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. 16-0395-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

JOINT POST-HEARING REPLY BRIEF OF ENVIRONMENTAL DEFENSE FUND AND OHIO ENVIRONMENTAL COUNCIL

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I. Introduction

Pursuant to the procedural schedule established by the Attorney Examiners in this case, Environmental Defense Fund ("EDF") and Ohio Environmental Council ("OEC") respectfully submit the following post-hearing Reply Brief in the above-captioned proceeding. The initial post-hearing briefs of the signatory parties to the Amended Stipulation fail to show that the Amended Stipulation satisfies prongs two and three of the Commission's test for reasonableness of a stipulation. The Amended Stipulation, as a package, does not benefit ratepayers and the public interest, and it violates important regulatory principles and practices, as noted in EDF and OEC's initial brief and as set forth below.

II. Discussion

A. The Amended Stipulation does not benefit ratepayers and the public interest.

Dayton Power & Light ("DP&L") claims that no intervenor argued that the Company could provide safe and reliable service or pursue grid modernization without the Distribution Modernization Rider ("DMR"). DP&L Initial Brief at 1, 7-8. Though a convenient storyline for DP&L, the Company conveniently misses the point. DP&L submitted testimony that it needs these funds in order to maintain financial integrity, but those funds should not come from ratepayers, nor should the funds prop up DP&L's obligations to its parent company. DP&L may well need additional funds, but has options other than forcing ratepayers to pay for its mistakes. Like any other company, DP&L can and should take measures to reduce

its debt *itself*, and has options, including reducing executive pay and bonuses; cutting shareholder dividends, issuing more equity, etc. The idea that the only way to reliably keep the lights on for DP&L's customers is to charge them more is a red herring, and one that Staff has bought into in dramatic fashion. Staff Initial Brief at 13. Requiring the public to pay for DP&L's failure to properly manage its finances is merely enabling it continue its irresponsible business practices.

Overall, DP&L has failed to show that the Amended Stipulation as a package benefits ratepayers as a whole, and the Commission should reject the Amended Stipulation.

1. Rider DMR inappropriately allocates costs to customers for the financial problems of DP&L and its parent.

DP&L claims, through testimony of its witnesses Malinak and Jackson, that DP&L could not maintain its financial integrity and provide safe and reliable service without the DMR and that such testimony is entirely uncontested. DP&L Initial Brief at 8. Further, Witness Malinak claimed that perhaps even the DMR is "likely too low." Tr. Vol. I, p. 116 (emphasis added); DP&L Initial Brief at 9. However, DP&L has, as EDF and OEC repeatedly pointed out both in testimony and its initial brief, various other options than putting the burden on its ratepayers.

There are avenues other than Rider DMR in the Amended Stipulation for DP&L to ensure safe and reliable service.[1] DP&L argues that it is acting like a good corporate citizen because its shareholders agreed as part of the Amended

[1] Also, OCC points out in its Initial Brief that DP&L has been providing safe and reliable service for quite some time. OCC Initial Brief at 64, citing Williams Supp. Dir. at 18-19:17-7; see also Nicodemus Testimony; Schroder Testimony.

Stipulation to make significant equity investments which otherwise couldn't be required by the Commission; however, DP&L misses the point that if the Company wasn't gifted the $105 million per year from ratepayers, its shareholders can and would make those equity investments if the Company truly needed it. Yet, DP&L admitted that it did not want to ask AES for any more funds because it had "already made a significant contribution" and that "it's not reasonable" to ask "any outside equity investor to put money into DPL when you know you are not going to get a return on that until at least 2022", so instead DP&L is asking ratepayers who are blameless for the financial difficulties of the Company to food the bill. Hearing Transcript, Vol. I at 82:12-24.

The Company also cites asset sales as one thing it has tried over the past several years to improve its financial integrity. DP&L Initial Brief at 10. The Company (along with the rest of Ohio's investor-owned utilities) was ordered to deregulate nearly *20 years ago*, yet it is still looking for help. At what point does the Company become responsible for its own actions rather than continuing to return to the Commission to ask for ratepayers to fix its poor business decisions?

Staff also relies upon the fact that gifting DP&L $105 million per year from ratepayers will permit it to then access capital markets. Staff Initial Brief at 3. Yet, Staff also glosses over the fact that DP&L's own witnesses have stated that the amount of Rider DMR needs to actually be higher to ensure its financial health. EDF/OEC Initial Brief at 16; Company Ex. 1A at 16-17. The Company is talking out of both sides of its mouth. On one hand it wants the Commission to believe that if it

gets $105 million for five years[2] it will be fiscally sound enough to access capital markets and proceed with grid modernization, while testifying that actually it needs far more than the amount proposed by the Amended Stipulation. The Amended Stipulation is an empty promise, and in short, DPL wants a handout for acting like a fiscally responsible company, which it should have been doing from the start.

DP&L claims it needs Rider DMR to providing safe and reliable service and that it is one of the many public benefits achieved by the Stipulation, without then listing any of other public benefits stemming from the Amended Stipulation. DP&L Initial Brief at 12. DP&L and the signatory parties' reasons given for awarding DP&L $105 million per year for three to five years are hollow.

2. DP&L should not receive a handout for promising to operate in a fiscally responsible manner in the future.

DP&L cites AES' commitment to not receive a dividend during the ESP term, not to collect tax-sharing payments, and converting DP&L's tax liabilities into equity as proof that the company is taking its share of the burden in this case. DP&L Initial Brief at 17. While these seem like laudable commitments that may help ensure the financial health of DP&L, these hardly can be considered sacrifices (see OCC Initial Brief at 28-29) and, again, there is no reason that AES' responsible behavior should mean its companies get a handout. Rewarding a company with ratepayers' dollars for acting fiscally responsible and for making decisions that any financially sound business should make is inappropriate. The reason DP&L is asking for these funds

[2] Though the Amended Stipulation only states that the Company will be awarded the funds for three years with the possibility of two additional years, DP&L argues it must have the $105 million per year for all five years throughout its initial brief in order to maintain financial integrity. DP&L Initial Brief at 1, 8, 12, 16.

is because it failed to act responsibly in the past. DP&L and its parent company should bear the burden of previous poor business decisions, not ratepayers.

Staff Witness Donlon testified that these commitments were secured through the Amended Stipulation, constituting something that the Commission would not have the authority to do otherwise. DP&L Initial Brief at 18. While that may be true, it still does not justify forcing ratepayers to rectify DP&L's poor business decisions, and there is still no guarantee whatsoever that DP&L will move forward on items that will truly benefit ratepayers. The Amended Stipulation is putting a pricey commitment for three to five years on ratepayers without any hard guarantees in return.

DP&L and Staff provided a list of the purported benefits provided by the Amended Stipulation. DP&L Initial Brief at 19-22; Staff Initial Brief at 5-6. While many of these have positive impacts on the DP&L territory, these do not outweigh saddling ratepayers with $105 million/year for three to five years. The benefit from these other items simply does not outweigh the burden this Amended Stipulation, as a package, will place on ratepayers. Further, some of the commitments made as part of the Amended Stipulation may be beneficial but are direct cash payments to certain customer segments represented by signatory parties. *See* Amended Stipulation at 9-10. This is not the type of compromise the Commission should be encouraging.

B. The Amended Stipulation violates important state regulatory principles and practices, and should not be approved.

1. Proposed Rider DMR effectively allows unlawful recovery of transition costs.

Rider DMR is an illegal transition charge, as EDF and OEC detailed in our Joint Initial Post-Hearing Brief at pages 12-13, and the Supreme Court of Ohio recently ruled that riders similar to Rider DMR would in fact be considered as such. Though DP&L claims that the funds are being used to provide a safe and reliable distribution service and implement distribution grid modernization (DP&L Initial Brief at 32-33), it is clear that the funds are needed due to aging and failing generation plants, and as previously discussed, none of the Rider DMR will be spent to modernize the grid.

Staff similarly argues that Rider DMR is not a transition charge, because it is not tied to the company's investment in generation plants; however, Staff notes that the record does show that DP&L intends to dispose of its remaining plant investments and how it does so is entirely up to DP&L. From DP&L's own balance sheets, the Company's plants are financed by approximately 60% debt, and under Rider DMR, DP&L will be collecting revenue specifically to pay interest on debt and pre-pay debt. Some of that debt finances the Plants, making Rider DMR an illegal collection of transition revenue.

For Staff to say that Rider DMR is not tied to disposal of DP&L's assets whatsoever, but rather based entirely on the Company's need to access capital markets is glossing over the facts. DP&L admits in its own Initial Brief that the "DMR

funds will be used to pay interest obligations" and "pay debt". DP&L Initial Brief at 34. DP&L's own testimony shows that it is concerned with being able to meet debt obligations at the parent company. Tr., Vol. I at 58:3-6 (noting that if "the debt at DPL Inc. cannot be serviced, which does rely on cash flow from DP&L, it may prevent us from meeting our debt obligations at the parent"). As noted by OCC, though DP&L has already obtained nearly $700 million of Ohioans' money through requests for money to help "stabilize electric service", it is back for more. OCC Initial Brief at 7-9. Further, all four reasons given by DP&L for the need for the DMR are tied in some way to generation. *Id.* at 13-14. DP&L has the ability to file a rate case if it believes it is receiving insufficient funds from its distribution business, and is able to do the same by asking FERC to increase transmission costs if its transmission side is the problem. DP&L has done neither, making it even more clear that this is a quest to bail out its generation assets and the debt directly tied to those assets.

Additionally, DP&L's argument that even if Rider DMR is a transition cost it is lawful, is wrong. DP&L Initial Brief at 34-36. The "notwithstanding" clause issue, as DP&L points out, has not been ruled on by the Ohio Supreme Court. If and when this Commission and the Court take on this issue within the context of the DP&L DMR, it will show that the Rider in question is devoted to paying back the debt from the generation plants that have caused the fiscal problem with the Company. Nothing in 4928.143(B) would excuse past generation based debt repayment—notwithstanding any "notwithstanding" clause. Furthermore, the FirstEnergy DMR to which DP&L refers is still under rehearing review and has not

yet been finalized.

2. Rider DMR is inconsistent with past Commission rulings on grid modernization riders, and does not support Ohio's codified energy policies because there is no guarantee that it will encourage innovation or smart grid programs.

For the Company to suggest it will be unable to move forward with grid modernization without the DMR is inaccurate. It is plainly apparent that even if the Commission approves Rider DMR, none of it will be going toward grid modernization, there is no plan or requirement on DP&L[3] to move forward with grid modernization, and no requirement on it to access capital markets in order to do so, a fact recognized by signatory parties. *See e.g.*, Honda & City of Dayton Initial Brief at 4; Edgemont & OPAE Initial Brief at 8; (noting only that Rider DMR gives DP&L the "ability" to access the capital markets). The report issued by DP&L's third-party credit rating agency allegedly demonstrates that DP&L needs $105 million per year for five years to maintain financial integrity, obviously not that DP&L needs it to come specifically from Rider DMR. DP&L's quest to saddle individual Ohioans with its mistakes should be rejected, and the Company should use any one of the alternative options it has to ensure its credit stability.

DP&L does claim that the Amended Stipulation provides a "specific path and means by which DP&L can and will implement grid modernization", but it then admits that the Amended Stipulation will simply "position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution

[3] The Smart Grid Rider ("SGR") discussed by Witness Schroder, creates a rider that is set at zero and might someday assist DP&L in recovering costs of a grid modernization plan that it does not yet have to create, therefore requiring DP&L to do exactly nothing. Co. Ex. 3 at 11.

infrastructure." DP&L Initial Brief at 12; 44. As EDF and OEC have pointed out repeatedly, there are no real requirements being placed upon DP&L in this deal. The Amended Stipulation does not require DP&L to do anything related to grid modernization for the funds it is receiving, other than submit a more detailed plan after the completion of *PowerForward*. Amended Stipulation, Mar. 13, 2017 at 7. Staff Witness Donlon testified that the primary purpose of the DMR is to allow the company to be able to invest in grid modernization (*see* Tr. Vol. V, pp. 875-76), but the statement is nothing more than a wish that the Company will do so in the future. The Amended Stipulation does not contain any requirements for the Modernization Plan other than to write one. Amended Stipulation, Mar. 13, 2017 at 7-8. Further, this conflicts with past Commission precedent, which previously required at least a written plan before opening up ratepayers' checkbooks to pay for a utility's mistakes. *See In re FirstEnergy ESP*, Case No. 08-0935-EL-SSO (Opinion and Order at 40-41) (Dec. 19, 2008).

While Staff could have kept the requirement that a portion of the funds be specifically set aside for grid modernization, as it was in the original Stipulation (*see* Stipulation and Recommendation, Jan. 30, 2017 at 6), or included some other requirement as part of the package to ensure the Company truly moves toward modernization, it was removed it from the Amended Stipulation entirely and Staff signed on anyway. There is no dispute that grid modernization would provide significant customer benefits if done correctly, as several witnesses recognize. *See* DP&L Initial Brief at 13-14 (citing DP&L Witness Malinak and IGS Witness White).

Staff indicates that to require DP&L to develop details for their plan prior to the end of *PowerForward* is “pointless”, and while EDF and OEC agree that guidance from the Commission is important, there is no reason the Commission cannot now require *some* commitment from DP&L as to what timeline the Company will move forward on for grid modernization and how much the Company will invest.

DP&L is a business, not an altruistic entity, and if the Commission is going to force ratepayers to financially support DP&L, it should also put hard requirements on the Company to ensure DP&L follows through with its promise to modernize the grid. DP&L repeatedly cites intervenor witness testimony for the proposition that investing in grid modernization and smart grid technology is a wise decision. EDF and OEC could not agree more, but want to see some actual commitments arising from this proceeding rather than a large payout from ratepayers hinging on the hope that DP&L goes through with grid modernization in the future. DP&L claims it needs Rider DMR in order to be in a position to access the capital markets (*see* DP&L Initial Brief at 16; Witness Jackson testimony Trans., Vol. I, pp. 109-10), and the Company admits it will use none of Rider DMR to fund grid modernization. The Amended Stipulation leaves DP&L free to use the entirety of Rider DMR to pay off debt, and whether or not it ever seeks to invest in grid modernization remains up to the Company because there is nothing requiring it to do so as part of this Amended Stipulation.

DP&L also states repeatedly that it needs the full amount of Rider DMR for five years to maintain financial integrity, and also “to implement the Commission's

PowerForward initiative". DP&L Initial Brief at 1, 8, 12, 16. At this time, there is zero information as to what requirements will come out of *PowerForward*, or if *any* actual requirements will come out of the initiative. Staff recognizes this (*see* Staff Initial Brief at 3), but then claims there will "a significant investment required", without citing any source. Sadly, it appears this is a pretense merely paying lip service to the fact that the Commission correctly believes that grid modernization should be a priority, because nothing in the Amended Stipulation requires the Company to do *anything* with grid modernization. Because of the lack of any requirements around a grid modernization effort, along with several other reasons discussed in our Initial Brief and this Reply, EDF and OEC cannot support it.

V. Conclusion

DP&L and the signatory parties to the Amended Stipulation failed to present a package that meets the Commission's standard of review. The Amended Stipulation does not benefit ratepayers, is not in the public interest, and violates several Ohio regulatory principles and practices. Therefore, the Amended Stipulation should be rejected so DP&L ratepayers do not have to pay for Rider DMR to financially prop up the utility. For the reasons set forth above and in our Joint Initial Post-Hearing Brief,

Environmental Defense Fund and Ohio Environmental Council respectfully request that the Commission reject the proposed Amended Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Joint Post-Hearing Reply Brief by the Environmental Defense Fund and Ohio Environmental Council*, was served upon the persons listed below via electronic transmission this 15th day of May, 2017.

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