasis added). The Commission also is able to modify an application after the hearing, subject to the utility's right to withdraw it. Ohio Rev. Code § 4928.143(C). Dismissing any portion of the Amended Application at this stage would violate DP&L's right to have its application heard.

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[1] July 22, 2015 Entry, p. 7, In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Case No. 14-1297-EL-SSO ("FirstEnergy ESP IV") ("the Commission, as an administrative agency, is not bound by the Ohio Rules of Civil Procedure").

Alternatively, the Commission should deny the Motion on the merits because IEU fails to show "beyond doubt" that DP&L "can prove no set of facts warranting a recovery" – the standard of review for Rule 12(B)(6) motions. Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Disregarding that standard and the duty to "presume that all factual allegations . . . are true and make all reasonable inferences in favor of" DP&L, id., IEU offers a lengthy critique (pp. 4-12) of DP&L's financial condition and its need for the DMR that variously attacks, downplays, and ignores facts asserted by DP&L. Id. Rather than support dismissal, this argument reveals a factual dispute to be resolved at the evidentiary hearing.

In addition, the DMR is lawful pursuant to three separate subdivisions of Ohio Rev. Code § 4928.143: (B)(2)(h), (B)(2)(i), and (B)(2)(d). Although IEU argues (pp. 13, 24) that the DMR violates various corporate separation requirements and prohibitions against the collection of anticompetitive subsidies, transition costs, and the equivalent of transition costs, those provisions are inapplicable given two "notwithstanding" clauses in § 4928.143(B) and the fact that § 4928.143 is the later-enacted statute. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35; Ohio Rev. Code § 1.52(A). Moreover, even if those provisions were applicable, the DMR does not violate them. DP&L is not subject to the corporate separation requirements because it no longer provides competitive retail electric service, and the DMR will not collect an anticompetitive subsidy, transition costs, or the equivalent of transition costs because it is a forward-looking distribution charge that incentivizes grid modernization. Oct. 12, 2016 Fifth Entry on Rehearing, pp. 128, 130, FirstEnergy ESP IV Case.

## II. THE COMMISSION SHOULD DENY THE MOTION TO DISMISS AS PROCEDURALLY IMPROPER

Before considering the merits of the Motion, the Commission should deny the Motion because Rule 12(B)(6) motions to dismiss are not permitted in SSO proceedings. They are not authorized in PUCO proceedings by the Ohio Revised Code, the Ohio Administrative Code, or caselaw of the Supreme Court of Ohio or the Commission. They also conflict with the hearing requirement of Ohio Rev. Code § 4928.141(B), and the right of the Commission to modify SSO applications under Ohio Rev. Code § 4928.143(C).

IEU concedes (p. 12) that the Commission is not subject to the Ohio Rules of Civil Procedure. However, it erroneously argues that Ohio Rev. Code § 4903.082 "directs the Commission to rely on those rules 'wherever practicable,'" including Rule 12. Id. (emphasis added.) A closer look reveals that § 4903.082 is merely a discovery statute – not a pleading statute – and that IEU has cherry-picked language to distort its meaning. The statute reads, in full:

> "All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable."

Ohio Rev. Code § 4903.082 (emphasis added).

IEU's twisted interpretation of § 4903.082 violates well-established rules of statutory construction. For instance, Ohio Rev. Code § 1.42 states that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Ohio Rev. Code § 1.42 (emphasis added). Accord: Smith v. Landfair, 135 Ohio St.3d 89, 2012-

Ohio-5692, 984 N.E.2d 1016 , ¶ 26 ("Words in a statute must be read in context . . . .") (emphasis added). In addition, the Supreme Court of Ohio follows the maxim of noscitur a sociis, i.e. "it is known from its associates." Sunoco, Inc. v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 43 ("Under the doctrine of noscitur a sociis, the meaning of an unclear word may be derived from the meaning of accompanying words."). Here, the context and surrounding words in § 4903.082 show that the statute deals only with discovery matters.

The only other authority that IEU cites to support the use of Rule 12(B)(6) is a case in which the Commission expressly declined to rule on a motion to dismiss and, instead, conducted a full evidentiary hearing, Feb. 13, 2014 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc. for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code, et al., Case Nos. 12-2400-EL-UNC, et al., where the Commission held that it "is not strictly bound by the rules of civil procedure," and that it was proper to "follow a thorough evidentiary process, in order to give all interested parties an opportunity to be heard on the issues pertaining to [the] application." Id. at 15-16. The Commission did not authorize the use of Rule 12 motions — much less, shortly before trial, after discovery.

Allowing tardy Rule 12(B)(6) motions in SSO proceedings would be contrary to the statutory framework adopted in Am. Sub. SB 221. Specifically, Ohio Rev. Code § 4928.141(B) provides that "[t]he commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code." (Emphasis added.) Thus, dismissing any portion of the Amended Application would violate DP&L's right to have its proposal heard. Additionally, the Commission has the right to modify DP&L's application, subject to DP&L's right to withdraw it. Ohio Rev. Code § 4928.143(C). Dismissal would undermine that process.

## III. TO PREVAIL ON THE MERITS OF ITS MOTION, IEU MUST SHOW BEYOND DOUBT THAT NO SET OF FACTS SUPPORTS THE DMR

If the Commission considers the merits of the Motion, then it must follow the same standard of review for Rule 12(B)(6) motions that is applied by Ohio's courts. "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ. R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." O'Brien v. Univ. Community Tenants Union, Inc., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus (emphasis added) (citing Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed2d 80 (1957)). Accord: Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Such dismissals are "unusual and should be granted with caution." State ex rel. Lindenschmidt v. Bd. of Comm'rs, 72 Ohio St.3d 464, 467, 650 N.E.2d 1343 (1995).

Consideration of a Rule 12(B)(6) motion "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." Mitchell, 40 Ohio St.3d at 192, 532 N.Ed.2d 753. The Supreme Court of Ohio has cautioned further that "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." York v. Ohio State Hwy. Patrol, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991) (emphasis added).

## IV. THE FACTS SHOW THAT THE DMR IS NECESSARY FOR DP&L TO PROVIDE STABLE AND CERTAIN UTILITY SERVICE AND TO MAINTAIN, MODERNIZE, AND GROW EXISTING TRANSMISSION AND DISTRIBUTION INFRASTRUCTURE

Despite its burden to show "beyond doubt" that "no set of facts" support the DMR,[2] IEU spends eight pages of its Motion (pp. 4-12) variously attacking, downplaying, and ignoring the facts in the Amended Application and supporting testimony. Its factual arguments reveal a factual dispute that supports the need for an evidentiary hearing.

As R. Jeffrey Malinak explains in his testimony, "it is evident that both DPL [Inc.]'s and DP&L's financial integrity is already impaired." Oct. 31, 2016 Direct Testimony of R. Jeffrey Malinak, p. 4. The companies have a "'junk'" rating by Standard and Poor's, and they are on negative outlook at the three major credit rating agencies. Id. DP&L also "has limited or no access to reasonably priced debt capital or equity capital to finance growth or significant infrastructure improvements and grid modernization." Id.

A number of factors have driven this outlook:

"1. Load growth has been anemic at best with the combination of a slow economic recovery and increased energy efficiency holding down demand for electricity.

2. On June 20, 2016 the Supreme Court of Ohio reversed the Commission's Order in Case No. 12-426-EL-SSO. Beginning in September 2016, DP&L began collecting significantly less under its ESP I rates than it had under its ESP II rates.

3. On May 24, 2016, PJM posted the results of its 2019/2020 delivery year Reliability Pricing Model ('RPM') Base Residual Auction (BRA), which cleared at only $100 per MW-day.

[2] O'Brien v. Univ. Community Tenants Union, Inc., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

> This action, along with prior year auctions for PJM's RPM capacity market, have produced prices well below PJM's calculation of the 'Net Cost of New Entry.'
>
> 4. Natural gas has continued to trade around historically low prices, which has impacted power prices and ultimately, the $/MWh energy margins or 'dark spreads' realized by coal plants have decreased due to low power prices."

Oct. 11, 2016 Direct Testimony of Craig L. Jackson, p. 8. These factors "have strained the financial performance" and have "reduced cash flow forecasts, and adversely impacted the financial outlook of both companies." Id. For example, when DP&L recently refinanced $445 million of First Mortgage Bonds, its elevated credit risk led investors to require "(a) a short-term maturity (6-years); (b) a relatively high (and variable) cost of borrowing; and (c) a covenant package that, among other things, prevents the Company from raising debt to modernize the transmission and distribution system during the term of the loan." Id. at 10.

DP&L has proposed the DMR to ensure "(a) that both DPL and DP&L could reach an appropriate capital structure and maintain their financial integrity, and (b) that DP&L would have access to equity and debt capital in order to finance transmission and distribution infrastructure and modernization investments." Id. at 12.

> "Without approval of the Company's proposed DMR, both DP&L and DPL would be unable to realize any of the elements essential to a utility's and utility holding company's financial integrity. Specifically, both DPL and DP&L would: (a) have insufficient cash flows to pay all normal course obligations, including but not limited to operating expenses, principal and interest, pension contributions, tax payments, and planned T&D capital expenditures; (b) face an immediate downgrade of their current credit ratings to a below investment grade level; (c) be unable to pay down debt to appropriately capitalize the business; and (d) be unable to provide a reasonable return to equity holders."

Id. at 17. Those outcomes, in turn,

> "would have a deleterious effect on the utility's (a) ability to provide stable and certain utility service to customers, (b) access to debt and/or equity to finance capital expenditures necessary to maintain, modernize or grow existing transmission and distribution infrastructure; (c) access to the debt capital markets to refinance existing obligations; (d) borrowing costs and net cash flows available to maintain its transmission and distribution assets."

Id. at 17-18 (emphasis added).

Rather than construe those facts in DP&L's favor, IEU inconsistently argues (a) that the financial integrity of DP&L and DPL Inc. is not actually at risk (p. 9), (b) that the companies' financial integrity is at risk, but only because of their acquisition by The AES Corporation five years ago (pp. 4-6) or because DP&L has paid dividends to DPL Inc. in order to pay down debt at DPL Inc. (pp. 7-8), and (c) that regardless of whether the companies' financial integrity is or is not at risk, the Commission has allowed too many nonbypassable charges in previous SSO cases (pp. 11-12). These factual disputes do not show "beyond doubt" that "no set of facts" support the DMR. On the contrary, they stress the necessity of an evidentiary hearing. The Motion should be denied for this reason as well.

## V. THE DMR IS LAWFUL PURSUANT TO THREE SEPARATE SUBDIVISIONS OF OHIO REV. CODE § 4928.143(B)(2)

In its Motion, IEU ignores completely the Commission's recent approval of a DMR rider for FirstEnergy's utilities pursuant to Ohio Rev. Code § 4928.143(B)(2)(h). Oct. 12, 2016 Fifth Entry on Rehearing, FirstEnergy ESP IV. DP&L's DMR is authorized by that provision, as well as by Ohio Rev. Code §§ 4928.143(B)(2)(i) and (B)(2)(d). Each subsection constitutes a separate and independent basis for its lawfulness.

### A. The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(h)

Section 4928.143(B)(2)(h) provides that an electric security plan may include:

> "Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."

Ohio Rev. Code § 4928.143(B)(2)(h) (emphasis added).

In FirstEnergy's pending ESP case (Case No. 14-1297-EL-SSO), Staff proposed a DMR pursuant to that subsection so that FirstEnergy's utilities could "provide the appropriately allocated support for First Energy Corporation (FE) to maintain investment grade by the major credit rating agencies." June 29, 2016 Rehearing Testimony of Joseph P. Buckley, p. 2. FirstEnergy's DMR was designed to "to encourage the modernization of the distribution grid, the offerings of innovative services, and the diversity of supply and suppliers." June 29, 2016 Rehearing Testimony of Tamara S. Turkenton, p. 4. Staff argued that the DMR was lawful pursuant to § 4928.143(B)(2)(h) because it is "an incentive mechanism to support modernization of the distribution grid." Aug. 29, 2016 Rehearing Reply Brief Submitted on Behalf of the Staff

of the Public Utilities Commission of Ohio, p. 5. Indeed, Staff observed that the "DMR is even more basic than an incentive. It is a prerequisite to being able to pursue the modernization objective at all." Id. at 5-6 (emphasis added). Staff argued that the reliability requirements in the statute were met because (1) the DMR would take the utilities' performance from "good enough to advance," (2) the interests of customers and the utilities were aligned, and (3) "[i]f the companies lose access to credit markets or if the access is constrained, grid modernization, with its significant benefits, may be unattainable." Id. at 6-7.

The Commission agreed that the DMR was authorized by § 4928.143(B)(2)(h). Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 190-191, FirstEnergy ESP IV. Specifically, the Commission found that FirstEnergy's DMR was related to distribution, not generation, and that it was "intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems." Id. at ¶ 190. It also was satisfied by Staff's examination of the reliability requirements of the statute. Id. at ¶ 191. Thus, FirstEnergy's DMR was lawful.

As Craig Jackson explains in his testimony, without the DMR proposed by DP&L, the financial integrity of DP&L and DPL Inc. will continue to be imperiled, and DP&L will not have "access to debt and/or equity to finance capital expenditures necessary to maintain, modernize or grow existing transmission and distribution infrastructure." Oct. 11, 2016 Direct Testimony of Craig L. Jackson, pp. 17-18 (emphasis added). Though IEU complains (p. 21) that DP&L does not have a grid modernization plan on file with the Commission, it fails to note that in the FirstEnergy case, the Commission anticipated the need for future approval of any grid modernization projects enabled by the DMR. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 207. No Commission regulation requires the filing of such a plan. Thus, having a plan on file is not a prerequisite. Perhaps cognizant of similarities between the two DMRs, IEU does not even

address the Commission's approval of FirstEnergy's DMR in its discussion of § 4928.143(B)(2)(h) (pp. 20-22). Instead, IEU cites cases[3] that do not concern the overriding issue for both FirstEnergy and DP&L, i.e., threats to the utilities' financial integrity that could hamper grid modernization. Thus, those cases are of little value.

DP&L's DMR is a distribution charge that incentivizes and makes grid modernization possible. Jackson, pp. 17-18. As with FirstEnergy's DMR, it would improve DP&L's performance, the interests of customers and DP&L are aligned, and without the DMR, "grid modernization, with its significant benefits, may be unattainable." Aug. 29, 2016 Rehearing Reply Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, p. 7 (Case No. 14-1297-EL-SSO). Accord: Jackson, pp. 17-18. In addition, the DMR constitutes single-issue or incentive ratemaking as it concerns a specific issue (i.e., ensuring DP&L's financial integrity) and is intended to incentivize DP&L's ability to obtain capital for grid modernization. Thus, the charge is authorized pursuant to § 4928.143(B)(2)(h).

### B. The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(i)

The DMR is separately and independently authorized pursuant to Ohio Rev. Code § 4928.143(B)(2)(i), which provides that electric security plans may include:

> "Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs

[3] Mar. 18, 2009, Opinion and Order, pp. 34-36 In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, et al., Case Nos. 08-917-EL-SSO, et al.; Dec. 19, 2008 Opinion and Order, In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan, et al., Case Nos. 08-935-EL-SSO, et al.

> across all classes of customers of the utility and those of electric distribution utilities in the same holding company system."

Ohio Rev. Code § 4928.143(B)(2)(i) (emphasis added.)

Contrary to IEU's claim (p. 23) that "DP&L has not set forth any claims in its Amended Application or prefiled testimony that the DMR will result in economic development, job retention, or is related to energy efficiency programs," witness Malinak's testimony (p. 64) explains that "all residential, commercial, industrial, and governmental customers in West Central Ohio would benefit from the economic development, new jobs, and investment in human and physical capital that would be caused by the grid modernization projects," which as witness Jackson notes, would not be possible without the DMR supporting DP&L's financial integrity. Malinak, p. 64; Jackson, pp. 5-6; 12-13. Thus, the requirements of § 4928.132(B)(2)(i) are also satisfied.

### C. The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(d)

Finally, the DMR is separately and independently authorized by Ohio Rev. Code § 4928.143(B)(2)(d), under which an electric security plan may include,

> "without limitation . . . [t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service."

"Thus, a proposed item in an ESP is authorized if it meets three criteria: (1) it is a term, condition, or charge, (2) it relates to one of the listed items (e.g., limitations on customer shopping, bypassability, carrying costs), and (3) it has the effect of stabilizing or providing

certainty regarding retail electric service." In re Application of Columbus S. Power Co., Case No. 2013-0521, slip op. No. 2016-Ohio-1608, ¶ 43 (Sup. Ct. Ohio Apr. 21, 2016). Accord: Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 97, FirstEnergy ESP IV.

The DMR satisfies the first condition of (B)(2)(d) because it would consist of a charge, incurred by customers. Id. ¶ 98. It meets the second condition because it relates both to "bypassability" as a nonbypassable charge and "default service" since it would ensure the financial integrity of DP&L, thus enabling DP&L to continue providing SSO (i.e., "default") service to customers. Sept. 4, 2013 Opinion and Order, p. 21 In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al., Case No. 12-426-EL-SSO, et al. Finally, the DMR satisfies the third condition by ensuring DP&L's financial integrity and access to capital; therefore, it would have the effect of stabilizing or providing certainty regarding retail electric service. Jackson, pp. 17-18 (testifying that without the DMR, there would be a "deleterious effect" on DP&L's ability "to provide stable and certain utility service to customers"). Thus, the DMR is authorized pursuant to this subdivision as well.

## VI. THE DMR IS NOT BARRED BY CORPORATE SEPARATION REQUIREMENTS OR PROHIBITIONS AGAINST ANTICOMPETITIVE SUBSIDIES, TRANSITION COSTS OR THE EQUIVALENT OF TRANSITION COSTS

IEU argues (pp. 13-17; 24-27) that the DMR violates the corporate separation requirements in Ohio Rev. Code § 4928.17 and Ohio Admin. Code § 4901:1-37-04, as well as the prohibitions against collecting anticompetitive subsidies in Ohio Rev. Code § 4928.02(H), transition costs in Ohio Rev. Code §§ 4928.38 and 4928.141, and the equivalent of transition costs in Ohio Rev. Code § 4928.38. Each of those provisions, however, is inapplicable to the DMR. Moreover, even if they were applicable, the DMR does not violate them.

### A. The DMR Is Lawful "Notwithstanding" Corporate Separation Requirements and Prohibitions against Collecting Anticompetitive Subsidies, Transition Costs and the Equivalent of Transition Costs

As shown in Section V., the DMR is authorized pursuant to Ohio Rev. Code § 4928.143(B), which contains not one, but two "notwithstanding" clauses. Each "notwithstanding" clause gives the DMR precedence over nearly every other provision of Title XLIX, including but not limited to the corporate separation requirements and prohibitions against the collection of anticompetitive subsidies, transition costs, and the equivalent of transition costs cited by IEU.

The first "notwithstanding" clause appears in § 4928.143(B), which provides:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code . . . ." Ohio Rev. Code § 4928.143(B) (emphasis added).

Similarly, Section 4928.143(B)(2)(h) states, in pertinent part:

> "Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. " Ohio Rev. Code § 4928.143(B)(2)(h) (emphasis added).

The Supreme Court interprets "notwithstanding" clauses broadly, holding that they "indicate[] the General Assembly's intention" that a given provision "take[s] precedence over any contrary statute purporting to limit" that provision. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35 (emphasis added). Accord: Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("[A] 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the

'notwithstanding' section override conflicting provisions of any other section. . . .") (emphasis added).

The "notwithstanding" clauses in § 4928.143 establish that the DMR is lawful even if the Commission were to conclude that the DMR violates the requirements or prohibitions cited by IEU. The "notwithstanding" clause of § 4928.143(B)(2)(h) contains no exceptions, and the "[n]otwithstanding" clause of § 4928.143(B) does not exclude the provisions concerning corporate separation, anticompetitive subsidies, and transition costs and their equivalent. Ohio Rev. Code §§ 4928.02(H), 4928.17. 4928.38 and 4928.141, and Ohio Admin. Code § 4901:1-37-04. Thus, those provisions are inapplicable to whether the DMR is lawful.

### B. The DMR Is Lawful Because Ohio Rev. Code § 4928.143 Is the Later-Enacted Statute

There is a separate and independent reason that the DMR does not violate corporate separation requirements of Ohio Rev. Code § 4928.17, and the prohibitions against the collection of anticompetitive subsidies under Ohio Rev. Code § 4928.02(H) and transition costs or their "equivalent" under Ohio Rev. Code § 4928.38, all of which were enacted in 1999 as part of S.B. 3. Specifically, the DMR is lawful pursuant to three separate subdivisions of § 4928.143, which was enacted nine years later, in 2008, as part of Am.Sub.S.B. 221.

Since § 4928.143 was enacted after those provisions, a charge approved under subdivisions (B)(2)(h), (B)(2)(i), and (B)(2)(d) is lawful even if it violates their corporate separation requirements or allows the collection of anticompetitive subsidies or transition costs or their equivalent. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

### C. The DMR Does Not Violate Corporate Separation Requirements or Prohibitions against Collecting Anticompetitive Subsidies, Transition Costs and the Equivalent of Transition Costs

Even if the Commission was to apply the corporate separation requirements of Ohio Rev. Code § 4928.17 and the prohibitions against collecting anticompetitive subsidies in Ohio Rev. Code § 4928.02(H), transition costs in Ohio Rev. Code §§ 4928.38 and 4928.141, and the equivalent of transition costs in Ohio Rev. Code § 4928.38, the DMR does not violate those provisions.

First, the corporate separation requirements of § 4928.17 no longer apply to DP&L's generation services – the concern raised by IEU (p. 14). Section 4928.17(A)(1) states that a corporate separation plan must provide "for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate." DP&L does not provide a "competitive retail electric service" (DP&L sells all of its generation at wholesale and has sold DPLER), and DP&L no longer engages in the business of competitive retail electric service as it relates to generation; thus, the corporate separation requirements of § 4928.17 no longer apply in that regard.

The DMR also does not violate Ohio Admin. Code § 4901:1-37-04, which merely amplifies § 4928.17. Yet even if the DMR did violate that rule, its requirements may be waived by the Commission. Ohio Admin. Code § 4901:1-37-04(C) ("Unless otherwise approved by the commission, the financial arrangements of an electric utility are subject to the following restrictions . . . .") (emphasis added). Moreover, the DMR does not make DP&L responsible for the debt of DPL Inc. (see, p. 16); rather, DP&L is "notched" to DPL Inc. for purposes of credit ratings. This "notching" has a direct effect on DP&L's ability to finance and attract capital necessary to maintain and modernize the distribution and transmission systems.

Second, the DMR is not an anticompetitive subsidy. In approving FirstEnergy's DMR, the Commission explained that the charge "is intended to provide credit support to the Companies in order to avoid a downgrade in credit ratings," which in turn "will allow the Companies to access the capital markets in order to fund needed investments in grid modernization . . . ." Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 281, FirstEnergy ESP IV. The Commission was satisfied that ongoing Staff review of FirstEnergy's DMR would ensure that the affiliates would not receive an unlawful subsidy, and noted with approval that FirstEnergy's stakeholders were sharing in the burden of improving its financial health. Id. ¶ 282, 283.

So too here. DP&L's DMR also is intended to provide credit support in order to avoid a downgrade in credit ratings, which in turn will enable it to access capital markets in order to fund needed investments in grid modernization. Jackson, pp. 17-18. Moreover, DP&L and DPL Inc. have already taken several strategic actions to improve their financial integrity, including (1) the sale of East Bend generating station, (2) the sale of competitive retail electric services (MC Squared Energy Services, LLC and DPL Energy Resources, LLC), and (3) debt prepayment. Jackson, p. 18. Moreover, DPL Inc.'s parent company, The AES Corporation, has foregone dividends and tax sharing payments since 2012. Id. Thus, the DMR does not violate Ohio Rev. Code § 4928.02(H). Moreover, DP&L does not have generation specific debt (IEU, p. 24); rather, the DMR will be used to pay down all debt at DP&L and DPL Inc.

Third, the DMR does not collect transition costs or their equivalent. Transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). Ohio Rev. Code § 4928.39(A) ("The costs were prudently incurred.") (emphasis added); Ohio Rev. Code § 4928.39(B) ("The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to

electric consumers in this state.") (emphasis added); In re Application of Columbus S. Power Co., slip op. No. 2016-Ohio-1608, ¶ 22 (Sup. Ct. Ohio Apr. 21, 2016).

As the Commission found in the FirstEnergy case, there is no "transition" involved here. DP&L is already providing its SSO service through 100% competitive bidding. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 287, FirstEnergy ESP IV. Moreover, the DMR is an amount that will allow DP&L to provide safe and reliable retail electric service and make necessary investments to modernize and maintain the Company's distribution and transmission systems. Furthermore, the DMR is markedly different than AEP's RSR and also DP&L's previously-approved SSR (IEU, p. 26) – it is designed to provide DP&L with a path to pay down debt to allow investments and modernization of the distribution and transmission grid.

In its Amended Application and supporting testimony, DP&L demonstrates why its financial integrity is imperiled, and the necessity of the DMR. The fact that IEU does not agree with those facts is not grounds for dismissal; it is grounds for an evidentiary hearing. Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

## VII. CONCLUSION

For these reasons, the Court should deny Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider as procedurally improper or, alternatively, on the merits, and proceed in due course with its review of DP&L's Amended Application.

Respectfully submitted,

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I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider has been served via electronic mail upon the following counsel of record, this 6th day of December, 2016:

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