THE PUBLIC UTILITIES COMMISSION OF OHIO

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| IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY TO ESTABLISH A STANDARD SERVICE OFFER IN THE FORM OF AN 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. | CASE NO. 16-397-EL-AAM |

# THIRD ENTRY ON REHEARING

Entered in the Journal on September 19, 2018

## I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the application for rehearing of the October 20, 2017 Opinion and Order filed by The Dayton Power and Light Company and denies the applications for rehearing filed by other parties to the proceeding. The Commission also denies an April 26, 2018 motion to reopen the proceeding.

## II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) is a public utility and an electric distribution utility as defined under R.C. 4905.02 and R.C. 4928.01, respectively. Therefore, the Company is subject to the jurisdiction of this Commission.

{¶ 3} Under R.C. 4928.141, DP&L is required to provide a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service, including a firm supply of electric generation service, to customers within its certified territory. On February 22, 2016, DP&L filed an application for an SSO in the form of an electric security plan (ESP) in accordance with R.C. 4928.143. At the same time, the

Company filed applications for the approval of revised tariffs and of certain accounting authority. On October 11, 2016, DP&L filed an amended application for an ESP.

**{¶ 4}** On January 30, 2017, DP&L and various parties filed a stipulation and recommendation regarding the applications. Subsequently, on March 14, 2017, an amended stipulation and recommendation (Amended Stipulation) was filed. Several parties who did not join in the original stipulation were included in the Amended Stipulation.

**{¶ 5}** On October 20, 2017, the Commission issued an Opinion and Order (Opinion and Order) approving and modifying the Amended Stipulation and authorizing DP&L's third ESP, effective for the period beginning on November 1, 2017, through October 31, 2023 (ESP III).

**{¶ 6}** R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding. To be heard, the application for rehearing must be filed within thirty days after the journalization of the Commission's Order.

**{¶ 7}** On November 17, 2017, The Ohio Environmental Council and Environmental Defense Fund (Environmental Advocates or Advocates) filed an application for rehearing. Next, on November 20, 2017, Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), the Retail Energy Supply Association (RESA), Interstate Gas Supply, Inc. (IGS), Ohio Manufacturers Association Energy Group (OMAEG), the Kroger Company (Kroger), and DP&L each filed an application for rehearing. On the same day, Murray Energy Corporation and Citizens to Protect DP&L Jobs (collectively, Murray/Citizens) also filed a joint application for rehearing.

**{¶ 8}** After obtaining a brief extension of time, five parties filed memoranda contra to the various applications for rehearing. Specifically, on December 4, 2017, Kroger, OMAEG, IEU-Ohio, OCC, and DP&L each filed a memorandum in opposition to rehearing.

{¶ 9} On December 6, 2017, the Commission granted the applications for rehearing for further consideration of the matters specified within the applications.

## III. APPLICABLE LAW

{¶ 10} R.C. Chapter 4928 provides an integrated system of regulation containing specific provisions designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing both Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in R.C. 4928.02, as amended by Am.Sub.S.B. 221 (S.B. 221).

{¶ 11} In addition, S.B. 221 enacted R.C. 4928.141, which provides the statutory framework for this proceeding. R.C. 4928.141 mandates that, beginning January 1, 2009, electric distribution utilities must provide customers with an SSO that is intended to serve as the electric utility's default service. The SSO must be established as either a market rate offer (MRO) under R.C. 4928.142 or an ESP under R.C. 4928.143. As stated above, DP&L's application is for an ESP under R.C. 4928.143. Under that statute, the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. If the ESP is not determined to be more favorable in the aggregate than the expected results of an MRO, the Commission must disapprove the application. R.C. 4928.141(C)(1).

## IV. DISCUSSION

{¶ 12} Collectively, the various applications for rehearing assert 27 assignments of error regarding the Opinion and Order. In the broadest terms, these 27 alleged errors can be reduced to five essential areas of argument. Those areas are: (1) the

lawfulness/reasonableness of the Distribution Modernization Rider (DMR); (2) the lawfulness/reasonableness of the Reconciliation Rider as modified by the Commission; (3) the economic development incentives offered to large customers that signed or did not oppose the Amended Stipulation; (4) terms concerning the transfer of generation assets and sale of coal assets; and (5) whether the Commission erred in determining that DP&L's ESP is more favorable in the aggregate than an MRO.

### *A. The Distribution Modernization Rider (DMR)*

**{¶ 13}** The Environmental Advocates and OCC each raise arguments challenging the Commission's Opinion and Order with respect to the DMR. Each argues that the Amended Stipulation, and thus the Commission's Opinion and Order adopting the same, is unlawful and unreasonable because the DMR does not benefit ratepayers or the public interest and because the DMR violates important state regulatory principles and practices.

#### 1. THE DMR BENEFITS RATEPAYERS AND THE PUBLIC INTEREST.

**{¶ 14}** The Advocates first argue that the Commission's reasoning in approving the DMR is unreasonable and unlawful because it allocates costs to customers who are without blame for the Company's financial problems. In short, Environmental Advocates insist that DP&L's customers should not be forced to finance the Company's poor financial choices and that the inclusion of the DMR in the Amended Stipulation elevates the interests of DP&L's shareholders over its ratepayers. Compounding the Commission's unreasonable approval, the Advocates add, is the fact that the DMR does not guarantee the Company's financial stability and fails to obligate the Company to actually spend any of the DMR revenues on grid modernization. It is the latter complaint that leads to the Environmental Advocates second contention: that the Commission unreasonably found that the DMR is an "incentive" for distribution modernization as permitted by R.C. 4928.143(B)(2)(h). Here, the Advocates state that the Commission failed to ensure that the Company would actually dedicate any resources to the reliability of the distribution system; instead, "position[ing] DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission

and distribution infrastructure" is merely one of three possible uses of the funds. Opinion and Order at ¶ 14(g). The Advocates argue that providing the ability to invest in distribution modernization is not the same as requiring such an investment and, lacking that requirement, equating the DMR to a distribution modernization incentive is clearly unreasonable and unlawful.

**{¶ 15}** In its memorandum contra rehearing, DP&L contends that the Environmental Advocates' position on the DMR should be rejected. The Company states that the Advocates ignore financial realities, jurisdictional limits of the Commission, and witness testimony revealing the flaws of their arguments. Moreover, the Company indicates that the Environmental Advocates fail to view the Amended Stipulation as a whole, as one must do, choosing instead to criticize particularities. For example, the Advocates insist that shareholders rather than ratepayers should bear the cost of DP&L's debt while ignoring the fact that, pursuant to the Amended Stipulation, DP&L shareholders are making equity investments in the Company – investments that the Commission has no authority to require absent the Amended Stipulation. DP&L further states that the Advocates' arguments under R.C. 4928.143(B)(2)(h) ignore the Amended Stipulation's requirement that the Company file a Distribution Infrastructure Modernization Plan to pursue grid modernization.

**{¶ 16}** The Commission finds that rehearing on this assignment of error should be denied because the evidence in the record demonstrates that the DMR benefits ratepayers and the public interest. First, we note that it is the policy of this state to:

> (D) Encourage innovation and market access for cost-effective supply-and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure; * * *

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces.

R.C. 4928.02(D) and (F). In this case, the record establishes that: (1) the financial difficulties of DP&L and its parent, DPL Inc., present a substantial obstacle to investing in grid modernization; (2) DP&L's parent and shareholders have taken steps and will continue to take steps to improve the financial position of DP&L and DPL Inc.; and (3) DP&L is committed to investing in grid modernization, beginning with the filing of a grid modernization plan.

**{¶ 17}** The Commission finds that the financial difficulties of DP&L and DPL Inc., as evidenced by their credit ratings, present a substantial obstacle to investing in grid modernization. We note that OCC witness Kahal agreed that he considered it to be vitally important that DP&L have an investment grade credit rating (Tr. Vol. IV at 695). However, the record demonstrates that, at the time the Company's testimony was filed in this case, DPL Inc.'s credit ratings were below investment grade: B+/BB/Ba3 with negative outlooks (Fitch/S&P/Moody's). At that point, DP&L's secured bond ratings were investment grade: BBB/BBB-/Baa2 with negative outlooks (Fitch/S&P/Moody's). (Co. Ex. 1B at 28; Co. Ex. 2B at 42-43). However, at the time of the hearing, both the issuer credit rating of DP&L and DPL Inc. had been downgraded, by S&P, to BB- which is below investment grade (Tr. Vol. IV at 698-700; Co. Ex. 105).

**{¶ 18}** Further, the record contains undisputed evidence of the actual adverse consequences of a possible downgrade to below investment grade to a public utility and of the actual adverse consequences to a utility if its parent is downgraded to below investment grade. Due to the credit ratings, DP&L was unable to refinance its debt on terms typical for an investment grade utility. Instead, DP&L was forced to accept credit terms including: a short term maturity of six years; a relatively high variable cost of borrowing; and a covenant

package which, among other terms, prevents the Company from raising debt to modernize its transmission and distribution systems for the term of the loan (Co. Ex. 1B at 9-10; Tr. Vol. I at 109-110).

**{¶ 19}** Moreover, contrary to the Advocates' claim that the Amended Stipulation elevates the interests of shareholders over ratepayers, DP&L and DPL Inc. have taken important affirmative steps to improve the financial position of DP&L and DPL Inc., and the Amended Stipulation obligates DP&L and DPL Inc. to take additional significant steps to improve their finances. First, with respect to dividend payments, DPL Inc. has used dividend payments from DP&L, including $50 million in 2015, exclusively to meet interest obligations and pay down debt at DPL Inc. However, DPL Inc. has not made any dividend payments to its parent, AES Corporation (AES), since 2012, using all excess cash flows to pay down debt instead. (Co. Ex. 1B at 11; Co. Ex. 3 at 9-10; Tr. Vol. I at 88). Under the terms of the Amended Stipulation, DPL Inc. will not make any dividend payments to AES, or AES Ohio Generation LLC, during the six-year term of the ESP (Co. Ex. 3 at 10, 18-19; Jt. Ex. 1 at 3).

**{¶ 20}** In addition, AES has committed to forego collection of unpaid tax-sharing payments from DPL Inc. that have accrued since 2012; and, under the Amended Stipulation, AES has agreed to forego any additional required tax payments that accrue during the term of the DMR. Instead, the existing accrued liabilities will be converted into an equity investment in DPL Inc., and during the term of the DMR, any additional tax sharing liabilities will be converted, on a monthly basis, to an additional equity investment. (Co. Ex. 3 at 19; Jt. Ex. 1 at 3-4.) The record establishes that this additional equity investment in DPL Inc. will provide additional cash flow for debt service and for improving the financial health of DPL Inc. and DP&L by significantly strengthening DPL's balance sheet (Co. Ex. 2B at 4, 61-62, 66-67.)

**{¶ 21}** Further, DPL Inc. and DP&L have undertaken significant asset sales and will continue to do so under terms of the Amended Stipulation. DPL Inc. sold its retail affiliate,

raising $90 million in cash. In addition, DP&L sold its interest in the East Bend generation facility, raising $15-$20 million in cash and eliminating the negative cash flow from East Bend's operations. (Tr. Vol. I at 33-34.) Under the Amended Stipulation the Company and DPL Inc. committed to a process to sell certain coal-fired generation assets and to use the proceeds from that process to further reduce debt (Co. Ex. 3 at 9; Jt. Ex. 1 at 4). Pursuant to that commitment, DP&L's interests in Miami Fort and Zimmer have been sold. *In re Dayton Power and Light Co.,* Case No. 13-2420-EL-UNC (*DP&L Divestiture Case*), Notice Filing (July 24, 2017) (notice of sale of ownership interests in Miami Fort Station 7 and 8 and in Zimmer for $50 million, subject to certain adjustments).

**{¶ 22}** With respect to the Advocates' claim that the DMR is unreasonable because it does not require DP&L to invest in grid modernization, the Advocates elide the fact that the Amended Stipulation provides for grid modernization along two *parallel* tracks: first, the DMR provides DP&L with an incentive to position itself to invest in grid modernization and/or to make capital investments needed to maintain its distribution and transmission infrastructure; and second, DP&L is required under the Amended Stipulation to file a grid modernization plan (Jt. Ex. 1 at 4-5, 7-8). Under the first track, DP&L is required to use the funds from the DMR for only three purposes: (1) pay interest obligations on existing debt at DPL Inc. and DP&L; (2) make discretionary debt prepayments at DPL Inc. and DP&L; and (3) position DP&L to make capital expenditures to modernize and/or maintain transmission and distribution infrastructure (Jt. Ex. 1 at 5; Tr. Vol. V at 907-908). Meanwhile, on the second parallel track, DP&L will file a grid modernization plan. This modernization plan will provide both a cost/benefit analysis of its components and anticipated timelines for deployment. The modernization plan will also include proposals for specific technology components such as advanced metering infrastructure, including smart meters. (Jt. Ex. 1 at 7). We expect that the modernization plan will be guided by the Commission's PowerForward initiative. Moreover, all interested stakeholders, including the Advocates, will have a full and fair opportunity to participate in the Commission proceeding reviewing the modernization plan (Jt. Ex. 1 at 7-8). Once the modernization plan is approved by and

made the order of the Commission, DP&L will be *required* to implement the modernization plan. Therefore, we reject the Advocates' claim that the DMR is unreasonable because it does not require DP&L to invest in grid modernization; the Amended Stipulation, rather than the DMR, requires that DP&L invest in grid modernization, subject to Commission approval of the modernization plan. The DMR provides DP&L with the means to improve its credit worthiness and overall financial integrity so that it can satisfy the requirement to make grid modernization investments, and to do so in a financially efficient manner. Accordingly, the DMR is a "provision[] regarding [a] distribution infrastructure and modernization incentive[]" in accordance or R.C. 4928.143(B)(2)(h).

**{¶ 23}** It is important to note that the term of the ESP is six years, commencing November 1, 2017, which allows the Commission, the Company and stakeholders to take a long-term perspective on the modernization plan. We cannot commit that the grid modernization plan will be fully implemented by the end of the ESP on October 31, 2023; in fact, it is unlikely that technology approved under the plan can be fully deployed by that date. However, by the end of the ESP, DP&L will have a long-term grid modernization plan in place and substantial progress in implementing the grid modernization plan will be achieved. Rehearing on this assignment of error should be denied.

**{¶ 24}** OCC asserts in its fourth assignment of error that the Amended Stipulation is contrary to the public interest and fails to benefit ratepayers because the DMR forces DP&L customers to pay an impermissible acquisition premium. In this, OCC states that a condition precedent to AES obtaining the Commission's approval to merge with DPL Inc. and its subsidiary, DP&L, was the commitment that DP&L's customers would not be charged for costs associated with closing the transaction or for any acquisition premium. *In re AES Corporation*, Case No. 11-3002-EL-MER, Finding and Order at ¶ 19(d) (Nov. 22, 2011) (*Merger Case*). Yet, in the Company proposing and the Commission accepting the DMR as part of the stipulated ESP, OCC states that AES is doing just that: charging DP&L customers

for AES's poor financial decisions associated with its acquisition of the Company. As such, OCC asserts that the Commission erred in adopting the Amended Stipulation.

**{¶ 25}** DP&L argues that OCC's own witness defeats any assertion that the DMR is an acquisition premium. According to the Company, the only evidence to be found in support of any conclusion that the DMR is an acquisition premium is in the direct testimony of OCC witness Mathew I. Kahal, yet Mr. Kahal abandoned his previous position at the hearing (OCC Ex. 12A at 27-28; Tr. Vol. IV at 712-713). DP&L acknowledges that it incurred debt as a result of the merger but submits that the mere existence of that debt does not create an acquisition premium. Moreover, the Company says, witness testimony confirms that the price AES paid for DP&L was reasonable at the time and based on market conditions; thus, there was no premium paid (Tr. Vol. I at 98). Finally, the Company asserts that neither OCC nor any other opponent of the DMR has identified any evidence that the DMR collects an acquisition premium.

**{¶ 26}** The Commission finds that rehearing on this assignment of error should be denied. The Commission notes that, as a condition of approval of the merger between AES and DPL Inc., AES and DPL Inc. agreed that no acquisition premium shall be eligible for inclusion in rates and charges applicable to retail electric service provided by DP&L. *Merger Case* at ¶ 19(d). However, although the Company has the burden of proof in this proceeding, OCC's assignment of error is flawed because OCC fails to cite to any evidence in support of its claim that an acquisition premium is being recovered through the DMR. Instead, OCC relies upon the testimony presented by its witness Kahal in support of OCC's claim of an "acquisition premium" in the merger between AES and DP&L's parent, DPL Inc., but Mr. Kahal, on cross examination, denied that there was anything in his testimony regarding an "acquisition premium."

> Q. And it's true, isn't it, that you don't sponsor any calculation showing which debt and how much debt at DPL Inc. is associated with an acquisition premium?

> A. I don't, no. *I don't think that my testimony says anything about an acquisition premium* one way or the other.

(Emphasis added.) (Tr. Vol. IV at 713). OCC does not cite to any evidence, other than Mr. Kahal's testimony, in support of its claim of an acquisition premium nor does OCC offer any evidence that this alleged premium is being recovered through the DMR. Accordingly, rehearing on this assignment of error should be denied.

**{¶ 27}** In its final challenge to the DMR as against the public interest, OCC's sixth assignment of error argues that the Opinion and Order is unreasonable because the cost allocation to residential consumers who pay the DMR is not based on the cost allocation of DP&L's existing nonbypassable rider and therefore charges too much. OCC observes that, in the Opinion and Order, the Commission noted that the cost allocation of the DMR is based upon the cost allocation of DP&L's existing nonbypassable rider in finding that the principle of gradualism supported using a similar cost allocation to reduce impact on customer bills. Opinion and Order at ¶ 111. This, however, is not correct according to OCC. Instead, OCC states that only 33 percent of the cost allocation methodology governing the DMR adopted in the Amended Stipulation is actually based on the cost allocation of DP&L's existing nonbypassable rider. As reported by an OCC witness, this results in nearly $5,000,000 in additional charges being paid by the residential class on an annual basis, which is not in the public interest.

**{¶ 28}** In response, Kroger contends that this assignment of error fails to state a basis upon which the Commission should reverse or modify the order. Kroger states that OCC fails to articulate how this cost allocation, as a singular issue, is not in the public interest given the fact that the Commission found that the Amended Stipulation, as a whole, is expected to result in overall lower rates for residential customers. Opinion and Order at ¶ 112. In sum, Kroger posits that OCC has failed to state a basis for error on this singular issue where the Commission found that the Amended Stipulation, as a whole, was in the public interest.

**{¶ 29}** The Commission notes that the Opinion and Order inadvertently misstates the cost allocation of the DMR. The cost allocation of the DMR in the Amended Stipulation is 34 percent based on 5 coincident peaks, 33 percent based on distribution revenue, and 33 percent based upon the historic allocation of the currently charged nonbypassable rider (Jt. Ex. 1 at 5-6). In the Opinion and Order, the Commission stated that "the cost allocation for the DMR is based upon the cost allocation of DP&L's existing nonbypassable rider." Opinion and Order at ¶ 111. The Opinion and Order should have stated that the cost allocation for the DMR is based, *in part,* upon the cost allocation of DP&L's existing nonbypassable rider. However, this does not change our rationale or our conclusion with respect to cost allocation.

**{¶ 30}** In the Opinion and Order, we found that the principle of gradualism supported the stipulated cost allocation method. Opinion and Order at ¶ 111. The stipulated cost allocation method bases 33 percent of the costs on the allocation of the existing nonbypassable rider, which will no longer be in effect. Partial reliance upon the allocation method used in the previous nonbypassable rider supports gradualism because it mitigates against an abrupt change in rates due to a change in cost allocation. In the Opinion and Order, we stated that the cost allocation and rate design of the DMR was part of a larger stipulation that took into consideration multiple factors; this differed from our previous consideration of a DMR cost allocation, which was not the product of a stipulation. *Id.* at ¶ 112. We also concluded that the cost allocation appropriately considers overall customer bill impact. *Id.* Testimony in the record shows that the Amended Stipulation, as a whole, is expected to result in lower overall rates for residential customers (Co. Ex. 3 at 20-21). Upon review, we affirm our decision to approve the stipulated cost allocation method for the DMR. Rehearing on this assignment of error should be denied.

### 2. THE DMR DOES NOT VIOLATE IMPORTANT REGULATORY PRINCIPLES OR PRACTICE.

**{¶ 31}** Advocates and OCC say that the Opinion and Order is unlawful because it violates important state regulatory principles by permitting DP&L to collect illegal

transition revenues through the DMR. In its second assignment of error OCC asserts, without explanation, that the DMR and the Reconciliation Rider are indistinguishable from the Retail Rate Stability Rider that the Supreme Court of Ohio deemed to be transition (or equivalent) revenues barred by R.C. 4928.38 in *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 (*AEP ESP II*); and, therefore, the Commission's Opinion and Order adopting the DMR and the Reconciliation Rider is unlawful.

**{¶ 32}** The Advocates also cite *AEP ESP II* and R.C. 4928.38, claiming that the Commission's justification in finding that the DMR is not a transition cost or equivalent because the Company's SSO is served entirely through competitive bidding and its generation assets no longer serve SSO customers fails to analyze DP&L's debt in a comprehensive manner. Given that DP&L still owns five power plants and the Company's capital structure is approximately 40 percent equity and 60 percent debt, the Advocates deduce that the plants are financed by approximately 60 percent debt. And, even if DMR revenue is not used directly to discharge debt that is related to generation, that revenue will make it substantially easier for DP&L to pay generation-related debt. Therefore, the Advocates assert that the DMR allows DP&L to collect the equivalent of transition revenues in violation of Ohio law and regulatory principles.

**{¶ 33}** The Company disagrees that the DMR allows the collection of an unlawful transition charge. To the contrary, DP&L states that DMR revenues are not "directly assignable or allocable to retail electric generation service provided to electric consumers in this state," and, thus, fall outside the statutory definition of transition charges. R.C. 4928.39. DP&L states that the DMR does not relate to retail electric generation service for three separate and independent reasons: (1) DP&L will not own generation assets after the stipulated transfer of such assets to an affiliate, (2) the purpose of the DMR is to allow DP&L to provide safe, reliable, and modernized distribution service, and (3) the Amended Stipulation establishes that the Company will provide SSO service through 100 percent

competitive bidding. Regardless, DP&L adds, even if the DMR is properly characterized as a transition charge, it remains lawful. This is so, the Company says, because the DMR is authorized pursuant to R.C. 4928.143(B)(2)(h), which contains two "notwithstanding" clauses giving the DMR precedence over nearly every other provision of R.C. Title 49. Additionally, DP&L insists that R.C. 4928.143(B)(2)(h) prevails as the later-enacted statute since it was passed after R.C. 4928.38.

**{¶ 34}** Upon review of the record of this proceeding, the Commission affirms our determination that the DMR does not permit DP&L to collect transition revenue or its equivalent. With respect to OCC's assignment of error, the Commission notes that, rather than explaining its position, OCC simply cites to its Initial Post-Hearing Brief filed in this proceeding. The Commission thoroughly addressed those arguments in the Opinion and Order. Opinion and Order at ¶¶ 103, 106, 107, 108. Since OCC does nothing other than rely upon its Initial Post-Hearing Brief in support of its assignment of error, OCC clearly has raised no new arguments for the Commission to consider, and rehearing should be denied on that basis. We will address below OCC's claim that the Reconciliation Rider permits DP&L to collect transition revenue or its equivalent.

**{¶ 35}** With respect to the assignment of error raised by the Advocates, the record demonstrates that the purpose of the DMR is to put the Company in a financial position to invest in its distribution system in order to provide safe and reliable distribution service and to modernize its distribution system and that the DMR is related to distribution rather than generation (Staff Ex. 2 at 4; Tr. Vol. V at 875-76, 876-78). Moreover, DP&L's generation assets no longer supply SSO customers because, prior to the approval of ESP III, DP&L began serving SSO customers though a competitive bidding process. *In re The Dayton Power and Light Co.*, Case No. 13-2120-EL-UNC, Finding and Order (Oct. 30, 2013), Finding and Order (Sept. 25, 2014), Finding and Order (Sept. 30, 2015); *In re Dayton Power and Light Co.*, 08-1094-EL-SSO, Finding and Order (Aug. 26 at 2016), Finding and Order (Mar. 22, 2017). Under the terms of ESP III, DP&L's SSO customers continue to be served through a competitive

bidding process (Jt. Ex. 1 at 8). Moreover, the Advocates' claim that DP&L still owns five power plants is simply false. DP&L agreed under the Amended Stipulation to transfer its generation assets to an affiliate and to sell certain generation assets to a third-party, and DP&L began implementation of that commitment prior to the issuance of the Opinion and Order. DP&L's interests in Miami Fort and Zimmer have been sold. *DP&L Divestiture Case*, Notice Filing (July 24, 2017) (notice of sale of ownership interests in Miami Fort Station 7 and 8 and in Zimmer). Opinion and Order at ¶ 107. Moreover, DP&L has received authorization from the Federal Energy Regulatory Commission (FERC) to transfer its remaining generation assets to an affiliate. *Dayton Power and Light Co./AES Ohio Generation LLC*, 160 FERC ¶ 61,034 (FERC authorization of transfer of DP&L's generation facilities to affiliate). With respect to the Advocates' claim that the Commission failed to analyze DP&L's debt in a comprehensive manner, we noted in the Opinion and Order that, in approving the transfer of the generation assets from DP&L to its affiliate, the FERC rejected arguments raised by OCC that the debt associated with the generation assets to be transferred could result in cross-subsidization of the affiliate by DP&L's retail customers. 160 FERC ¶ 61,034 at 17, 18; Opinion and Order at ¶ 107. Finally, the record reflects that DPL Inc. has sold its competitive retail electric service business (Tr. Vol. I at 33-35). Therefore, we agree with DP&L that revenues generated by the DMR cannot be "directly assignable or allocable to retail electric generation service provided to electric consumers in this state." R.C. 4929.39(C). Accordingly, rehearing on this assignment of error should be denied.

**{¶ 36}** The Advocates further contend that the Commission erred in adopting the Amended Stipulation because the DMR acts as an anti-competitive subsidy in providing a "non-competitive" service in violation of R.C. 4928.02. In support of this allegation, the Advocates argue that the DMR allows funds to pass through from DP&L, a noncompetitive retail electric service, to its parent company DPL Inc., a competitive retail service. The Advocates also state that the DMR contradicts previous Commission rulings on similar riders because, unlike those past cases, the Commission has not required the rider be

accompanied by a grid modernization plan and be based on actual and prudently incurred costs for grid modernization. In fact, say the Advocates, there is no actual requirement that the funds be used for grid modernization. For these same reasons, the Advocates assert that the DMR fails to act as an actual distribution modernization incentive under R.C. 4928.143(B)(2)(h) and, thus, falls short of supporting Ohio's energy policies.

**{¶ 37}** In response, DP&L argues that the DMR is clearly intended to allow the Company to implement grid modernization efforts, not support generation service. Moreover, the Company asserts that the record contains testimony confirming that the Amended Stipulation, including the DMR, supports state policy as set forth in R.C. 4928.02. Finally, DP&L again contends that, even if the DMR did violate that policy, it is lawful "notwithstanding" R.C. 4928.02(H) pursuant to R.C. 4928.143(B) and R.C. 4928.143(B)(2)(h).

**{¶ 38}** Rehearing on this assignment of error should be denied. The Advocates claim that the DMR violates R.C. 4928.02(H) by providing an anticompetitive subsidy from a noncompetitive retail electric service, i.e., DP&L's distribution service, to a competitive retail electric service provided by DP&L's parent, DPL Inc. It is the policy of this 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." (Emphasis added.) R.C. 4928.02(H). However, the Advocates' claim is fatally flawed because there is no evidence in the record of this proceeding that DPL Inc., or any subsidiary of DPL Inc., is currently providing competitive *retail* electric service in this state. In fact, at the hearing, DP&L witness Jackson testified that DPL Inc. had sold its interest in its competitive retail electric service business. (Tr. Vol. I at 33-35). If neither DPL Inc. nor any of its subsidiaries are actually providing competitive retail electric service, there can be no subsidy flowing from DP&L's noncompetitive retail electric service to competitive retail electric service provided by the parent or any affiliate.

**{¶ 39}** In its final challenge to the DMR as against regulatory principles and state policy, OCC argues that the Opinion and Order is unlawful because the Commission

excluded the DMR from the significantly excessive earnings test (SEET) in R.C. 4928.143(F). This, OCC asserts, means that DP&L shareholders will be permitted to earn significantly excessive earnings at the expense of ratepayers in contravention of the statute and *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276. Thus, OCC urges the Commission to reconsider this aspect of the Opinion and Order on rehearing.

**{¶ 40}** DP&L asserts that the DMR revenues are properly excluded from SEET calculations. DP&L reasons that this will ensure that the DMR revenues are available to address debt obligations, effectively freeing earnings to be invested in distribution modernization. Moreover, DP&L points out that the Amended Stipulation limits dividend payments to shareholders, thus assuring that no DMR revenues would reach shareholder pockets.

**{¶ 41}** We affirm our decision in the Opinion and Order to exclude DMR revenues from SEET because failing to exclude the DMR from SEET would add an unnecessary element of risk to DP&L and undermine the purpose of the DMR, which is to allow DP&L and DPL Inc. to improve their financial positions in order to access the capital markets, in the future, for funds to invest in grid modernization (Staff Ex. 2 at 4; Co. Ex. 3 at 10, 18-19). Further, the Amended Stipulation prevents DMR revenue from flowing to shareholders by precluding dividend payments to AES while the DMR is recovered and by restricting the use of cash flow from the DMR to: (1) pay interest obligations on existing debt at DP&L and DPL Inc.; (2) make discretionary debt prepayments; and (3) position DP&L to make capital expenditures to modernize and maintain DP&L's transmission and distribution infrastructure (Jt. Ex. 1 at 3, 5; Co. Ex 3 at 10). Accordingly, rehearing on this assignment of error should be denied.

### *B. The Reconciliation Rider*

**{¶ 42}** OCC, IEU-Ohio, RESA, IGS, OMAEG, and Kroger filed applications for rehearing assigning error to the Commission's modification of the proposed Reconciliation

Rider, which recovers the above-market costs DP&L incurs as a result of its interest in the generation facilities of the Ohio Valley Electric Corporation (OVEC). As proposed by the Amended Stipulation, the Reconciliation Rider was a bypassable rider. The Commission's Opinion and Order modified the Amended Stipulation on this issue, making the Reconciliation Rider nonbypassable. Opinion and Order at ¶ 63.

1. DUE WEIGHT WAS GIVEN THE TERMS OF THE AMENDED STIPULATION.

**{¶ 43}** IGS, OMAEG and Kroger challenge the Opinion and Order as unlawful and unreasonable inasmuch as it materially modified the Amended Stipulation and authorized DP&L to collect the Reconciliation Rider as a nonbypassable rider.[1] IGS asserts that the Commission's authorization of a nonbypassable Reconciliation Rider unjustly and unreasonably undermined the benefit of the mutually agreed Amended Stipulation and, if left uncorrected, will undermine confidence in the settlement process itself. Similarly, Kroger and OMAEG argue that the Commission failed to accord the terms of the negotiated amended stipulation substantial weight and erred in modifying the expressly negotiated, material term that the Reconciliation Rider be bypassable. Each of these parties also reminds the Commission of the party's right to withdraw from the Amended Stipulation, resulting in additional litigation, should we not grant rehearing to restore the negotiated bypassable Reconciliation Rider.

**{¶ 44}** OCC asserts otherwise. In its memorandum in opposition to rehearing, OCC asserts that there is no merit to the argument that the Commission failed to give the terms of the Amended Stipulation substantial weight. OCC emphasizes the fact that, while the terms of a settlement may be given substantial weight, the settlement is not binding on the Commission. Indeed, observes the OCC, the Commission has only recently reminded parties to a stipulation "that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission." *In re Ohio Edison Co., The Cleveland Elec. Illum.*

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[1] While not directly arguing the issue, IEU-Ohio also urges the Commission to "restore the delicate balance" reached within the Amended Stipulation.

*Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*FirstEnergy ESP IV Case*), Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 51.

**{¶ 45}** The Commission finds that rehearing on these assignments of error should be denied. As the signatory parties are aware, the Commission is tasked with evaluating the reasonableness of any stipulation presented by its signatory parties and applies a three-part test to that end. In applying the test, the Commission has at times modified stipulations in order to ensure that a stipulation was in the public interest or to ensure that a stipulation did not violate an important regulatory principle or practice. *See, In re Ohio Power Co.*, Case No. 10-501-EL-FOR, et al., Opinion and Order (Jan. 9, 2013); *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 10-2376-EL-UNC, et al., Opinion and Order (Dec. 14, 2011); *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 11-351-EL-AIR, et al., Opinion and Order (Dec. 14, 2011). In fact, on at least one prior occasion, we found it necessary to modify the terms of a stipulation offered by DP&L and other signatory parties in order to ensure that the stipulation was in the public interest. *See, In re Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005) at 9. Further, both the Commission's rules and longstanding precedent of the Supreme Court of Ohio make clear that the Commission is not bound by a stipulation and may modify its terms. Ohio Adm.Code 4901-1-30(E); *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-126, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). It is well-established that a stipulation entered into by the parties is a recommendation made to the Commission and is in no sense legally binding upon the Commission. The Commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *FirstEnergy ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 51. Therefore, parties entering into stipulations have full notice that the Commission may modify a proposed stipulation based upon the evidence in the record of any given case.

**{¶ 46}** In this case, the Commission afforded due weight to the terms of the stipulation. The Amended Stipulation consists of 41 pages and includes a variety of provisions addressing distribution service and grid modernization, SSO rates, an economic development rider, an economic development grant fund, the Reconciliation Rider, a revenue decoupling rider, a transmission cost recovery rider, a regulatory compliance rider, an uncollectibles rider, cogeneration, and competitive retail market enhancements, as well as provisions related to individual signatory parties (Jt. Ex. 1 at 3-36). Opinion and Order ¶ 14. In the Opinion and Order, the Commission, based upon the evidence presented, modified a single provision out of all of those provisions, modifying the Amended Stipulation to make the Reconciliation Rider nonbypassable rather than bypassable. *Id.* at ¶ 63. We cannot find that the modification of a single provision out of the numerous provisions of the Amended Stipulation demonstrates that the Commission failed to afford due weight to the terms of the Amended Stipulation. Rehearing on these assignments of error should be denied.

### 2. THE MODIFICATION OF THE RECONCILIATION RIDER IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶ 47}** IGS, this time joined by RESA, broadens its argument that the Commission failed to accord the terms of the Amended Stipulation substantial weight with the additional contention that the Opinion and Order's authorization of a nonbypassable Reconciliation Rider is unsupported by the manifest weight of the evidence. RESA adds that the Commission inappropriately weighed the evidence in deciding to make the Reconciliation Rider nonbypassable. In other words, RESA states that the Commission failed to give weight to the evidence supporting the Reconciliation Rider as a bypassable rider. Instead, RESA alleges that the Commission selectively curated only those parts of the record that supported its conclusion while ignoring contrary evidence.

**{¶ 48}** Likewise, IGS contends that the Commission's reasoning is not justified by the manifest weight of the evidence. Here, IGS indicates that an examination of record demonstrates that the Opinion and Order is an over-reaction and could have addressed the

Commission's concern regarding the potential for escalating bill impacts without materially modifying the Amended Stipulation. IGS suggests that, rather than make the Reconciliation Rider nonbypassable, the Commission could have included conditions to guard against the potential for escalating bill impacts as shopping increases, such as establishing an upper bound rate for the bypassable Reconciliation Rider or a per kWh cap on the size of any bypassable charge that an SSO customer would incur. OMAEG, Kroger, and RESA agree with IGS on this issue; all propose that the Commission had alternative options that would address concerns of escalating bill impacts without creating a nonbypassable Reconciliation Rider. Kroger and OMAEG recommend that the Commission create a conditionally bypassable Reconciliation Rider by establishing a "circuit breaker" provision, i.e., setting a percentage or level of bill impacts as the threshold at which the Reconciliation Rider would become nonbypassable. Similarly, RESA advocates for the imposition of a "trigger point" at which charges above a certain amount would be recovered on a nonbypassable basis and maps out a suggested process for this approach.[2]

**{¶ 49}** RESA and IEU-Ohio also surmise that the Opinion and Order is against the manifest weight of the evidence because, in materially modifying the bypassability of the Reconciliation Rider, it allegedly ignores the Commission's ongoing authority to review and adjust the rider. RESA states that, in light of the Commission's oversight and annual reviews under the Amended Stipulation, the rejection of Staff's and the Signatory Parties' agreement to make the Reconciliation Rider bypassable simply is not justified by the evidence. IEU-Ohio similarly argues that the Opinion and Order is unlawful and unreasonable because it modifies the negotiated, proposed Reconciliation Rider to address

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[2] In its memorandum contra the applications for rehearing filed by OCC, Murray/Citizens, and the Environmental Advocates, DP&L states that it supports the applications for rehearing asserting that the RR should be made bypassable. The Company submits that the bypassable nature of the RR was an important feature of the Stipulation and should be restored. The Company also announces its support of the concept of a circuit breaker or trigger point mechanism, as suggested by Kroger, OMAEG, RESA, and IGS, which would restore the delicate balance of the Amended Stipulation and address the Commission's concern about escalating bill impacts.

an as yet unmaterialized concern where, instead, it could exercise its authority to prospectively modify rates during the term of the ESP.

**{¶ 50}** OCC, on the other hand, disagrees with all parties who support a bypassable Reconciliation Rider or, for that matter, a conditionally bypassable Reconciliation Rider. Instead, OCC submits that the Reconciliation Rider is unlawful regardless of whether it is bypassable or nonbypassable. OCC states that the precise issue has already been decided by the Commission in a previous proceeding. Specifically, OCC submits that the Commission held that a similar nonbypassable rider is lawful in *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR (*AEP PPA Case*), Second Entry on Rehearing (Nov. 3, 2016) at ¶ 51-58. Thus, OCC deduces that any argument against the Reconciliation Rider simply because it has been modified to be nonbypassable is without merit. OCC further contends that RESA's proposed trigger point approach should be rejected as lacking evidentiary support and because, in OCC's view, no measure can render an OVEC subsidy rider such as the Reconciliation Rider lawful.

**{¶ 51}** The Commission finds that rehearing on these assignments of error should be denied. In determining that the Reconciliation Rider should be nonbypassable, the Commission was persuaded by the testimony of OCC witness Kahal. Although Mr. Kahal was fundamentally opposed to the Reconciliation Rider, Mr. Kahal argued that keeping the Reconciliation Rider as bypassable would artificially inflate SSO prices, and he recommended that the costs recovered by the Reconciliation Rider be shared by all distribution customers on an equitable basis (OCC Ex. 12 at 38). Moreover, we find that the record demonstrates that making the Reconciliation Rider bypassable would create the risk for escalating bill impacts as shopping increases (Tr. Vol. II at 351). We also agree with OCC that there is no basis in the record for the trigger mechanisms now proposed by some of the signatory parties.

**{¶ 52}** With respect to arguments raised that the Commission could prospectively modify and adjust the Reconciliation Rider in the event that the Commission's concern for

potential escalating bill impacts becomes a reality, the Commission notes that it is well established that the Commission is entitled to modify a prior order provided that the Commission explains the reasons for the modification and that the new regulatory course is permissible. *In re Application of Ohio Power Co.,* 2015-Ohio-2056 at ¶ 16, quoting *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ¶ 52. However, electric distribution utilities have a statutory right to withdraw an ESP application in the event that the Commission modifies and approves the proposed ESP. R.C. 4928.143(C)(2)(a). The Supreme Court has held that the Commission cannot modify ESPs in a manner which denies the electric distribution utility its statutory right to withdraw. *Ohio Power Co.,* 2015-Ohio-2056 at ¶¶ 24, 26. Given our ability to address the potential for escalating bill impacts now, we are unwilling to defer, to the future, modification of the Reconciliation Rider due to the risk that such future modification may be construed to deny DP&L of its statutory right to withdraw the ESP. Finally, the Commission notes that, although we have decided this issue on the evidence presented in this proceeding, our decision that the Reconciliation Rider should be nonbypassable is consistent with our ruling in the *AEP PPA Case. AEP PPA Case,* Second Entry on Rehearing (Nov. 3, 2016) at ¶ 51-59.

### 3. THE OPINION AND ORDER DID NOT VIOLATE R.C. 4903.09.

**{¶ 53}** IEU-Ohio, IGS, RESA, OMAEG, and Kroger assert that the Commission's modification of the Reconciliation Rider to be nonbypassable is unsupported by the record and, therefore, unlawful. The parties submit that, pursuant to R.C. 4903.09 and *Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999), the Commission is obligated to support our decisions with record evidence and to provide findings of fact and the reasons prompting the decisions arrived at, based on those findings of fact, such that the Supreme Court of Ohio can readily ascertain whether the order is unlawful or unreasonable. Each of the above-named parties submits that, here, the Commission failed to fulfill this duty and, instead, provided a rationale—"the potential for escalating bill impacts as shopping increases"—that is based on speculation. Opinion and Order at ¶ 63. IEU-Ohio, IGS, RESA, OMAEG, and Kroger all affirmatively state that the Commission committed reversible error

in failing to cite to the evidence upon which we based our decision. RESA adds that, in fact, the record is silent as to the issue of whether the Reconciliation Rider rates will escalate during the term of the ESP.

**{¶ 54}** OCC argues to the contrary. Although not abandoning its argument that the Reconciliation Rider is unlawful and unreasonable, OCC does contend that the record contains evidentiary support for a nonbypassable Reconciliation Rider. Specifically, OCC points to its witness, Mr. Kahal, and DP&L's witness, Ms. Schroeder, as both providing direct record evidence supporting the Commission's modification.

**{¶ 55}** The Commission fully explained in the Opinion and Order the basis for modifying the Reconciliation Rider and the record evidence in support of that modification. In the Opinion and Order, the Commission noted OCC's arguments that: the Reconciliation Rider unfairly burdened SSO customers; as more customers decide to shop and fewer customers remain with the SSO, the Reconciliation Rider's rates will increase; and this is unfair and not in the public interest. Opinion and Order at ¶ 57 (citing OCC Ex. 12 at 38). The Commission then agreed with the argument raised by OCC, stating that "because the signatory parties have proposed that the Reconciliation Rider be bypassable, we agree that there is the potential for escalating bill impacts as shopping increases." Therefore, the Commission modified the Reconciliation Rider to make it nonbypassable. Opinion and Order at ¶ 63. Nonetheless, the Commission will reiterate that the record demonstrates that making the Reconciliation Rider bypassable would create the risk for escalating bill impacts as shopping increases (Tr. Vol. II at 351). In order to address this risk, we were persuaded by the testimony of OCC witness Kahal who argued that keeping the Reconciliation Rider as bypassable would artificially inflate SSO prices and that the costs recovered by Reconciliation Rider should be shared by all distribution customers on an equitable basis (OCC Ex. 12 at 38). Rehearing on this assignment should be denied.

**{¶ 56}** IEU-Ohio, in its third assignment or error, argues that the Opinion and Order is unlawful and unreasonable because the Commission failed to base its authorization of the

cost allocation and rate design for a nonbypassable Reconciliation Rider on findings of fact supported by the record as required by R.C. 4903.09. IEU-Ohio submits that, because the Amended Stipulation recommended a bypassable Reconciliation Rider, all evidence submitted to the record took into account only the impact of the Reconciliation Rider on SSO customers. Therefore, there is no record evidence to support any cost allocation or rate design methodology for a nonbypassable Reconciliation Rider. Thus, at the very least, IEU-Ohio urges the Commission to grant rehearing to hear additional evidence on the appropriate cost allocation and rate design for a nonbypassable Reconciliation Rider.

**{¶ 57}** The Commission finds that IEU-Ohio's arguments on this assignment of error lack merit. In the Opinion and Order, the Commission directed that the Reconciliation Rider should be allocated to tariff classes based upon an allocation method of 50 percent demand and 50 percent energy with demand being allocated on total load on a 5 Coincident Peak basis and charged on a kWh basis. Opinion and Order at ¶ 63. This is precisely the same cost allocation and rate design recommended by the Amended Stipulation (Jt. Ex. 1 at 13). IEU-Ohio offers no regulatory principle that provides that the recommended cost allocation and rate design are no longer appropriate merely because the Reconciliation Rider has been modified from bypassable to nonbypassable, and IEU-Ohio proffers no evidence in the record demonstrating that the recommended cost allocation and rate design should be changed merely because the Reconciliation Rider has been modified. Accordingly, rehearing on this assignment of error should be denied.

**4. THE RECONCILIATION RIDER IS NOT AN UNLAWFUL TRANSITION CHARGE.**

**{¶ 58}** In its second assignment of error, OCC summarily claims that the Reconciliation Rider is indistinguishable from the Retail Stability Rider deemed to be an unlawful transition charge by the Supreme Court of Ohio in the *AEP ESP II* case, and, therefore, the Opinion and Order adopting the Reconciliation Rider is unlawful.

**{¶ 59}** With respect to OCC's assignment of error, the Commission notes that, rather than explaining its position, OCC cites to its Initial Post-Hearing Brief filed in this

proceeding. The Commission thoroughly addressed those arguments in the Opinion and Order. Opinion and Order at ¶¶ 117, 119. Since OCC does nothing other than rely upon its Initial Post-Hearing Brief in support of its assignment of error, OCC has raised no new arguments for the Commission to consider, and rehearing should be denied on that basis.

**{¶ 60}** IGS adds that it believes the Commission's underlying rationale as to why the Reconciliation Rider is not a transition charge does not withstand scrutiny. IGS first disagrees with the Commission's determination that costs related to OVEC's generation assets do not meet the criteria for transition costs under R.C. 4928.39(B) or (D). In this, IGS states that the Supreme Court of Ohio has interpreted the restructuring legislation that occurred in 1999, as refined in 2008, as clearly prohibiting the Commission from authorizing utilities to recover out-of-market costs from all customers. *AEP ESP II*. On this authority, IGS submits that, regardless of the Commission's rationale, the Opinion and Order approving a nonbypassable Reconciliation Rider provides DP&L with unlawful transition costs. IGS additionally contends that the Commission's rationale is faulty as ignoring the prohibition against not just transition charges but also "any equivalent revenues." Thus, states IGS, labeling the Reconciliation Rider as a stability charge does not insulate it from reversal, as the Supreme Court looks to the nature of the costs recovered through the charge, not the label placed upon it.

**{¶ 61}** DP&L, however, offers two arguments as to why the Reconciliation Rider is not a transition charge or equivalent revenue. First, as it did with regard to the DMR, the Company asserts that the Reconciliation Rider is lawful pursuant to R.C. 4928.143(B)(2), which contains a "notwithstanding" clause that elevates it beyond the proscriptions found in R.C. 4928.38. Second, DP&L observes that the Commission has already rejected this argument in relation to a similar rider and should not revisit the issue or reverse course here. *AEP PPA Case*, Second Entry on Rehearing (Nov. 3, 2016) at ¶ 253.

**{¶ 62}** The Commission affirms our decision that the Reconciliation Rider is not a transition charge. IGS claims that the Reconciliation Rider collects transition costs or its

equivalent. However, in order to reach that conclusion, IGS simply ignores the plain language of R.C. 4928.39, which sets forth the criteria for transition costs. R.C. 4928.39 states, in relevant part:

> Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds *meet all of the following criteria*:
>
> (A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and *directly assignable or allocable to retail electric generation service provided to electric consumers in this state.*
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) *The utility would otherwise be entitled an opportunity to recover the costs.*

(Emphasis added.) R.C. 4928.39. The purpose of transition revenue was to allow electric distribution utilities to recover the costs of generation assets used to provide generation service to customers prior to the unbundling of rates in S.B. 3, if such costs could not be recovered through the market. R.C 4928.39. However, OVEC's generation output was used to provide generation service to the U.S. Department of Energy and its predecessors prior to January 1, 2001. Therefore, as discussed above, the OVEC contractual entitlement, which was a *wholesale transaction* between OVEC and DP&L, was not "directly assignable or allocable to *retail electric generation service* provided to electric consumers in this state." (Emphasis added). R.C. 4928.39(B). Moreover, at the time of the enactment of S.B. 3 and the

transition to a competitive market on January 1, 2001, OVEC's generation assets were used to serve OVEC's sole customer, the U.S. Department of Energy. Thus, DP&L was not "entitled an opportunity to recover the costs" within the meaning of the statute. R.C. 4928.39(D). Accordingly, we affirm our finding that costs related to OVEC's generation assets do not meet the criteria for transition costs under R.C 4928.39(B) or (D). Since OVEC's generation assets were used to provide generation service to the U.S. Department of Energy and its predecessors prior to the transition to a competitive market on January 1, 2001, costs related to OVEC's generation assets cannot be the basis for transition charges or their equivalent. *See also, AEP PPA Case,* Second Entry on Rehearing (Nov. 3, 2016) at ¶ 252-253, Fifth Entry on Rehearing (Apr. 5, 2017) at ¶ 83. Accordingly, rehearing on IGS' third assignment of error should be denied.

**{¶ 63}** Additionally, OMAEG and Kroger argue that the Reconciliation Rider became unlawful upon the Commission's modification of the rider from bypassable to nonbypassable. OMAEG and Kroger observe that, based on the authority of *AEP ESP II,* the Supreme Court of Ohio recently reversed the Commission's approval of DP&L's former nonbypassable service stability charge as an unlawful transition charge and state that a nonbypassable Reconciliation Rider is similarly unlawful. *In re Dayton Power and Light Co.,* 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 734. In this, Kroger and OMAEG conclude a bypassable Reconciliation Rider is lawful where the nonbypassable Reconciliation Rider is not because a transition charge is by definition nonbypassable.

**{¶ 64}** Rehearing on these assignments of error should be denied. The fact that the Commission modified the Reconciliation Rider to make it nonbypassable rather than bypassable has no bearing on whether the Reconciliation Rider is a transition charge, which it is *not* under any circumstances. There is no statutory support for the proposition that a rider, collecting the same costs, is not a transition charge if it is bypassable but is a transition charge if it is nonbypassable. R.C. 4928.37 states, in relevant part:

> (A)(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive *transition revenues* that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues *through both of the following mechanisms* beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:
>
> (a) *Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service* during the market development period *by the customer's electric distribution utility,* which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;
>
> (b) *Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service* during the market development period *by an entity other than the customer's electric distribution utility,* as such transition charge is determined under section 4928.40 of the Revised Code. * * *

(Emphasis added.) R.C. 4928.37. The plain language of the statute demonstrates that transition revenues were to be collected by both bypassable charges, under R.C. 4928.37(A)(1)(a), and nonbypassable charges, under R.C. 4928.37(A)(1)(b), depending on whether a customer was served by the electric distribution utility or a competitive retail electric service provider. The Reconciliation Rider is not a transition charge or its equivalent, and the fact that the Commission modified the Amended Stipulation to make the Reconciliation Rider nonbypassable does not cause the Reconciliation Rider to be a transition charge or its equivalent.

5. THE RECONCILIATION RIDER IS NOT AN ANTICOMPETITIVE SUBSIDY.

{¶ 65} In the final group of arguments regarding the Reconciliation Rider as a nonbypassable rider, Kroger, OMAEG, RESA and IGS argue that the Opinion and Order is unlawful in modifying the Amended Stipulation because, as a nonbypassable rider, the Reconciliation Rider violates Ohio policy by authorizing the collection of generation charges through distribution rates. Pointing to R.C. 4928.02(H), under which it is Ohio policy to ensure effective competition in the provision of retail electric service by prohibiting the recovery of any generation-related costs through distribution rates, these parties all argue that a nonbypassable Reconciliation Rider is unlawful because it permits DP&L to collect generation-related costs from shopping customers whose generation is procured elsewhere. IGS adds that R.C. 4928.143 provides only two instances in which the Commission may authorize a nonbypassable generation-related rider as part of an ESP: to recover costs associated with generating facilities under construction or constructed after 2009. R.C. 4928.143(B)(2)(b) and (c). IGS argues that, as neither instance is implicated here, the Commission should reject the nonbypassable Reconciliation Rider.

{¶ 66} The Commission finds that rehearing on these assignments of error should also be denied. In the Opinion and Order, the Commission determined, based upon the evidence in the record, that the Reconciliation Rider will benefit customers because it will act as a hedge which will mitigate spikes in market prices (Co. Ex. 3 at 14; Tr. Vol IV at 755-56). Opinion and Order at ¶ 63. Although the Commission modified the Reconciliation Rider in order to reduce the potential for escalating bill impacts, this countercyclical hedge should benefit both shopping and nonshopping customers. Nonetheless, the Commission finds that, as a nonbypassable rider, the Reconciliation Rider should present no obstacle to effective competition in the DP&L service territory because the Reconciliation Rider will be charged in the same amounts irrespective of whether the customer is obtaining generation from the standard service offer or from a competitive retail electric supplier. Further, we reject IGS' claim that R.C. 4928.143 provides only two instances in which the Commission may authorize a nonbypassable generation-related rider as part of an ESP. R.C.

4928.143(B)(2)(d) authorizes terms, conditions or charges relating to both limitations on customer shopping for retail electric generation service and default service. Moreover, R.C. 4928.143(B)(2)(d) specifically authorizes the Commission to determine the "bypassability" of such terms, conditions or charges.

### C. *Economic Development Incentives*

**{¶ 67}** In its third assignment of error, OCC argues that the Commission's Opinion and Order with regard to economic development incentives lacks evidentiary support in violation of R.C. 4903.09 and R.C. 4928.143(B)(2)(i). Narrowing the argument further, OCC submits that, absent a demonstration of need or specific commitments by those purportedly receiving the incentives, the Commission should not approve the economic development incentives.

**{¶ 68}** Kroger, DP&L, OMAEG, and IEU-Ohio disagree. These entities contend that OCC is arguing for a statutory requirement—the demonstration of need or specific commitments—that does not exist and, therefore, cannot successfully lead to rehearing. Further, these parties argue that, as the Commission correctly noted, R.C. 4928.143(B)(2)(i) expressly allows provisions for economic development and job retention. Finally, DP&L, OMAEG, IEU-Ohio, and Kroger all submit that there is ample support in the record for the Commission's findings regarding the economic development incentives.

**{¶ 69}** The Commission finds that rehearing on this assignment of error should be denied. OCC's claim that the Commission violated R.C. 4903.09 has no merit. In the Opinion and Order, the Commission noted that economic development programs are expressly authorized to be included in ESPs by R.C. 4928.143(B)(2)(i) and that there is no requirement for specific commitments or demonstration of need in the statute. Nonetheless, the Commission determined that the testimony of OPAE witness Cronmiller supported the need for economic development programs in the DP&L service territory. Ms. Cronmiller testified that a significant number of people in the DP&L service territory live below the poverty line and that median household incomes have fallen. We also noted Ms.

Cronmiller's testimony that one reason for the cause of the high poverty rate is that higher-paying, full-time jobs are being replaced with jobs that do not pay a living wage or jobs that are part-time or temporary (OPAE Ex. 1 at 3). Opinion and Order at ¶ 123.

### D. *Transfer of Generation Assets and Sale of Coal Assets*

**{¶ 70}** Murray/Citizens submit that the Commission unreasonably and unlawfully failed to exercise its jurisdiction under R.C. 4928.17(E) and Ohio Adm. Code 4901:1-37. In this, Murray/Citizens state that the Commission should have mandated that the Stuart and Killen stations be included in the Amended Stipulation's sale process in addition to the Conesville, Miami Fort, and Zimmer stations. Murray/Citizens assert that the exclusion of the Stuart and Killen stations from the proposed sale process does not benefit ratepayers and is against the public interest because it imposes costs and debt service on jurisdictional customers that will no longer benefit from the transferred generation assets, i.e., ratepayers will be responsible for the residual debt from the generation assets without the benefit of any gain that might be realized from their transfer or sale. Similarly, Murray/Citizens posit that the Commission's failure to insist on an attempted sale process, thus permitting that the plants simply be closed, is against the public interest because the communities in which the plants are located will be economically devastated. For these same reasons, Murray/Citizens further state that failure to include Stuart and Killen in the proposed sale process violates important regulatory principles, especially where the Amended Stipulation differs from the Commission's Finding and Order in the *DP&L Divestiture Case*. Finally, Murray/Citizens argue that the Commission's conclusion regarding the exclusion of the Stuart and Killen stations from the Amended Stipulation is contrary to the manifest weight of the evidence.

**{¶ 71}** Responding to Murray/Citizens, DP&L first states that Murray/Citizens fail to view the Amended Stipulation as a package and, instead, zero in on a narrow issue specific to their interests. For this reason alone, DP&L submits that Murray/Citizens' application for rehearing should be denied. Second, the Company submits that the

Commission should reject the assigned error because Murray/Citizens' witness conceded that the Amended Stipulation was, indeed, silent as to the Stuart and Killen stations. In other words, nothing in the Amended Stipulation requires that DP&L close Stuart or Killen, and nothing in the Amended Stipulation prevents DP&L or its affiliates from selling those plants to a third party. In essence, then, DP&L asserts that Murray/Citizens are arguing against a non-issue.

**{¶ 72}** The Commission notes that in the Amended Stipulation, the signatory parties agreed to a sale process to sell to a third-party DP&L's ownership in the Conesville, Miami Fort, and Zimmer generation stations (Joint Ex. 1 at 4). As DP&L notes, when we consider a proposed stipulation, the Commission evaluates the provisions of the stipulation as a package. Opinion and Order at ¶ 79. *See, e.g., In re Ohio Power Co.*, Case No. 94-996-EL-AIR, et al., Opinion and Order (Mar. 23, 1995) at 20-21; *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 99-1729-EL-ETP, et al., Opinion and Order (Sept. 28, 2000) at 44; *In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order (Sept. 2, 2003) at 29. In this case, the evidence did not support the modification of the Amended Stipulation on the issue raised by Murray/Citizens. Murray/Citizens' witness Medine acknowledged that the Amended Stipulation places no requirement on DP&L to close Stuart or Killen. Likewise, Ms. Medine agreed that the Amended Stipulation contains no prohibition against the sale of Stuart or Killen to a third party. (Tr. Vol. III 565.) Opinion and Order at ¶ 78. We are not persuaded by any evidence in the record, including the testimony provided by Ms. Medine, that it would benefit the public interest by restricting the Company's discretion as to the disposition of the Stuart or Killen generation stations. Accordingly, rehearing on this assignment of error should be denied.

**{¶ 73}** In its application for rehearing, DP&L states that the Opinion and Order is unreasonable and unlawful to the extent it modified the Amended Stipulation by finding that (1) AES, through DP&L and DPL Inc., committed to use the proceeds from the sale of **<u>any</u>** generation assets to pay down debt and (2) DP&L committed to pursue closure of any

coal-fired generation stations. DP&L indicates that both findings are misstatements of the record evidence that must be corrected on rehearing.

**{¶ 74}** Looking first to Paragraph 77 of the Opinion and Order, DP&L contends that the Commission erroneously stated, "AES Corporation, through DP&L and DPL Inc., has committed to use the proceeds from the sale of any generation assets to pay down debt (Co. Ex. 3 at 19; Jt. Ex. 1 at 4)." The Company asserts that, while AES committed to "use all proceeds from any sale of the coal generation assets to make discretionary debt repayments at DP&L and DPL Inc.," it did not agree to use the proceeds from the sale of any other generation asset for any particular purpose (Jt. Ex. 1 at 4). The Company argues that the Opinion and Order misstates both the Stipulation and the supporting testimony and, therefore, should be corrected on rehearing.

**{¶ 75}** Moving on to Paragraph 104 of the Opinion and Order, DP&L also contends that the Commission erroneously stated that, "as part of the Amended Stipulation, DP&L committed to transfer all of its generation assets to an affiliate and pursue either sale or closure of its coal-fired generation plants." To the contrary, argues DP&L, the Company did not commit to close any generation facilities within the Amended Stipulation. As with the above, the Company argues that the Opinion and Order misstates both the Amended Stipulation and the supporting testimony and, therefore, should be corrected on rehearing.

**{¶ 76}** The Commission will grant rehearing on this assignment of error to clarify that the Commission did not intend to modify the Amended Stipulation on these points. We agree that, in the Amended Stipulation, AES committed to use all proceeds from any sale of the coal generation assets to make discretionary debt repayments at DP&L and DPL Inc. Further, we agree that as part of the Amended Stipulation, DP&L committed to transfer all of its generation assets to an affiliate. (Joint Ex. 1 at 4). Nothing in the Opinion and Order should be construed to modify those provisions.

*E. ESP More Favorable in the Aggregate than MRO*

**{¶ 77}** In its first assignment of error, OCC asserts that the Commission erred in finding that ESP III is more favorable in the aggregate than an MRO in violation of R.C. 4928.143. OCC contends that because DP&L failed to present evidence regarding the cost of several proposed riders in ESP III, the Commission could not have considered "pricing and all other terms and conditions" of the ESP as required by R.C. 4928.143(C)(1). In other words, given the alleged lack of evidence of the cost of certain riders, OCC submits that the Commission's conclusion that the ESP III is more favorable than an MRO is fatally flawed.

**{¶ 78}** Responding, DP&L states that the Commission correctly concluded that the cited riders would be equally available under an ESP or an MRO; therefore, the fact that the cost of those riders is currently unknown is irrelevant to whether ESP III is more favorable. Thus, the Commission's analysis is not flawed. To the contrary, the Company asserts that ample record evidence supports the Commission's conclusion, which should remain undisturbed.

**{¶ 79}** The Commission finds that rehearing on this assignment of error should be denied. We reject OCC's contention that, because some of the riders approved or continued under the proposed ESP have a variable future cost, the Commission cannot conclude that the proposed ESP is more favorable in the aggregate than an MRO. Initially, we note that, in support of its claim, OCC incorrectly identifies the Economic Development Rider and the Storm Damage Rider as examples of riders which were newly created by the ESP and set to zero. These riders were created before the implementation of this ESP. *In the Matter of the Application of The Dayton Power & Light Co. to Update its Economic Development Rider,* Case No. 17-537-EL-RDR, Finding and Order (Apr. 26, 2017). *In the Matter of the Application of The Dayton Power & Light Co. for Authority to Recover Certain Storm-Related Service Restoration Costs,* Case No. 12-3052-EL-RDR et al., Opinion and Order (Dec. 17, 2014).

**{¶ 80}** In addition, the record demonstrates that certain zero-based riders created under the Amended Stipulation will recover costs that are either recoverable in a

distribution rate case or are otherwise recoverable in the hypothetical situation that DP&L were to implement an MRO. For example, the Commission has determined that, under an MRO, an electric distribution utility could recover the same costs through a distribution rate case as it would recover through a distribution investment rider under an ESP:

> With respect to the arguments raised regarding Rider DCR, the Commission notes that NOPEC and OCC/CP misrepresent the fundamental nature of Rider DCR. Under the Stipulation, Rider DCR allows the Companies to "earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant" not included in the rate base of the Companies' last distribution case (Co. Ex. 1, Stip. at 19; Tr. III at 39). In a distribution rate case, the Commission is required to determine the valuation, as of the date certain, of property used and useful in rendering public utility service. Section 4909.15, Revised Code. Therefore, to the extent that the Companies have made capital investments since the last distribution rate case, those investments will be recovered to an equal extent, through either Rider DCR or distribution rates, provided that the property is used and useful in the provision of distribution service. For this reason, Staff witness Fortney testified that, over the long term, the Companies will recover the equivalent of the same costs, and that, for purposes of the ESP v. MRO Test, the costs of the proposed Rider DCR and that the costs of a potential distribution rate case should be considered equal (Staff Ex. 3 at 4-5). The Commission notes that both the Companies and consumers benefit from distribution mechanisms authorized by Section 4928.143(B)(2)(h), Revised Code, such as Rider DCR. The Companies benefit from the mitigation of regulatory lag in their distribution rates. Consumers benefit from caps in rate increases in the short term and more gradual rate increases in the future (Tr. III at 141).

*In re FirstEnergy*, Case No. 12-1230-EL-SSO, Second Entry on Rehearing (Jan. 30, 2013) at 22-23. In this case, the Amended Stipulation provides for a distribution investment rider (DIR), initially set at zero, to recover incremental distribution capital investments (Jt. Ex. 1 at 6). Any costs recovered by the DIR would also be recoverable through a distribution rate case; for purposes of the ESP versus MRO test, it is a wash. Likewise, the Amended Stipulation provides for a new smart grid rider (SGR), initially set at zero, to recover the costs of DP&L's grid modernization plan, including advanced metering infrastructure (Jt. Ex. 1 at 7-8). R.C. 4905.31 specifically authorizes an electric light company to file a mechanism to recover the costs incurred in conjunction with any acquisition and deployment of advanced metering. Therefore, under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31, and DP&L could recover other distribution costs under the grid modernization program through a distribution rate case; for purposes of the ESP versus MRO test; it is a wash.

**{¶ 81}** Upon review of the record, we affirm our finding that the evidence demonstrates that ESP III is more favorable in the aggregate than an MRO. Staff witness Donlon testified that, on a quantitative basis, ESP III is more beneficial in the aggregate by a minimum of $9 million (Staff Ex. 2 at 5-6). Opinion and Order at ¶ 91-92. With respect to the riders which are newly established and set to zero, other than the DIR and the SGR, OCC had a full and fair opportunity to offer testimony at the hearing with OCC's own estimates of the future costs of these riders, but OCC failed to present testimony for the Commission to consider as part of the quantitative analysis.

**{¶ 82}** In addition, the Commission determined that there are additional, qualitative benefits of ESP III that would not be available under an MRO. There are commitments by the Company, and its parent, DPL Inc., to improve DP&L's financial integrity. During the term of ESP III, AES committed to foregoing dividend payments from DPL Inc. (Co. Ex. 3 at 10, 18-19; Jt. Ex. 1 at 3). During the period in ESP III in which the DMR is collected, AES agreed to forgo collection of tax sharing payments from DPL Inc. and convert those tax

sharing liabilities into an additional equity investment in DPL Inc., which will significantly strengthen DPL Inc.'s balance sheet (Co. Ex. 2A at 4, 61-62, 66-67; Co. Ex. 3 at 19; Jt. Ex. 1 at 3-4). DP&L is required to transfer its generation assets to an affiliate and, for certain generation assets, to begin a sales process. The proceeds of those sales are to go towards debt repayments. (Co. Ex. 3 at 19; J. Ex. 1 at 3-4). These commitments would not be required under an MRO and will put DP&L in a better position to invest in infrastructure and grid modernization (Tr. Vol. V at 883). Opinion and Order at ¶ 93. Therefore, we affirm our finding that ESP III, including its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO pursuant to R.C. 4928.142.

## V. MOTION TO REOPEN PROCEEDINGS

**{¶ 83}** On April 26, 2018, while the above applications for rehearing were pending, Ohio Environmental Council (OEC), Sierra Club, Environmental Law & Policy Center (ELPC), and Environmental Defense Fund (EDF) (collectively, Conservation Groups or Groups) filed a motion to reopen this proceeding to allow for consideration of "new risks and newly discovered facts" resulting from the bankruptcy of FirstEnergy Solutions (FES) that could allegedly impact the costs that DP&L customers would pay under the Reconciliation Rider (Motion to Reopen at 1). For cause, Conservation Groups state that FES' bankruptcy and related attempt to terminate its obligation under the Inter-Company Power Agreement present new risks for DP&L's customers under the Reconciliation Rider that the Commission should consider. The Groups also contend that the bankruptcy-related filings by FES and OVEC, both before the bankruptcy court and before FERC, present at least seven significant newly discovered facts that should be admitted into the record because they are relevant to costs faced by DP&L customers regardless of the outcome of FES' bankruptcy proceeding. Further, Conservation Groups declare that their motion comports with Ohio Adm.Code 4901-1-34, that the Commission has the authority to reopen

a proceeding at any time prior to the issuance of a final order, and that the Commission has, in fact, found good cause to reopen at least two proceedings prior to a final order.

**{¶ 84}** In a May 11, 2018 memorandum in opposition, DP&L proclaims that the Conservation Groups' motion is procedurally barred and substantively flawed. The Company first asserts that no motion to reopen can be heard because the Commission's October 20, 2017 Opinion and Order is a final order; thus, the motion is nothing more than an untimely application for rehearing, which the Commission has no authority to grant. Secondarily, DP&L states that the Groups have failed to show good cause for revisiting the Reconciliation Rider; nor have they demonstrated that the evidence they wish to present could not, with reasonable diligence, have been presented earlier in the proceeding in accordance with Ohio Adm.Code 4901-1-34(B). DP&L characterizes the facts upon which the Conservation Groups rely as speculation and hearsay, neither of which are properly included in the evidentiary record, or as having been created after the close of the record such as updated forecasts. The Company strongly urges the Commission to reject the notion that updated forecasts and events occurring months after the issuance of a final order can justify reopening a record.

**{¶ 85}** Responding, the Conservation Groups disagree that the Opinion and Order is a "final order," as contemplated by Ohio Adm.Code 4901-1-34(A) because it is final for purposes of appeal under R.C. 2505.02 and, moreover, because the issue it seeks to revisit—the Reconciliation Rider—is subject to rehearing. The Groups also stand behind their original contention that good cause exists to reopen the proceeding: to demonstrate the current risks related to FES' bankruptcy that for DP&L's customers under the Reconciliation Rider and present the Commission the opportunity to protect those customers from the financial burden of paying FES' share of OVEC losses through that rider. Finally, the Groups argue that the Commission can take administrative notice of the bankruptcy and FERC filings, or hear testimony from witnesses with personal knowledge of the same, to alleviate any concern regarding speculation or hearsay.

**{¶ 86}** The Commission finds that the motion to reopen proceedings should be denied. The motion to reopen proceedings was not timely in accordance with Commission precedent. Further, even if the motion was timely, which it was not, the motion did not set forth good cause to reopen the proceeding, and the motion does not demonstrate why the evidence proffered therein could not, with reasonable diligence, have been presented earlier in the proceeding.

**{¶ 87}** The Commission finds that, in accordance with Commission precedent, the motion to reopen the proceeding was not timely filed. As DP&L aptly notes, in both cases relied upon by the Conservation Groups, the Commission had not issued our opinion and order prior to the filing of the motion to reopen proceedings. *In re the Application of Delmas Conley*, Case No. 90-1568-TR-ACP (Motion to reopen proceedings filed on October 3, 1991, Entry reopening proceedings issued on October 24, 1991, Opinion and Order issued on May 21, 1992); *In re Columbia Gas of Ohio, Inc.*, Case No. 07-478-GA-UNC (Motion to hold hearing on amended stipulation filed on January 8, 2008, Entry reopening proceeding issued on January 10, 2008, Opinion and Order issued on April 9, 2008). Thus, Conservation Groups have not cited a precedent where the Commission has granted a motion to reopen proceedings after the issuance of the Opinion and Order in a case. Whereas, in this case, the Opinion and Order was issued on October 20, 2017, and the motion to reopen proceedings was not filed until April 26, 2018, over six months later.

**{¶ 88}** Further, the Commission has determined that a motion to reopen proceedings filed more than 30 days after issuance of an order of the Commission in a proceeding constitutes an untimely application for rehearing. R.C. 4903.10 states, in relevant part:

> After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. * * *

R.C. 4903.10. The Commission has determined that a motion to reopen proceedings filed more than 30 days after the Commission has issued an order in a proceeding, with respect to a matter determined by the Commission in such order, essentially equates to an untimely application for rehearing. *In re The East Ohio Gas Co.*, Case No. 07-829-GA-AIR et al. (*East Ohio Gas*), Entry (July 29, 2009) at 4. As noted above, the Commission issued the Opinion and Order in this case on October 20, 2017. The Environmental Advocates, i.e., OEC and EDF, filed an application for rehearing on November 17, 2017, but did not challenge the Reconciliation Rider as all of their assignments of error were related to the DMR. Neither Sierra Club nor ELPC filed an application for rehearing with respect to the Opinion and Order. However, in their motion to reopen proceedings, the Conservation Groups ask the Commission to reconsider a matter, the Reconciliation Rider, on which none of the four parties constituting the Conservation Groups (OEC, EDF, Sierra Club and ELPC) timely sought rehearing. Under these circumstances, and consistent with our ruling in *East Ohio Gas*, we find that the motion to reopen the proceeding filed on April 26, 2018, essentially equates to an application for rehearing which failed to meet the statutory deadline set forth in R.C. 4903.10. We cannot waive this statutory deadline. *East Ohio Gas*, Entry on Rehearing (Sept. 23, 2009) at 5. Accordingly, the motion to reopen proceedings should be denied.

**{¶ 89}** Nonetheless, even if the motion to reopen proceedings had been timely filed, which it was not, the Conservation Groups have not shown good cause to reopen this proceeding. Conservation Groups identify seven key "facts" to support reopening of this proceeding. However, most of the key facts are simply allegations made in pleadings before the United States Bankruptcy Court or the FERC. Two of the claims are made by FES in a motion to the Bankruptcy Court while another claim relates to the motion filed by FES. FES is not a party to this proceeding. No statement by FES was relied upon by the signatory parties in support of the Amended Stipulation. No witness from FES testified in this case. No evidence submitted by FES was relied upon by the Commission in the Opinion and Order. It is difficult for the Commission to construe allegations made by a non-party to this case, in a different case and in a different forum than the Commission, as good cause to

reopen this proceeding. Moreover, Conservation Groups have not demonstrated that the "evidence" could not, with reasonable diligence, have been presented earlier in the proceeding. FES is certified by the Commission to provide competitive retail electric service in this state. The Conservation Groups have not demonstrated that they were unaware of FES' financial issues before the bankruptcy or that FES' bankruptcy filing was unforeseen or unforeseeable. Conservation Groups have not demonstrated that they attempted but were unable to obtain this information from FES. Conservation Groups have not demonstrated that they sought a subpoena from the Commission pursuant to Ohio Adm.Code 4901-1-25 to obtain this information from FES. The application, which included the proposed Reconciliation Rider, was filed in this proceeding on February 22, 2016. The hearing commenced on April 3, 2017, over 13 months after the application was filed. If this information proffered by the motion to reopen was relevant to this case, Conservation Groups should have been able to obtain the information, prior to the hearing, with due diligence.

**{¶ 90}** Further, one of the allegations relied upon by Conservation Groups consists of a new forecast made by an expert, Judah Rose, in support of FES' motion before the Bankruptcy Court. Mr. Rose was not employed by DP&L to support its application. He did not testify in this proceeding. In the Opinion and Order, the Commission did not rely upon any testimony or other evidence submitted by Mr. Rose. The Conservation Groups consider it particularly noteworthy that Mr. Rose has also submitted testimony in a different case before the Commission. Certainly, parties in that case may seek to cross-examine Mr. Rose on the projection he submitted to the Bankruptcy Court, but Conservation Groups do not explain his relevance to this proceeding. Finally, the Commission is most reluctant to credit a "new" forecast as evidence that could not, with reasonable diligence, have been presented earlier in the proceeding because parties can always create or otherwise obtain new forecasts. Even if the Commission were to reopen this proceeding, hear testimony on this "new" forecast, and issue a new ruling in this case, a dissatisfied party could create and submit to the Commission yet another new forecast in support of its position, arguing that

this new forecast is grounds to reopen the proceeding because, since it is "new," it could not, with reasonable diligence, have been presented earlier in the proceeding.

{¶ 91} Conservation Groups also rely upon three allegations made by OVEC in a pleading before the FERC. As with the allegations made by FES, OVEC was not a party to this case. OVEC presented no testimony in this proceeding. The Commission did not rely upon any evidence submitted by OVEC in this proceeding. Moreover, as with FES, Conservation Groups have not demonstrated that the information could not, with reasonable diligence, have been presented earlier in the proceeding. OVEC is a public utility regulated by the Commission. Conservation Groups have not demonstrated that they attempted, but were unable, to obtain this information from OVEC prior to the hearing. Conservation Groups have not demonstrated that they sought a subpoena from the Commission pursuant to Ohio Adm.Code 4901-1-25 to obtain this information from OVEC. If the information proffered by the motion to reopen was relevant to this proceeding, Conservation Groups should have been able to obtain the information prior to the hearing with due diligence in the thirteen months between the filing of the application and the commencement of the hearing.

{¶ 92} Because it was not timely filed and otherwise fails to demonstrate good cause for the requested action, the Conservation Groups' motion to reopen this proceeding should be denied.

## VI. ORDER

{¶ 93} It is, therefore,

{¶ 94} ORDERED, That the Environmental Advocates' application for rehearing filed November 17, 2017, be denied. It is, further,

{¶ 95} ORDERED, That the applications for rehearing filed by OCC, IEU-Ohio, RESA, IGS, OMAEG, Kroger, and Murray/Citizens on November 20, 2017, be denied. It is, further,

{¶ 96} ORDERED, That the application for rehearing filed by DP&L on November 17, 2017, be granted, in part, and denied, in part, as set forth herein. It is, further,

{¶ 97} ORDERED, That the April 26, 2018 motion to reopen proceeding filed by the Conservation Groups be denied. It is, further,

{¶ 98} ORDERED, That a copy of this Third Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

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