BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	)))	Case No. 16-395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case No. 16-396-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. 16-397-EL-AAM

REPLY TO 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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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

In its Motion to Dismiss the request of The Dayton Power and Light Company ("DP&L") for authorization of the Distribution Modernization Rider ("DMR"), Industrial Energy Users-Ohio ("IEU-Ohio") demonstrated that DP&L's request would violate statutory requirements for corporate separation, cannot be lawfully authorized as a term of an electric security plan ("ESP") under R.C. 4928.143(B), would violate the prohibition of anticompetitive subsidies under R.C. 4928.02(H), and would violate the prohibition of authorization of transition revenue or its equivalent under R.C. 4928.38.[1]

[1] Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider and Memorandum in Support (Nov. 12, 2016) ("IEU-Ohio Motion to Dismiss").

DP&L responds that the Public Utilities Commission of Ohio ("Commission") is without authority to grant a motion to dismiss in a case in which DP&L is seeking authorization of an ESP. Second, it offers a defense of the DMR.[2]

DP&L's first claim, that the Commission is without authority to dismiss provisions of the ESP application, is wholly without merit. The Commission is charged by R.C. 4901.13 to regulate the mode and manner of all hearings. Under its statutory authority, the Commission has dismissed applications that failed to state grounds for relief as a means of conserving not only its resources but those of the interested parties from the waste associated with applications for relief that the Commission cannot lawfully address. In this regard, the Commission previously has dismissed an application for a standard service offer ("SSO") in a case in which the applicant did state adequate grounds for relief.

Because the DMR violates both state law and Commission rules, no hearing is required to address DP&L's request for the DMR. Contrary to DP&L's assertions that there are factual issues concerning the DMR that the Commission must decide, DP&L's amended application and its testimony in support of the DMR demonstrate that the DMR cannot be lawfully authorized as a term of an ESP. Accordingly, the Commission should dismiss the request for the DMR.

II. THE COMMISSION IS AUTHORIZED TO DISMISS AN APPLICATION FOR AN SSO THAT, AS A MATTER OF LAW, CANNOT BE AUTHORIZED BY IT

In its Motion to Dismiss, IEU-Ohio stated that it was seeking dismissal of the request for authorization of the DMR because DP&L had failed to state a claim on which

[2] The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider (Dec. 6, 2016) ("DP&L Memo Contra").

the Commission could grant relief.[3] In its memorandum opposing IEU-Ohio's Motion to Dismiss, DP&L asserts that motions to dismiss are not permitted in SSO proceedings.[4] In support of this extraordinary claim, DP&L argues that R.C. 4903.082 does not authorize the Commission to apply Civil Rule 12 standards to its proceedings and "dismissing any portion of the Amended Application would violate DP&L's right to have its proposal heard" under R.C. 4928.141(B) and the Commission's right to modify an application.[5] These claims are unsupported by Ohio law and long-standing Commission precedent.

In its Memo Contra, DP&L initially provides a technical argument that the Commission's authority to rely on Civil Rule standards to govern its management of its docket is somehow limited to only discovery based on R.C. 4903.082. As provided by that section, the Commission may look generally to the Rules of Civil Procedure. While other parts of that section address discovery, the general statement concerning the Commission's discretion to consider the Civil Rules is not limited to discovery. In this regard, the statute should be given its plain meaning.

DP&L's argument also ignores that the General Assembly has afforded the Commission broad authority to manage its docket. Under R.C. 4901.13, the "commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all … hearings relating to parties before it." "Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings."[6] Further, "[i]t is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how,

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[3] IEU-Ohio Motion to Dismiss at 12.

[4] DP&L Memo Contra at 3.

[5] *Id.* at 4.

[6] *Duff v. Pub. Util. Comm'n of Ohio*, 56 Ohio St.2d 367, 379 (1978).

in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort."[7]

In practice, the Commission has frequently granted motions to dismiss without hearing when an applicant has sought relief that the Commission could not lawfully authorize.

In a case involving the Monongahela Power Company, the electric distribution utility ("EDU") sought authorization of an SSO without demonstrating in its application that it had met the statutory requirements to terminate the market development period and implement an auction-based SSO. On a motion to dismiss filed by IEU-Ohio based on the EDU's failure to demonstrate that the statutory conditions were met, the Commission dismissed the application.[8]

Similarly, the Commission granted a motion to dismiss filed by several intervenors of an EDU's application for inclusion of certain projects in its energy efficiency and peak demand reduction ("EE/PDR") compliance plan because the application demonstrated that the projects did not meet statutory requirements.[9]

In a 2011 case, the Commission granted a motion to dismiss a request by the Office of the Ohio Consumers' Counsel ("OCC") for a show cause order against AT&T

[7] *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n of Ohio*, 69 Ohio St.2d 559, 560 (1982) (internal citation omitted).

[8] *In the Matter of the Application of the Monongahela Power Company for Approval of a Market-Based Standard Service Offer and Competitive Bidding Process*, Case No. 03-1104-EL-ATA, Finding and Order at 7-8 (Oct. 22, 2003).

[9] *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case Nos. 09-384-EL-EEC, *et al*., Entry at 2-3 (Dec. 16, 2009).

Ohio because an intervening change of law rendered the request for the show cause order moot.[10]

In a 2004 case, the Commission granted a motion to dismiss filed by a track owner of an application seeking an exemption of the requirement for school buses and carriers of hazardous materials from stopping at a railroad crossing. The dismissal was granted after the Commission Staff submitted a letter demonstrating that the crossing did not meet the statutory requirements for an exemption.[11]

In a 1989 case, the Commission granted a motion to dismiss an application seeking a boundary change for a telephone exchange because the application failed to state sufficient facts to support a finding that service was inadequate as required by the applicable statutes.[12]

This litany of cases demonstrates that the Commission has frequently and properly exercised its authority to dismiss an application without hearing when the application and supporting materials demonstrate that the Commission is without authority to grant the relief requested in the application. DP&L's assertion that the Commission lacks that authority is simply wrong.

DP&L's assertion that it has a right to hearing because it is seeking authorization of an SSO is also without merit. As noted above, the Commission can and has dismissed

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[10] *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case Nos. 06-1013-TP-BLS, *et al.*, Entry at 4 (May 19, 2011).

[11] *In the Matter of a Request for an Exemption from Stopping for School Buses and Other Motor Vehicles at the Highway/Railroad Grade Crossing Located at U.S. Route 6 (477-636E), Village of Napoleon, Henry County*, Case No. 03-2524-RR-RCP, Entry at 1 (June 2, 2004).

[12] *In the Matter of the Petition of Thelma Penwell and Other Subscribers of the Amanda Exchange of GTE North Inc., Requesting a Boundary Change*, 1989 Ohio PUC LEXIS 818 (Aug. 9, 1989).

unlawful applications, even in SSO cases. The right to a hearing does not equate to the right of an EDU to force a hearing on an application containing unlawful terms and conditions that the Commission cannot authorize.

As demonstrated at length in IEU-Ohio's Motion to Dismiss, the request for the DMR cannot be lawfully authorized by the Commission based on the allegations contained in the amended application and supporting testimony. Because the amended application and supporting testimony lead to only one conclusion, that the authorization of the DMR would be unlawful, the Commission is authorized to grant IEU-Ohio's Motion to Dismiss the request for the DMR.[13]

III. THE COMMISSION CANNOT LAWFULLY AUTHORIZE THE DMR AS A TERM OF AN ESP

A. The DMR is not a term that the Commission may authorize under R.C. 4928.143(B)(2)

As the Supreme Court recently held, albeit in a slightly different context, the legality of a charge authorized under an ESP does not turn on the name the utility ascribes to the charge.[14] Rather, it is the true "nature" of the charge that determines its legality.[15] The true nature of the DMR has nothing to do with distribution modernization or any other utility service. As demonstrated in IEU-Ohio's Motion to Dismiss, the DMR is not a term that may be lawfully authorized by the Commission under R.C. 4928.143.[16]

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[13] R.C. 4901.13; *In the Matter of the Application of the Monongahela Power Company for Approval of a Market-Based Standard Service Offer and Competitive Bidding Process*, Case No. 03-1104-EL-ATA, Finding and Order (Oct. 22, 2003).

[14] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 22 ("*Columbus Southern*").

[15] *Id.*

[16] IEU-Ohio Motion to Dismiss at 17-23.

In response, DP&L initially claims that the DMR meets the requirements under (B)(2)(h) and (i) based on the implementation of grid modernization initiatives.[17] While DP&L claims that without the DMR it will not have the access to debt or equity to invest in distribution modernization initiatives, it also does not plan to make any such investments with the DMR. As DP&L makes plenty clear in its testimony, it intends to use the DMR revenue to pay down debt at DP&L and DPL Inc.[18] Even a cursory review of R.C. 4928.143(B)(2) indicates that debt repayment is not a term or condition that may be included in an ESP. Because the true nature of the DMR is debt repayment and not investing in grid modernization initiatives, DP&L's claims that the DMR satisfies the requirements of (B)(2)(h) or (i) is without merit.

Moreover, the vast majority of the debt repayment that the DMR is intended to permit is associated with reducing the acquisition premium debt at DPL Inc. The ESP statute (and the Commission's jurisdiction in general) addresses public utilities, here DP&L. None of the provisions of R.C. 4928.143(B)(2) in any way, shape, or form authorizes the Commission to regulate any other company. Accordingly, the ESP statute cannot be used as a vehicle to secure revenue for DPL Inc. to repay the acquisition premium debt on its books.

DP&L also argues that the DMR may be authorized under (B)(2)(d) because the DMR will have the effect of stabilizing or providing certainty regarding retail electric

[17] As to (B)(2)(i), DP&L claims that the implementation of grid modernization initiatives will result in the investment in "economic development, new jobs, and investment in human and physical capital." Memo Contra at 12. Of course, these claimed benefits assume that DP&L will in fact implement grid modernization initiatives. As DP&L makes clear, it intends to use the DMR for debt repayment and not grid modernization initiatives.

[18] Direct Testimony of Craig L. Jackson at 17 (Oct. 11, 2016).

service.[19] In support of this claim, however, DP&L states that without the DMR DP&L will not make the necessary investments in the distribution network and will instead issue dividends to DPL Inc. to pay off the acquisition premium debt.[20] Such action would violate Ohio's corporate separation requirements and would require DP&L's board of directors to act in DPL Inc.'s best interest and not its own. The lawfulness of the DMR cannot be supported exclusively by a claim that the authorization of the charge will prevent DP&L from taking illegal actions.

DP&L further cites to the Commission's recent decision in FirstEnergy's ESP case in an attempt to bootstrap its newest requested nonbypassable revenue support to an entirely different set of facts. Initially, FirstEnergy had a pending application to implement distribution modernization initiatives before the Commission when the Staff proposed the DMR in the FirstEnergy case. The Commission also found that FirstEnergy's DMR was designed to incent investment in grid modernization. These facts are not present here. Unlike FirstEnergy, DP&L has not filed a smart grid plan; and it was directed to do so no later than July 1, 2014 if it wanted to extend the Service Stability Rider ("SSR") (through the SSR-Extension or "SSR-E").[21] Unlike FirstEnergy, DP&L has indicated that the DMR revenue will not be used for distribution modernization initiatives. Instead, the DMR revenue will be used to pay down debt.[22] And unlike FirstEnergy, DP&L has committed to not seeking to collect the AES acquisition premium (*i.e.* the repayment of the AES

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[19] DP&L Memo Contra at 13.

[20] *See id.*

[21] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 27-28 (Sept. 4, 2013) ("*DP&L ESP II Case*").

[22] IEU-Ohio Motion to Dismiss at 3, 20.

acquisition debt that remains on DPL Inc.'s books and which is the sole cause for all of the claimed financial integrity issues at DP&L and DPL Inc.), which the DMR would fund.[23]

The true nature of DP&L's DMR is to pay down debt, debt that largely results from AES's highly-leveraged takeover of DPL Inc. in 2011. DP&L has not set forth any plan in this case, or any other, to invest in distribution modernization initiatives. Because the true nature of the DMR is to pay down debt that largely resides at DPL Inc., a purpose not authorized under the ESP statute, the Commission should grant IEU-Ohio's Motion to Dismiss.

B. The claim that the Commission may authorize the DMR under R.C. 4928.143 notwithstanding the prohibition in R.C. 4928.38 and 4928.141 should be rejected because it is not supported by legislative intent or the Commission's prior, simultaneous, and subsequent interpretation and application of the regulatory structure applicable to EDUs

DP&L also argues that R.C. 4928.143 permits the Commission to authorize the DMR even if authorization of the DMR would violate other prohibitions contained in Chapter 4928.[24] According to DP&L, the Commission may ignore the various prohibitions on the basis of a "notwithstanding" clause in R.C. 4928.143 or because the later adoption of R.C. 4928.143 silently repeals the previously adopted and conflicting statutes. Its statutory arguments are without merit.

In asserting that the Commission can authorize the DMR, DP&L assumes that the Commission can authorize the DMR under one of the provisions of R.C. 4928.143(B)(2). As discussed above, no provision of that Section authorizes the credit support rider DP&L

[23] *In The Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light* Company, Case No. 11-3002-EL-MER, Finding and Order at 9 (Nov. 22, 2011).

[24] DP&L Memo Contra at 14-15.

is seeking and, as the Court has already held, the failure to demonstrate that the rider is authorized by that section is dispositive.[25]

DP&L's attempt to avoid the application of the various prohibitions that prevent authorization of the DMR by pointing to the "notwithstanding" clause also should be rejected because it violates norms of statutory construction.

The "paramount concern in construing a statute is legislative intent."[26] "Notwithstanding" clauses such as that contained in R.C. 4928.143(B)(2) therefore must be read in light of the "paramount concern" of the legislation.[27]

In this instance, the "notwithstanding" clause in R.C. 4928.143(B)(2) must be read in light of the enactment in the same legislation of R.C. 4928.141, which prohibits an allowance for transition costs, and other provisions that render the DMR unlawful.

As part of Amended Substitute Senate Bill 221 ("SB 221"), the legislation enacting R.C. 4928.143 and its "notwithstanding" clause, the General Assembly also enacted R.C. 4928.141. That Section specifies that an electric utility must maintain an SSO and that this offer may take the form of a market rate offer ("MRO") under R.C. 4928.142 or an ESP under R.C. 4928.143. R.C. 4928.141 also addresses the previously-enacted prohibition on transition revenue and directs the Commission to exclude an allowance for

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[25] *In re Application of Columbus Southern Power Company*, 128 Ohio St.3d 512, 520 (2011); *Columbus Southern*, at ¶¶ 14-40.

[26] *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 22.

[27] *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (*quoting State v. Cook*, 83 Ohio St.3d 404, (1998)) ("A cardinal rule of statutory interpretation is that '[a] court must look to the language and purpose of the statute in order to determine legislative intent.'"); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (2010); *Yates v. U.S.*, 574 U.S. __, 2015 WL 773330 at *6 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (term "tangible object" in Sarbanes-Oxley Act did not include fish because "'[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'").

transition costs from any SSO. As the Court recently explained, R.C. 4928.141 "expressly prohibits the recovery of transition costs" under "a standard service offer made through an ESP."[28]

In SB 221, the General Assembly provided additional direction that it did not intend the "notwithstanding" clause to subsume all of the other statutory provisions in Title 49. In particular, the General Assembly modified the state policy by amending and renumbering R.C. 4928.02(H) to provide that it is the policy of the State to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."[29] The amendment specifically prohibits a charge such as the Reconciliation Rider ("RR") that provides DP&L's generation business with additional revenue through a distribution-like, *i.e.*, nonbypassable, charge.

In addition to prohibiting an allowance for transition costs in R.C. 4928.141, the General Assembly also modified R.C. 4928.17. Under then-existing and current law, this Section requires an electric utility to separate its competitive generation function from the noncompetitive distribution and transmission functions and prohibits the utility from providing any undue preference or advantage to its competitive generation business unit

[28] *Columbus Southern*, at ¶ 17.

[29] Prior to SB 221, the statutory section was numbered as division (G) and provided that it is the State's policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48; *see also* Ohio General Assembly Archives, SB 221, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

or the generation business of any affiliate. In SB 221, the General Assembly added a requirement that electric utilities obtain Commission approval prior to divesting any generation assets. It is clear that the General Assembly did not intend to repeal the effect of this statute prohibiting a utility from providing an undue advantage or preference to its own competitive generation business by including the "notwithstanding" language simultaneously in SB 221.

When enacting SB 221 in 2008, the General Assembly also did not repeal R.C. 4928.06 which obligates the Commission to effectuate the state policy contained in R.C. 4928.02. In 2012, the General Assembly subsequently made additional changes to the state policy specified in R.C. 4928.02. *See* Senate Bill 315 (these additional changes did not alter the prohibition in R.C. 4928.02(H)). Therefore, it is clear that the General Assembly intends that the state policy continue to have effect.

Furthermore, the Commission's decisions bear out the Commission's understanding that the "notwithstanding" clause in R.C. 4928.143(B)(2) did not silently suspend various other requirements of Chapter 4928, and these decisions should guide the Commission's decision.[30]

In DP&L's prior ESP case, for example, the Commission rejected another nonbypassable charge proposed by DP&L under R.C. 4928.143(B)(2)(d), the Switching Tracker, because it "violates the policies of the state of Ohio [R.C. 4928.02], is anticompetitive, and would discourage further development of Ohio's retail electric services market."[31]

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[30] *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972).

[31] *DP&L ESP II Case*, Opinion and Order at 30 (Sept. 4, 2013).

In 2010, AEP-Ohio requested that the Commission authorize a charge under R.C. 4928.143(B)(2)(c) and (d) to allow it to collect costs associated with closing a generation plant.[32] The Commission rejected AEP-Ohio's application, finding that it did not have the authority under R.C. 4928.143(B)(2) to allow for such recovery *and* that the recovery of such costs was prohibited by R.C. 4928.02(H).[33]

Likewise, the Commission issued a decision that confirms the State policy in R.C. 4928.02 applies to charges authorized under R.C. 4928.143(B)(2).[34] In this order, the Commission held that it was required to modify a rider proposed by AEP-Ohio under R.C. 4928.143(B)(2) because the proposed rider would violate the prohibition in R.C. 4928.02(H). "[A]s proposed by AEP Ohio, the [bad debt rider] would flow the bad debt of both shopping and non-shopping customers, whether generation- or distribution-related, through a single rider, which may cause the type of subsidy that the Commission must avoid under R.C. 4928.02(H)."[35] The Commission further held in this order that an additional statutory requirement contained in R.C. 4928.10(D)(3) could not be ignored when authorizing a charge under R.C. 4928.143(B)(2).[36]

In summary, SB 221 and the overall structure of Title 49 make clear that the General Assembly did not intend to give the Commission *carte blanche* to ignore every other statute in Title 49 when authorizing charges under an ESP. The General

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[32] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 7, 17-19 (Jan. 11, 2012) ("Sporn Order").

[33] *Id.*

[34] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 7, 26, 65, 69, 91, 95 (Feb. 25, 2015).

[35] *Id.* at 81.

[36] *Id.* at 82.

Assembly's simultaneous and subsequent amendments of Chapter 4928 reflect an intent to maintain the applicability of the prohibitions in R.C. 4928.02(H), 4928.141, 4928.17, and 4928.38. Additionally, the Commission has repeatedly held that the terms and conditions contained in an ESP must conform to the other requirements specified in Chapter 4928. Thus, the "notwithstanding" clause in R.C. 4928.143 does not permit the Commission to authorize a rider that by its nature will violate the various prohibitions in Chapter 4928.

C. The claim that the Commission may authorize the DMR by resolving an alleged conflict under R.C. 1.52 should be rejected because there is no conflict between R.C. 4928.143(B)(2)(d) and 4928.38

In an alternative claim, DP&L asserts that the Commission should find that R.C. 4928.143(B)(2) allows the Commission to ignore the prohibitions contained in R.C. 4928.02, 4928.17, and 4928.38 because R.C. 4928.143 was later enacted. This claim is premised on R.C. 1.52 and is applicable only if two statutes are irreconcilable. R.C. 4928.143(B)(2) is irreconcilable with the other statutes, however, only if the Commission reads words into the former statute such that R.C. 4928.143(B)(2) would allow the Commission to authorize transition revenue or its equivalent or unlawful subsidies or preferences for DP&L's affiliates.

The Court has rejected statutory interpretations that require it to add or subtract words from the statutory language. "It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom."[37] The statutes as drafted are reconcilable because R.C.

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[37] *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948); *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E. 2d 8 (1969) (In matters of construction, "it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.").

4928.143(B)(2) does not authorize the recovery of transition revenue or its equivalent or unlawful subsidies or preferences for DP&L's affiliates and, therefore, the statutory construction rule favoring later enacted statutes is inapplicable.

Even if there were a conflict, the rule would not apply due to the enactment of R.C. 4928.02(H), 4928.141, and 4928.17 in the same legislation. When the General Assembly enacted R.C. 4928.143(B)(2) in SB 221, it also enacted R.C. 4928.141 prohibiting an allowance of transition costs, amended R.C. 4928.02(H) to prohibit nonbypassable collection of generation costs, and amended R.C. 4928.17 to require Commission review of generation asset transfers. Based on the General Assembly's enactment of provisions prohibiting recovery of transition costs and undue subsidies of generation services in SB 221, the claim that R.C. 1.52 requires the Commission to find that R.C. 4928.143(B)(2) permits DP&L to bill and collect transition charges is without support.

D. The DMR violates the prohibitions against undue subsidies, transition revenue or its equivalent, and undue preferences to affiliates

IEU-Ohio also demonstrated in its Motion to Dismiss that DP&L's DMR was prohibited by R.C. 4928.17 because it provided an undue advantage or preference to its affiliate; R.C. 4928.02(H) because it was an anticompetitive subsidy; and R.C. 4928.38 because it allowed DP&L to collect transition revenue or its equivalent. DP&L offers three baseless arguments as to why these prohibitions have not been violated.

Initially, DP&L claims that the corporate separation statute is no longer applicable to DP&L because it sells all of its generation output into the market. DP&L is not correct. R.C. 4928.17 applies to an electric utility that provides noncompetitive retail electric service and a competitive retail electric service; DP&L provides both.

Pursuant to R.C. 4928.141, DP&L is required to provide default generation service to those customers that do not take service from a competitive retail electric service ("CRES") provider. The provision of the SSO is a competitive retail electric service to non-shopping customers. See R.C. 4928.05(A). DP&L also provides noncompetitive distribution service. Thus, DP&L provides both competitive and noncompetitive retail electric services.

R.C. 4928.17 also applies when an electric utility provides a noncompetitive retail electric service and a product or service other than retail electric service. Because the DMR is not directly related to any retail electric service, it can only be classified as a product or service other than retail electric service. Thus, if the DMR were approved, DP&L would still be subject to R.C. 4928.17 even if it provided no competitive retail electric services.

DP&L also claims that the DMR does not violate the Commission's rules, but if it did the Commission can waive its own rules.[38] Initially, the Commission's ability to waive its rules is constrained when the requirement is also required by statute.[39] R.C. 4928.17 prohibits undue affiliate preferences. The Commission's rules similarly specify that the EDU may not provide an undue preference to its affiliate.[40] Because the prohibition on undue affiliate preferences set forth in Rule 4901:1-37-04, O.A.C., is also required by statute, the Commission cannot waive the rule.

Furthermore, the DMR violates the affiliate transaction restrictions specified in Rule 4901:1-37-04(C), O.A.C. This rule prohibits EDUs from entering into any arrangement

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[38] *See* DP&L Memo Contra at 16.

[39] Rule 4901:1-37-02(C), O.A.C.

[40] *Id.*

that would maintain the financial viability of an affiliate and from entering into any arrangement where the EDU would be responsible for an affiliate's debt.[41] Although DP&L asserts that the DMR does not make DP&L responsible for DPL Inc.'s debt, the testimony of Mr. Jackson makes clear that DP&L plans to use the DMR revenues to pay down debt at DPL Inc.[42] Thus, the restrictions in Rule 4901:1-37-04(C), O.A.C., would be violated if the Commission authorized the DMR.

DP&L also offers a nonsensical argument about DP&L's credit rating being notched to DPL Inc. for credit rating purposes.[43] Whatever impact or relationship credit ratings may have to the DMR, this impact or relationship cannot be used to bypass the requirements in Ohio law and the Commission's rules that make it clear that an EDU cannot maintain the financial viability of an affiliate; that an EDU cannot be held liable for the acquisition debt of an affiliate; and that an EDU is not responsible for its affiliate's debt.[44]

DP&L next claims that the DMR does not violate R.C. 4928.02(H) because it is designed to maintain DP&L's financial integrity and because DP&L has taken steps to improve its finances. Implementing nonbypassable charges that are uniquely available to DP&L to pay down generation debt it claims it cannot transfer to an affiliate and to pay down parent company debt is an advantage not available in the marketplace to DP&L

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[41] *See* Rule 4901:1-37-04(C), O.A.C.

[42] DP&L Memo Contra at 16; *see* IEU-Ohio Motion to Dismiss at 3, 20; *see also DP&L* Memo Contra at 17 ("the DMR will be used to pay down all debt at DP&L and DPL Inc."); Direct Testimony of Craig L. Jackson at 17 (Oct. 11, 2016).

[43] *Id.*

[44] *See* R.C. 4928.17; Rule 4901:1-37-04(C), O.A.C.

(and DPL Inc.'s competitors).[45] It, by definition, is a subsidy to DP&L and its corporate parent.

Finally, DP&L claims that the DMR is not transition revenue or its equivalent because transition costs are limited to historic costs and because DP&L has not proposed any transition in this case.[46] The Court has already rejected the narrow view to the statutory prohibition DP&L urges in its Memo Contra. In the case that formed the basis of the Court's reversal of the SSR, the Court held:

> [The Commission's and AEP-Ohio's] overly narrow definition of transition revenue overlooks that R.C. 4928.38 bars "the receipt of transition revenues *or any equivalent revenues* by an electric utility" after 2010. (Emphasis added.) By inserting the phrase "any equivalent revenues," the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name.[47]

Furthermore, DP&L's argument about historic costs has already been rejected. In defense of the SSR, DP&L argued to the Court that the SSR did not provide for the recovery of transition revenue because "transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants)."[48] The Court rejected DP&L's argument reversing the authorization of DP&L's SSR with citation citing the case that is the source of the quote above.[49]

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[45] *See* IEU-Ohio Motion to Dismiss at 24.

[46] DP&L Memo Contra at 17.

[47] *Columbus Southern*, ¶ 21.

[48] *In re Dayton Power and Light Co.*, Case No. 2014-1505, Supplemental Brief of Appellee The Public Utilities Commission of Ohio and Cross-Appellant The Dayton Power and Light Company Regarding Recent Supreme Court Decisions (Jun 2, 2016); *see also In re Dayton Power and Light Co.*, Case No. 2014-1505, Second Merit Brief of DP&L at 18-19 (Jan. 20, 2015).

[49] *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490 ¶ 1.

DP&L's second argument regarding the lack of a transition is both incorrect and irrelevant to the determination of whether a charge allows for the collection of transition revenue *or any equivalent revenue*. Initially, in its Memo Contra, DP&L explains the transition that it claims the DMR will provide: "[the DMR] is designed to provide DP&L with a path to pay down debt to allow investments and modernization of the distribution and transmission grid."[50] Thus, DP&L's claim, even if relevant, is contradicted by its own claims.

Furthermore, as the Court made clear in *Columbus Southern*, the statutory prohibition extends to the collection of transition revenue *or any equivalent revenue* and it is the true nature of the charge that dictates whether it violates this prohibition.[51] Regardless of whether there is a statutorily defined transition (as there was under SB 3), a charge that serves the same purpose is unlawful. And the purpose of the DMR is to provide DP&L with revenue it cannot secure in the competitive generation market. This is clear from DP&L's testimony.

In both the testimony of Mr. Jackson and Mr. Malinak, DP&L ties the DMR to lower than desired wholesale generation prices. Mr. Jackson testifies that low wholesale market prices are one of several factors driving DP&L's claimed need for the DMR.[52] Mr. Malinak testifies that the financial analysis that underlies the DMR is the same financial

[50] DP&L Memo Contra at 18.

[51] *Columbus Southern*, at ¶ 21.

[52] Direct Testimony of Craig L. Jackson at 8 (Oct. 11, 2016).

analysis that DP&L used to justify the SSR.[53] As explained by DP&L in its last ESP case, the primary driver for its claimed need for the SSR was low wholesale market prices.[54]

Accordingly, because the DMR violates the prohibitions against undue subsidies, transition revenue or its equivalent, and undue preferences to affiliates, the charge may not lawfully be authorized in this case.

IV. CONCLUSION

As demonstrated in the Motion to Dismiss the DMR and herein, the charge may not lawfully be authorized under R.C. 4928.143 and its authorization is prohibited by R.C. 4928.02(H), 4928.17, and 4928.38. Accordingly, the Commission should dismiss the DMR from DP&L's ESP application.

Respectfully submitted,

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[53] Direct Testimony of R. Jeffrey Malinak at 29-30 (Oct. 31, 2016).

[54] *DP&L ESP II Case*, Opinion and Order at 17 (Sep. 4, 2013).

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply to The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion to Dismiss the Distribution Modernization Rider* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 22nd day of December 2016, *via* electronic transmission.

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