FILE

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	))))))	Case No. 19-0020 On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of the Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	))))	

NOTICE OF APPEAL
BY
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC" or "Appellant"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal taken to ensure that customers paying hundreds of millions of dollars in rates to Dayton Power & Light ("DP&L") get the benefit of statutorily defined consumer protections. OCC is also appealing to protect DP&L's customers from paying rates that include unlawful above-market subsidy charges for electricity.

Appellant is the statutory representative, as established under R.C. Chapter 4911, of DP&L's nearly 460,000 residential customers. OCC was a party of record in the case being appealed. Appellant takes this appeal from PUCO decisions approving a Distribution Modernization Rider and a Reconciliation Rider for DP&L in PUCO Case No. 16-395-EL-SSO et al. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on October 20, 2017 (Attachment A), the PUCO's Third Entry on Rehearing of September 19, 2018 (Attachment B) and the PUCO's Fourth Entry on Rehearing of November 7, 2018 (Attachment C).[1]

OCC asserts that these Orders are unlawful and unreasonable in the following respects, all of which were raised in OCC's Application for Rehearing as noted:

1. The PUCO unreasonably and unlawfully ruled that the Distribution Modernization Rider revenues are to be excluded when considering whether electric security plan rates produce excessive profits for the utilities, violating R.C. 4928.143(F) and Supreme Court precedent. *In re Columbus S. Power Co,*

[1] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

134 Ohio St.3d 392 (2012). (OCC Application for Rehearing at 7-8 (November 20, 2017)).

2. The PUCO lacked jurisdiction to authorize DP&L to charge customers for power plant subsidies using a charge called the Reconciliation Rider. The PUCO's decision was unlawful because DP&L's Reconciliation Rider is preempted by the Federal Power Act. The PUCO's exercise of state authority in violation of the federal act runs afoul of the Supremacy Clause of the U.S. Constitution, Article 6.[2]

OCC respectfully submits that the PUCO's Opinion and Order entered in its Journal on October 20, 2017, the PUCO's Third Entry on Rehearing of September 19, 2018 and the PUCO's Fourth Entry on Rehearing of November 7, 2018 are unreasonable and unlawful and should be reversed or modified with specific instructions to the PUCO to correct its errors.

[2] Subject matter jurisdiction cannot be waived and may be raised at any time. *See, e.g., Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387-88 (1986) (state subject matter jurisdiction preempted where federal law vests exclusive jurisdiction over matter in another body); *Shawnee Twp. V. Allen County Budget Comm'n*, 58 Ohio St. 3d 14, 15 (1991); *H.R. Options v. Zaino*, 100 Ohio St. 3d 373, 374 (2004); *see also Publ'g Group, Ltd. V. Cooper*, 2011 Ohio 2872, para. 7 (Franklin 2011) ("the parties cannot waive subject-matter jurisdiction and may challenge it at any time."); *State v. Blair*, 2010 Ohio 6310, para. 13 (Hamilton 2010) ("A judgment imposed by a court without subject-matter jurisdiction is void. A party cannot waive subject-matter jurisdiction and may raise the issue at any time."); *City of Cleveland v. Simpkins*, 192 Ohio App. 3d 808, 813 (Cuyahoga 2011) (noting that a party "cannot waive subject matter jurisdiction."); *see also Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016) (holding plan similar to Reconciliation Rider was preempted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 7th day of January 2019.

s/ William J. Michael
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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

s/ William J. Michael
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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	))))))	Case No. 19-0020 On Appeal from the Public Utilities Commission of Ohio
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ATTACHMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

Entered in the Journal on October 20, 2017

I. SUMMARY

{¶ 1} In this Opinion and Order, the Commission modifies and adopts the Amended Stipulation filed by various parties and authorizes the Dayton Power and Light Company to establish its third electric security plan.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) is a public utility as defined under R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission. On February 22, 2016, DP&L filed an application for a standard service offer pursuant to R.C. 4928.141. DP&L's application is for an electric security plan (ESP) in accordance with R.C. 4928.143. Additionally, DP&L filed accompanying applications for approval of revised tariffs and for approval of certain accounting authority.

{¶ 3} By Entry on April 11, 2016, the attorney examiner scheduled a technical conference for May 5, 2016. By subsequent Entry, on August 16, 2016, the attorney examiner scheduled a local public hearing for September 27, 2016, as well as an evidentiary hearing that was eventually continued several times.

{¶ 4} Thereafter, on October 11, 2016, DP&L filed an amended application for an ESP.

{¶ 5} On January 30, 2017, a stipulation and recommendation was filed by DP&L and some of the parties. Subsequently, on March 14, 2017, an amended stipulation and recommendation (Amended Stipulation) was filed by DP&L and some of the parties, including additional parties that were not part of the first stipulation.

{¶ 6} Motions to intervene were granted to the Environmental Law and Policy Center (ELPC), the Independent Market Monitor for PJM (Market Monitor), the Ohio Energy Group (OEG), Energy Professionals of Ohio (EPO), Industrial Energy Users Ohio (IEU-Ohio), Dynegy, Inc. (Dynegy), the Kroger Company (Kroger), Ohio Manufacturers' Association Energy Group (OMAEG), the Ohio Consumers' Counsel (OCC), IGS Energy (IGS), Noble Americas Energy Solutions, LLC (Noble), Ohio Partners for Affordable Energy (OPAE), the Ohio Environmental Council and Environmental Defense Fund (Environmental Groups), EnerNOC, Inc. (EnerNOC), Sierra Club, the Ohio Hospital Association (OHA), City of Dayton (Dayton), Duke Energy Ohio, Inc. (Duke), PJM Power Providers Group and Electric Power Supply Association (EPSA), Honda of America Manufacturing, Inc. (Honda), Wal-Mart Stores East, LP and Sam's East, Inc. (Wal-Mart), Edgemont Neighborhood Coalition (Edgemont), Mid-Atlantic Renewable Energy Coalition, Utility Workers Union of America Local 175 (UWU), the Retail Energy Supply Association (RESA), the Citizens to Protect DP&L Jobs (CPJ), People Working Cooperatively (PWC), PJM Interconnection (PJM), and Murray Energy Corporation (Murray).

{¶ 7} A hearing was held, as scheduled, on April 3, 2017, and continued, intermittently, for eight days. Seven witnesses testified in support of the Amended Stipulation, and 12 testified against.

{¶ 8} A large number of public comments were filed in the docket. The majority of the comments were against DP&L's application and the Amended Stipulation.

{¶ 9} Initial briefs were filed by Murray Energy, CPJ, Walmart, Edgemont, OPAE, Kroger, Dayton, Honda, the Market Monitor, OEG, Sierra Club, PWC, OCC, IGS, RESA, UWU, the Environmental Groups, DP&L, and Staff. Reply briefs were filed by IEU-Ohio, Murray Energy, CPJ, Honda, Dayton, Edgemont, OPAE, OCC, the Environmental Groups, OEG, Kroger, OMAEG, Sierra Club, IGS, RESA, PWC, DP&L, and Staff.

III. Discussion

{¶ 10} R.C. Chapter 4928 provides an integrated system of regulation in which specific provisions were 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 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 amended R.C. 4928.141, which provides that, beginning January 1, 2009, electric utilities must provide customers with an SSO consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default service. R.C. 4928.143 sets forth the requirements for an ESP. Additionally, R.C. 4928.143(C)(1) provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of the same, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C 4928.142.

A. *Summary of the Application*

{¶ 12} In its original application, DP&L proposed an ESP with a term lasting from January 1, 2017, to December 31, 2026. Further, the Company requested to continue its current process for supplying its standard service offer load through 100 percent competitive bidding. DP&L also proposed several new riders. This included: (1) A Distribution Investment Rider (DIR) that would allow DP&L to recover the costs of specific infrastructure needs; (2) a Reconciliation Rider that would permit DP&L to recover deferred costs from the Ohio Valley Electric Corporation (OVEC); (3) a Distribution Decoupling Rider so that DP&L could account for the decoupling associated with energy efficiency requirements; (4) a Clean Energy Rider to facilitate investment in renewable and advanced technologies; and, finally, (5) a Reliable Electricity Rider (RER), which would permit DP&L to credit or charge customers the annual projected variance between the revenue requirement and revenues expected for its generation assets.

{¶ 13} In its amended application, the Company requested an ESP with a shorter term, lasting from 2017 through 2023. Additionally, DP&L also withdrew the RER and replaced it with the Distribution Modernization Rider (DMR). Through the DMR, DP&L requests to recover $145 million per year to permit the Company to access equity and debt capital to finance infrastructure modernization investments. DP&L asserts that the Company's financial integrity is facing significant threats due to a falling credit rating, anemic load growth, and historically low market prices. Accordingly, DP&L requests the DMR be approved so that the resulting cash flow can be used: to pay interest obligations on existing debt at DP&L and its parent company, DPL Inc.; to make discretionary debt prepayments at DP&L and DPL Inc.; and to allow DP&L to make capital expenditures to modernize and maintain transmission and distribution infrastructure. Without the DMR, DP&L states it would have insufficient cash flow to pay normal course obligations and would face an immediate downgrade of its credit rating to below investment grade level.

B. Summary of the Amended Stipulation

{¶ 14} As discussed, DP&L and numerous parties filed the Amended Stipulation (Jt. Ex. 1) on March 14, 2017. Below is a summary of the provisions agreed to by the stipulating parties, which is not inclusive of all provisions in the Amended Stipulation and is not intended to replace or supersede the Amended Stipulation.

a. During the term of the ESP, DPL Inc. will not make any dividend payments to AES Corporation or to AES Ohio Generation, LLC (collectively, AES).

b. During the term of the DMR, DPL Inc. will not make any tax-sharing payments to AES and AES will forgo collection of the payments. AES and DPL Inc. will convert the entirety of the current and non-current DPL Inc. Tax Sharing Liabilities to an additional equity investment in DPL Inc. on or before the effective date of the ESP. Thereafter, during the term of the DMR, AES and DPL Inc. will, each month, convert the additional DPL Inc. Tax Sharing Liabilities for that month to an additional equity investment in DPL Inc. AES, DP&L and DPL Inc. agree that the conversions will not be reversed at any future date.

c. Assuming approval by the Federal Energy Regulatory Commission (FERC), DP&L agrees to transfer its generation assets and non-debt liabilities to AES Ohio Generation, LLC, an affiliated subsidiary of DPL Inc., within 180 days following final Commission approval of the Amended Stipulation, provided that the Commission approves the Amended Stipulation without material modifications.[1]

d. DP&L will commit to commence a sale process to sell to a third party its ownership in Conesville, Miami Fort, and Zimmer Stations.[2]

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1 On August 29, 2017, FERC approved the transfer of DP&L generation facilities to its affiliate, AES Ohio Generation LLC. *The Dayton Power and Light Co./AES Ohio Generation LLC*, 160 FERC ¶ 61,034 (August 29, 2017) (order authorizing disposition and acquisition of jurisdictional facilities).

2 On July 24, 2017, DP&L provided notice of the sale of its ownership interests in the Miami Fort Generation Station (Miami Fort) Units 7 and 8 and in the Zimmer Generation Station (Zimmer). *In re Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Notice Filing (July 24, 2017) (notice of anticipated sale of ownership interests in generation assets). The Commission hereby takes administrative notice of this

e. AES will use all proceeds from any sale of the coal generation assets to make discretionary debt repayments at DP&L and DPL Inc.

f. DP&L will implement the DMR for years one through three of the term of the ESP. The DMR shall be designed to collect $105 million in revenue per year. With Commission approval, DP&L may have the option of extending the duration of the DMR for an additional two years. DP&L may apply for such extension by filing an application in a separate docket by June 1, 2019. The Commission will determine the amount of the DMR for the two-year extension period based upon the evidence presented in the separate docket, including, but not limited to evidence of DPL Inc.'s and DP&L's financial needs and evidence of the measures undertaken by DPL Inc. and DP&L, to address their financial issues.

g. Cash flow from the DMR will be used to (a) pay interest obligations on existing debt at DPL Inc. and DP&L; (b) make discretionary debt prepayments at DPL Inc. and DP&L; and (c) position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure.

h. The cost allocation of the DMR to tariff classes will balance the bill impact to customers, fairness, and cost-causation principles. This allocation shall be as follows: 34 percent allocated based on 5 Coincident Peaks, 33 percent allocated based on distribution revenue, and 33 percent based on historic allocation of the currently charged nonbypassable rider. The DMR will include an annual true-up mechanism, without carrying charges.

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filing. Accordingly, as the July 24, 2017 Notice Filing acknowledges the sale of the two generation stations, OCC's May 15, 217 motion requesting the Commission take administrative notice of an April 21, 2017 security filing documenting the same transaction is moot.

i. A DIR will be established, set initially at zero, to recover incremental distribution capital investments. Recovery of revenue requirements will be based upon and commence with the resolution of DP&L's distribution rate case or a future distribution rate case. All other matters related to the DIR, including, but not limited to cost allocation, term, rate design, and annual revenue caps, shall be addressed in the pending distribution rate case or a future distribution rate case.

j. The DMR revenues shall be excluded from Significantly Excessive Earnings Test (SEET) calculations. DP&L's SEET threshold will remain at 12 percent.

k. DP&L will file a comprehensive Distribution Infrastructure Modernization Plan (Modernization Plan) within three months of completion of the Commission's Power Forward initiative or February 1, 2018, whichever is earlier unless an extension is recommended by Staff or granted by the Commission.

l. The Modernization Plan should assess and analyze the cost-effectiveness and provide a cost/benefit analysis of all of its components and provide anticipated timelines for deployment. The Modernization Plan will identify operational cost savings from the program. The Modernization Plan will include a proposal for specific technology components.

m. The costs of DP&L's grid modernization efforts as outlined in the to-be-filed Modernization Plan, once approved by the Commission, will be recovered through a new Smart Grid Rider (SGR). The costs of the grid modernization program will be subject to an annual prudence review. The SGR shall be set initially at zero. All other matters relating to the SGR shall be addressed in a future proceeding seeking approval of the Modernization Plan.

n. DP&L will implement a bypassable, Standard Offer Rate that will be based on competitive bid auctions, as accepted by the Commission in Case No. 08-1094-EL-SSO and charged on a $/kilowatt hour (kWh) basis for all tariff classes.

o. Consistent with the current process, DP&L will procure renewable energy credits to meet the requirements in R.C. 4928.64 and recover those reasonable and prudent costs on a bypassable basis. Although these amounts will be separately identified in supporting schedules, these amounts will be included as a component of the Standard Offer Rate instead of a separate Alternative Energy Rider (AER) Tariff. Additionally, DP&L agrees to not implement the cash working component of the Standard Offer Rate as originally proposed in the Application.

p. For the proposed Standard Offer Rate, DP&L will phase in the proposed rate design for the Residential Heating Class and Secondary Class over a two year period such that DP&L's proposed rate design will be in place beginning year three of the ESP.

q. The Unbilled Fuel as proposed in the Application will be recovered and tracked separately on a bypassable basis over a three-year period with no carrying charges.

r. In DP&L's distribution rate case (Case No. 15-1830-EL-AIR), there will be an evaluation of costs contained in distribution rates that may be necessary to provide standard service offer service. Any reallocation of costs to the standard service offer as a result of this evaluation will be revenue neutral to DP&L.

s. DP&L will offer several different economic development incentives to large customers that are Signatory or Non-Opposing Parties. Customers may receive only one of the incentives below, and incentives may not be combined.

The costs of these programs will be recovered through DP&L's nonbypassable Economic Development Rider (EDR), consistent with how those costs are allocated and recovered through that rider currently. The provisions shall expire when the DMR expires, or when an equivalent economic stability charge intended to provide financial stability to DP&L or DPL Inc., whether proposed in this case or another proceeding, expires. DP&L will implement the following economic development incentives that will be equal to $(0.0040) per kWh for all kWh:

i. Economic Improvement Incentive: available to single site customers with megawatt (MW) demand of 10 MW or greater with an average load factor of at least 80 percent. The Signatory or Non-Opposing Parties that qualify for the incentive are: one member of OEG, one member of IEU-Ohio, and one member of OHA.

ii. Automaker Incentive: available to single site customers with MW demand of four MW or greater. The Signatory or Non-Opposing Parties that qualify for the incentive are: One member of OEG, Honda, and one member of OMAEG.

iii. Ohio Business Incentive: available to businesses headquartered in the State of Ohio; this incentive will aggregate accounts within the DP&L service area and must achieve a total average demand of two MW or greater. The Signatory or Non-Opposing Parties that qualify for the incentive are: Honda, two other members of OMAEG, Kroger, and one member of IEU-Ohio.

t. DP&L agrees to make the following economic development payments, which payments shall not be recoverable from customers. The provisions shall expire when the DMR expires, or when an equivalent economic stability charge intended to provide financial stability to DP&L or DPL Inc., whether proposed in this case or another proceeding, expires.

i. Economic Development grant fund of $1,000,000 annually for use by customers within DP&L's service territory for energy programs and infrastructure.

ii. Within 60 days of Commission approval of the Amended Stipulation, DP&L shall provide the first of no more than five economic development grants that will total $2 million dollars over the term of the ESP. DP&L will consult with the Adams County officials to identify the most appropriate third-party to administer the funds. The funds will be used specifically for (a) economic development activities, (b) workforce development, and (c) direct financial education assistance for job training at state or federally licensed educational institutions for individual DP&L employees who work at generation facilities in Adams and Brown Counties, Ohio and surrounding communities. At least half of the funds provided by DP&L shall be used for job training. DP&L further agrees to collaborate with local and statewide economic development organizations to identify and promote potential economic development in Adams and Brown Counties.

iii. To partially offset the costs of the Amended Stipulation and rate design modifications, within ten days of an Order by the Commission authorizing DP&L to file tariff sheets to collect the DMR, DP&L will pay $145,000 to IEU-Ohio for the benefit of its members, $18,000 to OMAEG for the benefit of its members, and $160,000 to Kroger. Thereafter, DP&L will pay the same amounts to IEU-Ohio, OMAEG and Kroger, on the annual anniversary of the date on which the first payment was made. If the Commission, another administrative agency, or a court modifies the proposed amount to be collected or credited under the DMR or the EDR credits, the parties agree that such modification is a material modification and agree to negotiate in good faith to amend this paragraph so that the parties receive the expected value of the agreement. In no event shall IEU-Ohio, OMAEG, Kroger or any of their benefiting members be obligated to return all or any portion of any payment made by DP&L.

u. DP&L has proposed riders in both its pending Distribution Rate case and this ESP case. Those requests will be treated as follows:

i. In the Reconciliation Rider, DP&L shall withdraw its request to recover in this case OVEC costs that it has deferred pursuant to the Commission's Order in Case No. 13-2420-EL-UNC. After an Order in this ESP case, DP&L shall defer/recover or credit, the net of proceeds from selling OVEC energy and capacity into the PJM marketplace and OVEC costs. The Reconciliation Rider will be trued up and the rate allocation will be updated annually. DP&L agrees to continue pursuing options to discharge its OVEC obligations. DP&L shall file an annual report no later than February 28 of each year during the term of the ESP, outlining its efforts made in the prior 12 months to relieve itself of its OVEC obligations.

ii. DP&L will implement the Decoupling Rider to include the lost revenues currently recovered through the Energy Efficiency Rider as agreed to in the Stipulation filed in Case No. 16-649-EL-POR on December 13, 2016. All other matters relating to the Decoupling Rider, including but not limited to cost allocation, term and rate design, shall be addressed in the pending distribution case, Case No. 15-1830-EL-

RDR or in DP&L's next Energy Efficiency Portfolio case. This Rider will be charged on a nonbypassable basis.

iii. DP&L's Transmission Cost Recovery Rider – Nonbypassable (TCRR-N) will be implemented as it is currently. In addition, DP&L agrees to deploy a small-scale pilot program providing an alternative means for customers to obtain and pay for services otherwise provided by or through the TCRR-N.

iv. DP&L will implement a nonbypassable Regulatory Compliance Rider (RCR) to recover the following five separate deferral balances: (1) Consumer Education Campaign costs; (2) Retail Settlement System costs; (3) Green Pricing Program costs; (4) Generation Separation costs; and (5) Bill Format Redesign costs. DP&L will recover carrying costs at DP&L's cost of debt on the Bill Format Redesign starting at the time those costs were incurred. Additionally, carrying costs at DP&L's cost of debt will be included at the onset of recovery of the RCR for the remaining RCR items except for Generation Separation costs. The rider will be trued up annually. The cost allocation of the RCR to tariff classes will be based on base distribution revenues. The RCR rate design will be a monthly charge per customer account. The total dollars recovered through the RCR shall not exceed a total of $20 million over the ESP term including the remaining costs associated with the separation of the generation assets which is capped at $10 million as set forth in Case No. 13-2420-EL-UNC. DP&L may also recover costs associated with supplier consolidated billing provisions, through the RCR, provided that the amount recovered through the RCR does not exceed the aforementioned cap.

v. The Storm Cost Recovery Rider (SCRR) will remain in place as a placeholder tariff. DP&L will file a future application if it seeks any recovery of costs from major storms. This nonbypassable rider will include Operating and Maintenance (O&M) expenses incurred for all storms that are determined to be "Major Events," as defined in Ohio Adm.Code 4901:1-10-01. No level of expenses for major storms will be in base rates, meaning that there will be no baseline for which an amount over would be considered. Therefore, all prudently-incurred expenses that are incremental to base rates would be considered for recovery. This would include, among other things, the amounts over the first forty hours of labor in a given week as well as overtime paid for union and management employees. If any mutual assistance revenue is received for storm repairs done in other markets, the straight-time labor portion of this would be deducted from the Company's storm rider recovery request to avoid potential double-recovery. Any capital assets would be addressed through the DIR.

vi. Additionally, carrying charges at the last approved cost of debt would be accrued from the point of deferral until recovery begins. Recovery would generally be over one year; however, if the deferred amount is large, the Company may request a longer recovery period to lessen the impact on rates. The Company will file yearly its SCRR by April 1 of each year and Staff will complete its audit with the Commission's approval for rates to be effective around August 1 of each year. The cost allocation of the SCRR to tariff classes will be based on base distribution revenues and will be a monthly charge per customer account. If the pending distribution rate case is not approved, then any future recovery will be offset by the three-year average of major storm repair expenses (less any outlier storms) until a future case decides an amount, if any, to be considered in base rates.

vii. As originally proposed in DP&L's distribution rate case, DP&L will implement an Uncollectible Rider to recover the uncollectible expense through a nonbypassable, annually filed true-up rider with the exception that DP&L will recover uncollectible expense associated with bypassable standard service offer rates through a bypassable component of the Uncollectible Rider. This rider will recover uncollectible expense that has historically been included in individual rate components and will track and recover actual costs. Implementation of this rider also represents the removal of uncollectible expense from other individual rate components except for the historical uncollected uncollectible Percentage of Income Payment Plan amounts up to the effective date of the rider. DP&L will address any uncollectible expense included in base distribution rates in the annual true-up filing of this rider, which will include an adjustment to revenue until new base distribution rates are in place. In addition, any amounts written off as uncollectible that are ultimately recovered will be credited back to the rider. Carrying charges will be included within the calculation of the over- or under-collection in the annual true-up mechanism.

v. No later than 60 days after a Commission order approving the Amended Stipulation with or without modifications, Staff will request that the Commission conduct a rule review to establish parameters to all for non-commodity billing in all electric distribution utility service territories. DP&L agrees to provide for a non-commodity billing on a customer's utility bills after the Commission has evaluated and approved billing requirements for non-commodity billing in a rule review process or another proceeding. DP&L will be permitted to seek cost recovery associated with providing non-commodity billing in part from Competitive Retail Electric Service (CRES) providers utilizing non-commodity billing and other third parties and ratepayers equally in another proceeding, with any application for cost recovery to be submitted on an expedited basis to ensure timely implementation of non-commodity billing. Notwithstanding any provision to the contrary, DP&L shall submit an application to the Commission to establish non-commodity billing and parameters and to establish any terms for cost recovery by DP&L no later than 18 months after the date the Commission issues an order approving the stipulation.

w. DP&L agrees to work with Staff, RESA, and IGS to determine the parameters of a two-year pilot supplier consolidated billing program for any CRES provider that is qualified and interested. The purpose of the pilot will be to provide the industry with data and information on the practicality of a supplier consolidated billing implementation in the Ohio electric choice market. Costs related to DP&L's implementation of the pilot supplier consolidated billing program will be shared 50 percent by participating CRES providers, and DP&L will develop and provide all interested CRES providers with an estimate of the total implementation costs, with the exception that DP&L will provide a credit of $150,000 toward the CRES providers' portion of these costs.

x. Finally, DP&L reached specific agreements with individual signatory parties, including Dayton, Honda, Edgemont/OPAE, OHA, and PWC, which are described in the Amended Stipulation. These provisions expire when the DMR expires, or when an equivalent economic stability charge intended to provide financial stability to DP&L or DPL Inc., whether proposed in this case or another future proceeding, expires.

C. *Consideration of the Amended Stipulation*

{¶ 15} As happens in many cases before the Commission, the parties filed a stipulation, which the parties specifically describe as the culmination of discussions and accommodation of diverse interests. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers Counsel v. Pub. Util Comm.*, 64 Ohio St.3d 123,125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util Comm.*, 55 Ohio St.2d 155,157, 378 N.E.2d 480 (1978).

{¶ 16} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *Western Reserve Telephone Co.*, Case No. 93- 230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993). The ultimate issue for our consideration is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit ratepayers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice? The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

1. IS THE SETTLEMENT A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 17} In the Amended Stipulation, the signatory parties assert the resulting settlement is a product of extensive, arm's-length bargaining among the signatory parties and non-opposing parties and that no parties were excluded from negotiations (Jt. Ex. 1 at 1-2). Company witness Sharon R. Schroder testified that numerous negotiations were held over a period of months and that the signatory parties and non-opposing parties represent diverse interests (Co. Ex. 2 at 4-5). Staff witness Patrick Donlon testified similarly, saying that the signatory parties and non-opposing parties are knowledgeable, capable parties that regularly participate in Commission proceedings and are represented by experienced and competent counsel (Staff Ex. 2 at 3-4). Honda, OEG, PWC, OPAE, and Kroger also aver that the Amended Stipulation meets the first prong of the test.

{¶ 18} OCC is the lone party that argues otherwise. OCC witness Mathew Kahal testified that only 10 of the roughly 30 intervenors support the Amended Stipulation, and of those intervenors, several of them do not explicitly support the DIR or the DMR. Other signatories, according to Kahal, only offer their support in exchange for cash handouts. (OCC Ex. 2 at 13, 16.) OCC witness James Williams further stated that the bulk of DP&L's customer base—the residential customers represented by OCC—do not support the Amended Stipulation. Without the support of the residential customers, who represent 89 percent of DP&L's customers, Williams submits that the Amended Stipulation does not represent a diversity of interests. (OCC Ex. 13 at 7.)

{¶ 19} In response, DP&L remarks that the Commission has repeatedly found that one party cannot effectively veto a stipulation, citing *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 41. Further, even though OCC opposes the Amended Stipulation, DP&L notes that the City of Dayton, the largest municipality in DP&L's service territory, as well as three low-income residential groups and Staff all signed the Amended Stipulation (Jt. Ex. 1 at 39-40). DP&L also maintains that OCC wrongly classifies the provisions that benefit specific parties as handouts. According to DP&L, many of the benefits are economic development incentives, which are specifically contemplated by R.C. 4928.143(B)(2)(i). Other contributions go to residential customers or further state policies. Thus, DP&L states the provisions are lawful and proper. In sum, DP&L states OCC's argument should be rejected, and the Commission should find that the Amended Stipulation is a product of serious bargaining.

{¶ 20} The Commission finds that the Amended Stipulation is the product of serious bargaining among capable and knowledgably parties. First, the signatory parties routinely appear in complex hearings before the Commission and all are represented by counsel with extensive experience (Staff Ex. 2 at 3-4). Further, the record demonstrates that the Amended Stipulation was the result of an extensive negotiations process (Co. Ex. 3 at 7-8), and there is no evidence that any party was unduly excluded from the negotiations process.

{¶ 21} We note that OCC witness Williams misstates the first prong of the three part test in his testimony (OCC Ex. 13 at 6). Although diversity of interests among signatory parties is not *necessary* for any stipulation to meet the first prong, it is *helpful* if the signatory parties do represent a variety of interests (Tr. Vol. V at 864-65). The parties signing the Amended Stipulation represent diverse interests, including a large municipality, competitive suppliers, commercial customers, industrial consumers, large businesses, advocates for low-income residential customers, and Staff. OCC's argument that the Amended Stipulation lacks a diversity of interests unless it includes OCC is without merit. Initially, we note that we have consistently rejected numerous proposals that any one class of customers can effectively veto a stipulation, finding that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first prong of the test. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (February 2, 2005) at 18; Entry on Rehearing (March 23, 2005) at 7.

{¶ 22} Moreover, it is inaccurate for OCC to assert that no residential customers support the Amended Stipulation. As discussed by DP&L, the City of Dayton, the largest municipality in DP&L's service territory, as well as three low-income residential groups and Staff all signed the Amended Stipulation (Jt. Ex. 1 at 39-40). We further find OCC's contention that some parties only agreed to the Amended Stipulation in exchange for cash payments to be unpersuasive. While many signatory parties receive benefits under the Amended Stipulation, we will not conclude that these benefits are the sole motivation of any party in supporting the Amended Stipulation. We expect that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. Additionally, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs. The question for the Commission under the first prong of our test for the consideration of stipulations is whether the benefits to parties are fully disclosed as required by R.C. 4928.145.

{¶ 23} Accordingly, we find that, based upon the record before the Commission, all provisions of the Amended Stipulation and any other agreements among the parties were fully and adequately disclosed pursuant to R.C. 4928.145 and that the Amended Stipulation appears to be the product of serious bargaining among capable, knowledgeable parties.

2. Does the Settlement, as a Package, Benefit Ratepayers and the Public Interest?

{¶ 24} DP&L, as well as the City of Dayton, Honda, IGS, Kroger, OEG, RESA, and Staff, submits that the Amended Stipulation benefits ratepayers and the public interest for numerous reasons. DP&L first argues that with the approval of the Amended Stipulation, and in particular the DMR, DP&L will be able to maintain its financial integrity and thus continue to provide safe and reliable service to customers. (Co. Ex. 1 at 17-18.) The Company maintains that it is facing major financial difficulties and that its credit ratings were recently downgraded. The updated credit ratings, according to the DP&L, are either below investment grade or barely investment grade (Co. Ex. 105). DP&L asserts that this could lead to a higher cost of debt for the Company, which, in turn, would lead to higher utility rates for customers. (Co. Ex. 2 at 58-59.)

{¶ 25} DP&L further states that the DMR allows DP&L to pay down debt and modernize its distribution grid. The Company avers that the public and the ratepayers would benefit from a modernized grid as it would, among other things, significantly improve reliability. (Co. Ex. 2 at 58-59.) Staff agrees, noting that the Commission announced intentions to advance a smart grid initiative. Staff avers that while details of the initiative are still being determined, it will require a significant investment from all electric utilities. According to Staff, the DMR puts DP&L in a financial position to be able to make such investments. Staff states consumers will benefit from an improved, more advanced distribution grid and thus will benefit from the DMR.

{¶ 26} The Company additionally asserts that the public benefits from concessions made by DP&L's parent company, AES. As part of the Amended Stipulation, AES will not receive any dividends from DPL Inc., nor will AES collect DPL Inc.'s tax sharing payments. Further, AES will convert DPL Inc.'s tax liabilities into equity. DP&L affirms that these are material investments from AES that are not otherwise required or typically within the Commission's jurisdiction. According to DP&L, these concessions improve the Company's financial health by providing additional cash flow to DP&L and DPL Inc. (Co. Ex. 2 at 4.)

{¶ 27} DP&L submits that the Amended Stipulation has numerous other provisions that provide benefits to customers. These include:

a. Competitive bidding. DP&L states that 100 percent of the Company's SSO load will be provided through competitive bidding. According to DP&L, competitive bidding is the most significant reason for the reduction of residential customer bills.

b. Transfer of generation assets and sale of coal assets. The Company asserts that by transferring its generating assets to an affiliate, customers benefit. Further, with the sale of certain coal-fired generation assets, DP&L states it will use the proceeds to pay down debt at DP&L and DPL Inc. and thus improve its financial well-being and allow the Company to better serve customers.

c. Economic development incentives. According to DP&L, incentives provided to certain large employers allow those companies to retain existing employees and hire new ones. DP&L submits that these investments have a multiplier effect, as those employees then contribute to other local businesses.

d. Economic development grant fund. DP&L avers this provides funds to certain customers to use for energy programs, certain large employers within the Company's service territory, as well as to Adams County. DP&L maintains these costs are absorbed completely by the Company and not recovered from customers.

e. Reconciliation Rider. With this rider, DP&L can recover or credit the net proceeds of selling OVEC energy and capacity into PJM. DP&L asserts that the rider is necessary for the Company's financial integrity but also serves as a hedge for customers against future spikes in power prices.

f. Competitive enhancements. The Company states the Amended Stipulation provides three significant competitive enhancements which assist the competitive market, and, in turn, benefit customers. According to DP&L, this includes a pilot program that makes TCRR-N rider bypassable, a supplier consolidated billing program, and provisions to include non-commodity items on a utility consolidated bill.

g. Provisions regarding City of Dayton. DP&L avers the residents of the City of Dayton, which is the largest municipality in the Company's service territory, benefit significantly from a number of provisions in the Amended Stipulation. Among other things, DP&L agrees to maintain its headquarters within the city, develop a job training program, and contribute $200,000 annually for economic development programs.

h. Funds for low-income customers. DP&L states it is committing to provide $965,000 annually, of shareholder funds, for its low-income residential customers.

{¶ 28} Finally, the Company maintains that with the approval of the Amended Stipulation, a typical residential customer will experience a reduction in rates. DP&L asserts this would result in the Company having the lowest residential rates in the state. (Co. Ex. 3 at 20-21.)

{¶ 29} OPAE, Edgemont, and PWC agree that the Amended Stipulation benefits the public interest and ratepayers, particularly low income residential customers. OPAE notes that nearly 20 percent of the population of Montgomery County lives below the poverty line and utility costs represent a major housing concern for many residents. OPAE asserts that besides the $965,000 of shareholder funds that DP&L is contributing annually to low-income residential customers, the Company is also providing $200,000 a year to fund programs to assist low-income, elderly, and disabled customers. OPAE confirms that this is an increase in the amount of assistance low-income customers receive and will substantially help customers in need. (OPAE Ex. 1 at 3-4.)

{¶ 30} Intervenors opposing the Amended Stipulation, including OCC, the Environmental Groups, Walmart, Murray, and UWU, argue that the Amended Stipulation does not benefit ratepayers or the public interest, as discussed below.

a. Whether the DMR benefits ratepayers and the public interest

{¶ 31} As discussed, DP&L maintains that, without the DMR, the Company's financial integrity would be jeopardized, which would affect the Company's ability to provide safe and reliable service to its customers. According to DP&L, the Company needs the DMR in order to have sufficient cash flows to pay all normal course obligations, including its operating expenses. Further, with the DMR, DP&L claims it will be on a path to be able to modernize its distribution grid.

{¶ 32} OCC argues that the DMR is not needed in order for DP&L to provide its customers with safe and reliable service. OCC asserts that the Commission sets specific reliability standards for electric utilities such as DP&L and requires them to file annual reports regarding their performance. According to OCC, DP&L has met or exceeded those standards every year for the past five years. OCC further maintains that if DP&L fails to meet the reliability standards, the Commission has rules in place that gives the Company nearly two years to correct any issues contributing to the decreased reliability performance. Accordingly, OCC submits that DP&L has not demonstrated that the current status of the Company's financial integrity is affecting its ability to provide safe and reliable service. (OCC Ex. 13 at 19-21.)

{¶ 33} DP&L responds that it is not disputed that the Company's financial integrity is presently at risk. DP&L further maintains that the Company's ability to provide safe and reliable service to its customers is directly tied to its financial integrity. Therefore, DP&L states the DMR is necessary and needed. While DP&L has continued to satisfy the Commission's reliability standards, DP&L avers this is because of previously stability riders that are no longer available. Moreover, DP&L affirms it is illogical to wait for service to become unreliable before addressing known concerns.

{¶ 34} OCC, Walmart, and the Environmental Groups further assert that the DMR is harmful to consumers and is not a cost that should be covered by ratepayers. OCC avers that DP&L is requesting the DMR to address significant debt issues that are affecting the Company's financial integrity. OCC states the debt issues stem from AES's purchase of DPL Inc. and DP&L. According to OCC, when AES purchased DP&L, and its generation assets, AES burdened DPL Inc. with approximately $1 billion in debt. OCC asserts that DP&L, by itself, is not facing any financial hardships and still maintains an investment grade credit rating (Co. Ex. 105). Walmart agrees and states that the decision to house the debt with DPL

Inc. was a business decision made by AES. Both Walmart and OCC submit that it is thus unfair for ratepayers to solve the Company's self-inflicted financial predicament. If approved, OCC asserts the DMR will be harmful to residential customers, as the average residential ratepayer will be paying $9 per month for the DMR, or $107 per year. Walmart further argues that the DMR, while harmful, does not change the Company's financial situation. According to Walmart, even with the cash infusion from the DMR factored in, DPL Inc.'s credit rating would still not be investment grade. OCC and Walmart submit that, instead of the DMR, DP&L should have pursued other, better options to address the Company's financial dilemma. Both OCC and Walmart suggest that DP&L's parent company, AES, could provide some form of equity infusion to alleviate DPL Inc.'s financial difficulties. OCC additionally states that the implementation of ring fencing measures to create greater credit rating separation between DPL Inc. and DP&L would also be beneficial. In sum, OCC, Walmart, and the Environmental Groups maintain that AES has the means and ability to alleviate the financial problems faced by DPL Inc. and DP&L and it should not be the responsibility of the ratepayers to pay the Company's debts.

{¶ 35} In reply, DP&L avers that AES is making significant concessions in order to address the financial issues facing DP&L and DPL Inc. The Company notes that the concessions agreed to in the Amended Stipulation would not otherwise have been available if the case was fully litigated. Even with the concessions by AES, however, DP&L claims that the DMR is still necessary.

b. The evidence demonstrates that the possible downgrade of DP&L's credit rating and the actual downgrade of DPL's credit rating has had an adverse effect upon the Company's ability to access capital markets and invest in the grid.

{¶ 36} In the FirstEnergy utilities' most recent electric security plan proceeding, the Commission was confronted by evidence of potential adverse consequence of a possible downgrade of three electric distribution utilities' credit ratings and the possible downgrade of the credit ratings of their parent company. In this proceeding, there is undisputed evidence of the actual adverse consequences of a possible downgrade to an electric distribution utility as well as the actual downgrade of its parent company. These adverse consequences are real and have a significant impact on the Company's ability to access capital markets to fund grid modernization in its service territory. In fact, OCC witness Kahal conceded that he considered it to be vitally important that DP&L have an investment grade credit rating (Tr. Vol. IV at 695).

{¶ 37} The record demonstrates that at the time DP&L's testimony was filed in this case on October 11, 2016, DPL's ratings were B+/BB/Ba3 with negative outlooks (Fitch/S&P/Moody's) and DP&L's secured bond rating was BBB/BBB-/Baa2 with negative outlooks (Fitch/S&P/Moody's). Thus DPL was below investment grade while DP&L was investment grade with negative outlooks. (Co. Ex. 1B at 28; Co. Ex. 2B at 42-43). However, the record also reflects that, by the time of the hearing, S&P had downgraded the issuer credit rating of both DPL and DP&L to BB- which is below investment grade (Tr. Vol. IV at 698-700; Co. Ex. 105).

{¶ 38} As a result, in its recent refinancing of debt, DP&L was unable to refinance the debt on terms typical for a traditional investment grade utility. Instead, DP&L was forced to accept credit terms including: a short-term maturity (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 the transmission and distribution system for the term of the loan (Co. Ex. 1B at 9-10; Tr. Vol. I at 109-110). The Commission finds that these terms pose a significant obstacle to grid modernization in the DP&L service territory.

c. *DP&L and its parent company have taken affirmative steps to address their financial difficulties.*

{¶ 39} The record demonstrates that DP&L and DPL have taken affirmative steps to address their financial difficulties prior to seeking relief from the Commission in this proceeding. DPL sold its interest in its retail affiliate, raising $90 million in cash. Further, 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).

{¶ 40} In addition, although DP&L has paid dividends to DPL Inc., including $50 million in 2015, DPL Inc. has used these dividends, exclusively, to meet interest obligations and to retire debt at DPL Inc. On the other hand, DPL Inc. has not made any dividend payments to its parent, AES, since 2012. (Co. Ex. 1B at 11; Tr. Vol. I at 88). Instead, DPL Inc. has used all excess cash flows to pay down debt (Co. Ex. 1A at 11).

{¶ 41} The evidence in the record demonstrates that DP&L's financial difficulties result from a number of factors. These factors include weak load growth due to the slow economic recovery and increased use of energy efficiency measures; the low capacity clearing price in the most recent PJM capacity auction; and low energy prices caused by low natural gas prices (Co. Ex. 2B at 8). Moreover, all of the debt at DP&L was issued with the full faith and credit of the utility and is supported by the assets and cash flow of DP&L (Co. Ex. 1B at 13). To the extent that the debt at DPL Inc. resulting from the acquisition is also a factor, it is important to note that, as discussed above, DPL Inc. has not made a dividend payment to AES since 2012 and has used all excess cash flows to pay down debt (Co. Ex. 2B at 11). Moreover, in the Amended Stipulation, DPL Inc. has committed that AES will make the equivalent of an equity contribution under the Amended Stipulation, which will result in a significant improvement to DPL Inc.'s capitalization ratio. (Tr. Vol. I at 107-108).

d. The DMR would provide a needed incentive to DP&L to focus its efforts on grid modernization.

{¶ 42} We agree with the testimony of Staff witness Donlon that the DMR will enable the Company to procure funds to invest in its grid modernization initiatives (Staff Ex. 2 at 4). The Company will use the funds recovered under the DMR exclusively to improve its ability to access capital markets and to invest in grid modernization. Specifically, the Company has committed to use the cash flow from the DMR to: (1) pay interest obligations on existing debt at DP&L and its parent, DPL Inc.; (2) make discretionary debt prepayments at DP&L and DPL Inc.; and (3) allow DP&L to make capital expenditures to maintain and modernize its distribution and transmission infrastructure (Co. Ex. 11B at 12-13). Moreover, testimony during the hearing shows that the Company cannot fund grid modernization investments without the DMR (Tr. Vol. I at 106-107). However, in conjunction with the Reconciliation Rider, the DMR will enable DPL Inc. and DP&L to pay down their existing debt (Co. Ex. 2A at 64).

{¶ 43} Nonetheless, in order to ensure that DMR revenues are used in a manner consistent with the Amended Stipulation, the Commission directs Staff to conduct an ongoing review of the use of Rider DMR cash flow during the ESP. In order to assist Staff in performing such review, the Commission directs Staff to prepare a request for proposal (RFP) for a third-party "monitor" to assist Staff and work with DP&L and DPL, Inc. This RFP should include interim quarterly updates on the use of DMR funds to Staff, a mid-term report to be docketed in any proceeding in which DP&L seeks an extension of the DMR, within 60 days of after the filing of an application for extension, and a final report in a separate docket established for the review of the DMR, to be filed 90 days after the termination of the DMR or its extension. This review process is consistent with reviews established for riders similar to the DMR. *See In re FirstEnergy*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (Aug. 16, 2017) at 49-50.

{¶ 44} OCC may be correct in its arguments that the DMR is not needed to maintain reliability, but that argument is of limited relevance to our decision. The Commission notes that the record shows that grid modernization will improve reliability by reducing the number of outages and improving responses to outages by the EDUs, and that grid modernization also is necessary to deliver innovative products to consumers, to empower consumers to make informed decision in the marketplace and to improve the efficiency of the grid, all of which are consistent with state policy set forth in R.C. 4928.02(B), (C), (D), and (F). (Co. Ex. 2B at 77).

e. The amount of the DMR provided by the Amended Stipulation is supported by the record.

{¶ 45} The evidence in the record demonstrates that including the DMR, as proposed in the Amended Stipulation, and the Reconciliation Rider, in DPL Inc. and DP&L revenues and cash flows, respectively, will result in a marked improvement in the financial condition and integrity of DP&L and DPL Inc. (Co. Ex. 2A at 61). Further, the DMR and Reconciliation Rider should provide stability and certainty regarding future cash flows which should enable DP&L to manage short-term debt maturities and to mitigate refinancing risks (Co. Ex. 2A at 62-63).

f. Whether the provisions regarding AES are beneficial to ratepayers and the public interest

{¶ 46} DP&L states that in agreeing to make several equity investments into DPL Inc., as discussed above, AES is making significant contributions towards alleviating DPL Inc. and DP&L's financial issues, which thus benefits both ratepayers and the public interest. DP&L affirms that these measures are unique and outside the jurisdiction of what the Commission can typically require. (Co. Ex. 2 at 4.)

{¶ 47} OCC responds that the contributions from AES are largely illusory. OCC notes that DPL Inc. has not paid dividends to AES or made tax sharing payment since 2012 (Tr. Vol. V at 16-21). According to OCC, AES would likely continue this practice whether or not the Amended Stipulation was in place. Thus, OCC submits that customers do not receive any benefits from this agreement. (OCC Ex. 12 at 12-14.) Additionally, Walmart argues that AES's commitments are unenforceable and should not be considered a potential benefit to ratepayers or the public interest. Walmart avers that AES did not sign the Amended Stipulation or participate in negotiations, nor does the Commission have jurisdiction over AES. Accordingly, Walmart and OCC conclude that any commitment from AES should be ignored by the Commission.

{¶ 48} The Commission finds that the future contributions to be made by DP&L's ultimate parent, AES are not illusory and are in the public interest. In the Amended Stipulation AES, through DP&L and DPL Inc., commits that, during the six-year term of the ESP, DPL will not make any dividend payments to AES or AES Ohio Generation LLC. (Co. Ex. 3 at 10, 18-19; Jt Ex. 1 at 3). We find no reliable basis for OCC's claim that, because DPL Inc. has not made any dividend payments since 2012, it is likely that this will continue for the next 6 years; OCC witness Kahal merely asserts this would "almost certainly continue" without any persuasive explanation why this is necessarily so (OCC Ex. 12 at 31).

{¶ 49} In addition, the Commission finds that the provisions related to tax sharing payments are the equivalent of cash equity infusion into DPL Inc. Under these provisions, AES has agreed not to collect tax-sharing payments from DPL Inc. that have accrued since 2012, and AES has agreed not to collect any additional required tax payments that accrue during the term of the DMR. Instead, the accrued liabilities will be converted to 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 demonstrates that this will result in an equity investment in DPL which will provide additional cash flow available for debt service and for improving the DPL Inc. and DP&L financial health (Co. Ex. 2A at 4). This additional equity infusion would result in a significant strengthening of DPL's balance sheet (Co. Ex. 2A at 61-62, 66-67). As with the dividend payments, we find no reliable basis for OCC's claim that, because DPL Inc. has not made any tax sharing payments since 2012, it is likely that this will continue in the future.

{¶ 50} Moreover, the Amended Stipulation provides that DP&L's ownership interests in three generation stations will be sold to a third party and that the proceeds of the sale will be used to further pay off debt at DP&L and DPL (Co. Ex. 3 at 19; Jt. Ex. 1 at 4).

{¶ 51} The Commission finds that all three of these contributions by AES are in the public interest as each contribution will assist in alleviating DPL Inc.'s and DP&L's financial issues. We also note that each of these contributions are consistent with the testimony of OCC witness Kahal. Mr. Kahal recommends that DP&L's financial integrity could be better protected through a combination of ring fencing and equity investments by AES, which could take the form of asset divestiture/sales, dividend payment reductions by AES, and AES providing cash investments to DPL Inc. for debt reduction (OCC Ex. 12 at 29). In fact, as shown above, the Amended Stipulation provides for generation asset sales, the proceeds of which will be used for debt reduction (Co. Ex. 3 at 19); no dividend payments from DPL Inc. to AES for six years (Co. Ex. 3 at 18-19) and equity investments by AES in DPL Inc. through the tax-sharing provisions (Co. Ex. 2A at 4; Co. Ex 3 at 19). In fact, OCC witness Kahal admits three steps—not taking dividend payments, not collecting tax sharing payments and converting liabilities into equity amounts to—is analogous or equivalent to AES infusing equity into DPL Inc. (Tr. Vol. IV at 712).

{¶ 52} Finally, the Commission does not agree with claims that these commitments are not enforceable. Both DP&L and its parent, DPL Inc., are signatory parties to the Amended Stipulation. By adopting the Amended Stipulation in this Opinion and Order, the Commission establishes DP&L's ESP for the next 6 years, commencing with the approval of the Amended Stipulation and makes the Amended Stipulation the order of the Commission. The Commission has considerable statutory authority to enforce its orders, but, more importantly, in the highly unlikely event that AES, through DPL Inc. and DP&L, were to breach the terms of the Amended Stipulation, any and all benefits to DPL Inc. and DP&L under the Amended Stipulation would be placed at risk. We are confident that compliance with the terms of the Amended Stipulation will not be an issue.

g. Whether other riders and programs included in the Amended Stipulation are beneficial to ratepayers and the public interest

{¶ 53} OCC argues that a number of riders and provisions in the settlement do not benefit ratepayers or the public interest. This includes the proposed Smart Grid Rider (SGR). OCC states that, with the SGR, DP&L proposes to collect costs associated with a distribution grid modernization plan and grid modernization investments. According to

OCC, however, the initiative is in such an early stage that the plans and possible investments are still unknown. OCC asserts it does not benefit ratepayers to start paying for undetermined investments. OCC further avers that the costs for such an investment are better recovered through a distribution base rate case. (OCC Ex. 13 at 8-10.)

{¶ 54} DP&L requests that OCC's argument be dismissed. DP&L asserts that the SGR will initially be set at zero and will not cost ratepayers anything. Further, DP&L avers that cost recovery will not begin until after a cost/benefit analysis and a review by the Commission. While OCC submits that the costs are best recovered through a distribution rate case, the Company counters that the cost recovery would occur either way.

{¶ 55} OCC additionally maintains that the TCRR-N pilot program is not in the public interest as it lacks necessary safeguards. According to OCC, if the program is to go forward, DP&L should outline the goals it seeks to achieve, identify all necessary costs, and state the anticipated benefits. OCC further recommends that the program be evaluated after a two-year term, instead of the requested six-year term, to ensure all customers are benefitting from the rider. (OCC Ex. 11 at 6.)

{¶ 56} In response, IEU-Ohio asserts that OCC's requested parameters are unnecessary. IEU-Ohio affirms that the purpose of the pilot program is explicitly mentioned in the Amended Stipulation and further discussed in DP&L's supporting testimony. That purpose, according to IEU-Ohio, is to explore whether customers would benefit from opting out of TCRR-N and instead applying an alternative transmission billing methodology. IEU-Ohio identifies several potential benefits of the program, including an enhanced competitive market, reduced need for transmission investments, and reduced costs to customers. IEU-Ohio argues that OCC previously recognized that the TCRR-N was imperfect and that the pilot program seeks to address some of the underlying issues with the TCRR-N. IEU-Ohio further affirms there is no need to evaluate the program after two years, as there is nothing to examine that would impact the lawfulness and reasonableness of the program.

{¶ 57} OCC additionally claims that the Reconciliation Rider unfairly burdens SSO customers. OCC submits that, because the rider is bypassable, residential and small business customers taking the SSO rate will be the customers paying for the rider. OCC states that this artificially inflates the SSO rate, which allows competitors to also raise their rates, which are often compared against the SSO rate. Further, according to OCC, as more customers decide to shop and less customers remain on the SSO rate, the Reconciliation Rider's rates will increase. OCC reasons that this is unfair and not in the public interest. (OCC Ex. 12 at 38.)

{¶ 58} DP&L, IGS, RESA, and IEU-Ohio submit that it is reasonable for the Reconciliation Rider to be bypassable. DP&L reiterates that the rider will serve as countercyclical hedge against changing energy prices and that it is logical for SSO customers to pay for the rider, as it relates to generation. IGS, RESA, and IEU-Ohio submit that the Reconciliation Rider is an enhancement to the competitive market because customers that do not want to pay for the Reconciliation Rider as part of the SSO can instead shop for generation service.

{¶ 59} We disagree with OCC's claim that the SGR is not in the public interest. The Amended Stipulation provides for the filing of a comprehensive infrastructure modernization plan. This plan will include proposals to modernize DP&L's grid, including advanced metering infrastructure, meter data management systems, system-wide distribution modernization and Volt-VAR optimization. The plan will include a cost/benefit analysis of each component as well as a timeline for deployment. After the plan has been filed, interested stakeholders will have a full and fair opportunity to comment upon and provide input into the final plan to be approved by the Commission. Once the plan has been approved by the Commission, the costs of implementing the plan will be recovered through the SGR, which will initially be set at zero. (Jt. Ex. 1 at 7-8). OCC witness Williams contends that the Commission should complete our PowerForward initiative before authorizing DP&L to invest in grid modernization and that all smart grid programs should be evaluated to determine if they are cost effective and provide sufficient benefit to customers (OCC Ex. 13 at 10-11). We agree. We will review any proposed plan to ensure that it is consistent with the PowerForward initiative, and the Amended Stipulation provides for a cost/benefit analysis of every component of the plan when it is proposed (Jt. Ex. 1 at 7-8). However, as we are currently continuing our work in the PowerForward initiative, we will modify the Amended Stipulation to provide for the filing of the comprehensive infrastructure modernization plan to be the earlier of three months after the completion of the PowerForward initiative or August 1, 2018, unless otherwise ordered by the Commission.

{¶ 60} We find that the provisions of the Amended Stipulation related to the SGR are in the public interest as such provisions comport with the state policy to 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, smart grid programs, and implementation of advanced metering infrastructure. R.C. 4928.02(D). We also reject OCC's claim that the costs related to grid modernization are better recovered through a distribution rate case. The General Assembly specifically included in R.C. 4928.143 provision authorizing single issue ratemaking and authorizing provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. R.C. 4928.143(B)(2)(h). The regulatory lag associated with traditional distribution rate cases under Chapter 4909 of the Revised Code may inhibit the expeditious deployment of grid modernization projects, which will require significant up-front capital investments.

{¶ 61} We also reject OCC's claim that the TCRR-N pilot program is not in the public interest. The pilot program will allow certain customers to opt out of DP&L's Transmission Cost Recover Rider and purchase transmission services directly from PJM, Inc., the regional transmission operator (Co. Ex. 3 at 16; Jt. Ex. 1 at 14-17). We note that we have approved similar pilot programs in other electric distribution service territories in order to determine if allowing customers to purchase transmission services directly from PJM will result in a net aggregate customer savings in each service territory. *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at 139-140. Such pilot programs are consistent with the state policy to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. R.C. 4928.02(G).

{¶ 62} Nonetheless, as we have noted in other proceedings involving similar transmission pilot programs, the TCRR-N pilot program is a pilot program which bears further study to determine if the actual results of the pilot program are in the public interest. The Commission directs DP&L and Staff to continuously review the actual results of the pilot program and periodically report their findings to the Commission. Such review should include, at a minimum: whether there is an aggregate savings in transmission costs for all of DP&L's customers; whether transmission costs are being shifted to customers not participating in the pilot program; whether the benefits of the pilot program outweigh any costs; and whether the TCRR-N mechanism results in an overall costs savings to customers. Such review is necessary for the Commission to determine whether the TCRR-N should be continued with the ability for customers to opt out; whether the TCRR-N should be continued without the ability for customers to opt out; and whether Rider TCRR-N should be terminated and replaced with a different mechanism to recover transmission costs incurred by DP&L. The Commission retains the right, during the term of the ESP, to modify the provisions of the TCRR-N based upon the results of this review. *See also FirstEnergy*, Case No. 14-1297-EL-SSO at 139-140.

{¶ 63} Moreover, we affirm that as modified by the Commission below, the provisions related to the Reconciliation Rider are in the public interest. The record shows that, under the Reconciliation Rider, DP&L will sell its share of the output from the OVEC generation plants into the wholesale marketplace and will net the proceeds against DP&L's share of the associated costs. This 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 755-756). However, 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, we will modify the Amended Stipulation to provide that the Reconciliation Rider be nonbypassable. As agreed to in the Amended Stipulation, recovery of OVEC costs through the Reconciliation Rider will commence effective the date of this Opinion and Order (Jt. Ex. 15-16). In light of our decision to make the Reconciliation Rider nonbypassable, we find that the Reconciliation should be allocated to tariff classes based on an allocation method of 50 percent demand and 50 percent energy with demand being allocated on total load on a 5 Coincidental Peak basis and charged on a kWh basis.

{¶ 64} The Commission also notes that the Amended Stipulation does not provide for carrying charges for the Reconciliation Rider but provides for all other details regarding its implementation. Therefore, we believe that it is the intent of the signatory parties that there should not be carrying charges for the Reconciliation Rider. In the event that this is not the signatory parties' intent, we will modify the Amended Stipulation to provide that there will be not carrying charges for the Reconciliation Rider. This is consistent with our approval of similar provisions in AEP-Ohio's current ESP. Likewise, we will modify the Amended Stipulation to provide that costs during outages of extended periods and capacity performance penalties may not be recovered through the Reconciliation Rider. *See In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Second Entry on Rehearing (Nov. 3, 2016) at ¶ 59.

h. Whether the pilot program regarding consolidated billing is beneficial to ratepayers and the public interest

{¶ 65} As to the proposed pilot program for supplier consolidated billing, OCC avers that it is not in the public interest. OCC notes that, as proposed in the Amended Stipulation, customers who receive generation from a marketer may receive a single consolidated bill for both regulated distribution charges and deregulated distribution charges. OCC argues that while customers are covering half of the costs of consolidated billing, only the marketers benefit from this program, as they are able to include new line items and their own branding on customer bills. OCC requests that the program either be rejected or that marketers be responsible for 100 percent of the program's costs. (OCC Ex. 11 at 6-7.)

{¶ 66} IGS and RESA ask the Commission to reject OCC's arguments regarding consolidated billing. According to IGS and RESA, the implementation of supplier consolidated billing allows customers to receive more innovative and energy efficient products and services. Regarding the cost allocation, IGS and RESA respond that it is appropriate for CRES providers and customers to divide the costs. They first note that there is an initial cap on the amount of money that can be recovered from customers. Further, IGS and RESA state that, because customers benefit from a more robust competitive market, it is reasonable for customers to incur some of the costs of market enhancements. (RESA Ex. 1 at 5-7.)

{¶ 67} The Commission notes that the implementation of supplier consolidated billing has been at issue since the inception of retail electric competition. In 2000, prior to the commencement of retail electric competition, the Commission noted that "all utilities have agreed in their transition case settlements to implement supplier-consolidated billing by target dates ranging from January 1, 2001 to July 1, 2002." However, we also cautioned that "we adopt these dates with the understanding that both EDUs and CRES provider may need to make substantial investments in time and money to modify or develop process and systems to handle these new services, and that unforeseen circumstances or developments in the market during the start-up period may require changes to these timelines." *In the Matter of the Establishment of Electronic Data Exchange Standard and Uniform Business Practices for the Electric Utility Industry*, Case No. 00-813-EL-EDI, Finding and Order (July 29, 2000) at 16-17.

{¶ 68} As we have noted in other recent proceedings, as the marketplace is currently situated, the Commission's desired course for competitive suppliers is to ultimately offer supplier consolidated billing and dual, billing. This would facilitate the innovative marketplace that we envision for the state of Ohio and would easily resolve how suppliers can bill for the goods and services that they wish to market and then bill to their customers. *In re Ohio Power Co.*, Case No. 15-1507-EL-EDI, Finding and Order (September 27, 2017) at 7-8. Our approval today of the supplier consolidated billing pilot program in this proceeding is consistent with that goal.

{¶ 69} It is time to move forward with the implementation of supplier consolidated billing in DP&L's service territory, and the provisions in the Amended Stipulation promise real progress on this issue (Co. Ex. 3 at 15-16; Jt. Ex. 1 at 21-26). The Commission finds that all customers, both shopping customers and SSO customers, benefit from a robust competitive market, and supplier consolidated billing is a positive step in the development of that competitive market. We note that RESA witness White, on behalf of competitive suppliers, supported the pilot supplier consolidated billing program (RESA Ex. 1 at 8-10). In the Amended Stipulation, although all customers benefit from the development of a competitive market, CRES providers have agreed to contribute 50 percent of the costs of implementing the program.

{¶ 70} We further find that approval of the pilot supplier consolidated billing program is consistent with the policy of this state set forth in R.C. 4928.02 to ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs and to ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers. R.C. 4928.02(B) and (C), respectively. As a pilot program, the proposed supplier consolidated billing program is also consistent with the state policy to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. R.C. 4928.02(G). Accordingly, the Commission finds that the provisions for a pilot supplier consolidated billing program are in the public interest.

i. Whether the closing and sale of certain generation assets is beneficial to ratepayers and the public interest

{¶ 71} As part of the Amended Stipulation, DP&L committed to transfer its generating assets to an affiliate of DPL Inc., as well as to commence a sale process to sell its ownership in its Conesville, Miami Fort, and Zimmer generation stations. Further, AES agreed to use the proceeds from any sale to make discretionary debt repayments at DP&L and DPL Inc. Murray notes the Stuart and Killen stations are absent from the proposed sale and asserts that DP&L intends to close both of the plants. Murray, along with UWU, argue that it does not benefit the public interest to close Stuart and Killen and both stations should be included as part of the sale process.

{¶ 72} Murray first explains that while the Stuart and Killen stations are not specifically mentioned within the Amended Stipulation, the Commission has authority to prevent the plants' closure and include them as part of proposed sale in the Amended Stipulation. Murray avers that pursuant to R.C. 4928.17(E) EDUs are prohibited from selling or transferring a generating asset without first obtaining Commission approval. Murray also notes that DP&L previously applied to transfer its assets in 2013, which was later approved by the Commission in 2014. Murray contends that the terms from the 2014 divestiture significantly differ from the terms in the Amended Stipulation and thus the Commission should reevaluate the proposed transfer of generating assets. (Murray Ex. 2 at 7.)

{¶ 73} Murray affirms that a major component of the Amended Stipulation is the transfer and sale of DP&L's generation assets. Murray states the sale is being considered a major benefit of the Amended Stipulation, as sale proceeds will be used to reduce DP&L's debt. Murray claims, however, that it is not beneficial to omit the Stuart and Killen stations from the proposed sales. According to Murray, it is wrong to assume that the stations will not generate interested buyers and that there is no harm in investigating a possible sale. Murray asserts the energy market is dynamic and both plants have historically operated above 60 percent capacity. Moreover, Murray asserts the industry is likely to change and the value of coal-generation plants like Stuart and Killen is expected to increase. Thus, Murray contends that a major purpose of the Amended Stipulation is to improve DP&L's financial integrity and it would be beneficial to include Stuart and Killen as part of the sale of generation assets. (Murray Ex. 2 at 11-15.)

{¶ 74} Murray and UWU further maintain that if Stuart and Killen stations are not included as part of the sale process and DP&L goes forward with the plant closures, the results would be devastating to the surrounding communities. Murray notes the stations are the largest employers in Adams County and the resulting loss of tax revenue would impact the townships, the county, and the school districts. Additionally, Murray asserts the impact of the closures would have a rippling effect that would cause severe harm to the surrounding communities, the coal industry, and the entire state of Ohio.

{¶ 75} Sierra Club disagrees with Murray and avers that the Stuart and Killen stations have no legal relevance in these proceedings. Sierra Club submits that nothing in the Amended Stipulation requires DP&L to close those two stations nor is DP&L precluded from selling the stations to a third party. Sierra Club states that, if the stations were sold, their value would likely be minimal as the stations reportedly operate at a loss and DP&L values them at $0. Sierra Club also doubts Murray's assertions regarding a resurgence of the coal industry and submit that if the stations closed there would be minimal impact on the supply of energy and capacity or the cost of energy and capacity.

{¶ 76} In its reply, DP&L affirms that the Amended Stipulation is silent on the future of the Stuart and Killen stations. According to DP&L, nothing in the Amended Stipulation requires to the Company to close the plants and, similarly, nothing prevents the Company from selling the plants to a third party. Accordingly, DP&L asserts that Murray's argument is without merit.

{¶ 77} The Commission finds that the Amended Stipulation provisions related to DP&L's remaining generation assets are in the public interest. Divestment of DP&L's

ownership interest in the Conesville, Miami Fort, and Zimmer generation stations, as well as the transfer of any remaining generation stations to an affiliate, will improve the financial position of DP&L and DPL Inc. and facilitate competition in DP&L's service territory. 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 Commission notes that, since the hearing, DP&L has received approval from the FERC to transfer its interests in its generation stations to its affiliate, AES Ohio Generation, LLC (AES Ohio). 160 FERC ¶ 61,034. Further, DP&L has provided notice of the sale of its interests in Miami Fort Units 7 and 8 and Zimmer with a fair market value of the ownership interests of $50 million. *In re Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Notice Filing (July 24, 2017). Moreover, the Commission finds that the transfer and divestment of DP&L's generation assets is consistent with the policy of this state set forth R.C. 4928.02 to ensure the availability of *unbundled* and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options. R.C. 4928.02(B).

{¶ 78} We agree with DP&L that the Amended Stipulation has no provisions related to the future of Stuart and Killen stations. DP&L has already received authorization from the Commission, as required by R.C. 4928.17(E), to transfer all of its generation assets to an affiliate or sell such assets to a third party. *In re Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Finding and Order (September 17, 2014), Entry on Rehearing (December 17, 2014). In this Opinion and Order, the Commission neither authorizes nor approves either the sale or closure of Stuart and Killen. The future of Stuart and Killen is not part of this ESP and is at the sole discretion of the Company's management or the management of AES Ohio once the transfer has been completed.

j. Commission Conclusion

{¶ 79} In considering the second portion of the three-part test, it is necessary for the Commission to evaluate the Amended Stipulation, as modified by the Commission, as a package. In prior cases, the Commission has considered and approved stipulations that address a wide variety of issues, often resolving several pending proceedings at the same time, and specifically emphasizing that the stipulation must be viewed as a package. *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 Southern 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. Additionally, we emphasize the importance of the Commission's mission to assure all customers access to safe and reliable utility service at fair prices. R.C. 4928.02(A). In addition to the specific provisions addressed above, we find that the evidence in this proceeding demonstrates that the Amended Stipulation, as a package, is in the public interest. Staff witness Donlon testified that the Amended Stipulation benefits customers and the public interest (Staff Ex. 2 at 4). The Amended Stipulation provides for competitive bidding of DP&L's SSO for non-shopping customer (Co. Ex. 3 at 12; Jt. Ex. 1 at 8) and provides for the transfer and divestment of DP&L's generation assets.

{¶ 80} The record at hearing also demonstrates that the Amended Stipulation provides for competitive enhancements in DP&L's service territory. These competitive enhancements include the pilot transmission program (Co. Ex. 3 at 16; Jt. Ex. 1 at 14-17), and pilot supplier consolidated billing program (Co. Ex. 3 at 15-16; Jt. Ex. 1 at 21-25), discussed above. The competitive enhancements also include utility consolidated billing improvements supported by testimony by Company witness Schroder and RESA witness White on behalf of competitive suppliers (Co. Ex. 3 at 15; RESA Ex. 1 at 10-11; Jt. Ex. 1 at 21).

{¶ 81} The Amended Stipulation also contains provisions for economic development incentives for large employers (Co. Ex. 3 at 12-13; Jt. Ex. 1 at 9-10, 33), for an economic development grant fund (Co. Ex. 3 at 13; Jt. Ex. 1 at 10-12), and for economic development programs for the City of Dayton (Co. Ex. 3 at 16-17; Jt. Ex. 1 at 27-32). The Commission finds that these economic development programs supports state policy to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N).

{¶ 82} Further, testimony at the hearing established that the Amended Stipulation provides for shareholder funding of programs to assist low-income residential customers (Co. Ex. 3 at 16; Jt. Ex. 1 at 33, 36). This shareholder funding promotes state policy to protect at-risk populations (OPAE Ex. 1 at 3-4). R.C. 4928.02(L).

D. *Does the settlement violate any important regulatory principles or practices?*

{¶ 83} DP&L asserts that the Amended Stipulation does not violate any important regulatory principles, to which Kroger, Honda, OEG, OPAE, Edgemont, PWC, and Staff agree. As discussed below, DP&L first maintains that, as required by R.C. 4928.143(C)(1), the ESP established by the Amended Stipulation is more favorable in the aggregate than an MRO. DP&L additionally argues that the various riders established by the Amended Stipulation, particularly the DMR, are lawful and authorized by the Ohio Revised Code. Accordingly, the Company requests the Commission find that the Amended Stipulation meets the third prong of the test.

k. *ESP versus MRO test*

{¶ 84} The Company notes that pursuant to R.C. 4928.143(C)(1) the Commission should approve, or modify and approve, an application for an ESP if it finds that 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 an MRO. DP&L further states that, in comparing the ESP to an MRO, factors to be considered by the Commission include quantifiable differences in the prices to be charged to customers and other quantifiable differences in customer charges, as well as non-quantifiable differences.

{¶ 85} In comparing the difference in price between the proposed ESP and an MRO, DP&L assert that there are no quantifiable differences. According to the Company, the SSO rates would be the same under either scenario. Additionally, because R.C. 4928.142(D)(4) permits an MRO to include a charge to address any emergency that threatens a utility's financial integrity, DP&L submits that the DMR would be available under either an MRO or an ESP. Similarly, DP&L represents that the other riders described in the Amended Stipulation would also be available under an MRO. Thus, DP&L states the SSO price under the proposed ESP or an MRO would be the same.

{¶ 86} DP&L maintains, however, that the benefits provided by DP&L shareholders are not required under an MRO, thus providing quantifiable benefits only available under the ESP. Specifically, DP&L avers that the economic development payments, energy education payments, and payments to assist low-income customers would provide between $9 million and $11.5 million in direct customers benefits that would not be otherwise required in an MRO. In addition, the Company maintains there are other, non-quantifiable benefits in the proposed ESP that would not be required under an MRO. These include the commitments made by AES, the transfer of DP&L's generation assets to an affiliate, a commitment to maintain DP&L's headquarters in the city of Dayton, and an accelerated implementation of grid modernization. Staff agrees with the Company and further reasons that the ESP provides a quicker and clearer path to implementing a smart grid.

{¶ 87} In opposing the Amended Stipulation, OCC argues that it is not evident that the proposed ESP is more beneficial than an MRO. OCC first submits that DP&L's arguments regarding the quantifiable benefits are contradictory. According to OCC, DP&L considers various shareholder commitments such as the economic development payments and provisions regarding AES as benefits specific to an ESP because there is no statute requiring such payments under an MRO. However, OCC asserts while such commitments are not required under an MRO, neither are they required under an ESP. OCC maintains that DP&L's shareholders could make the proposed commitments at any time and they should not be considered a benefit unique to the ESP. OCC additionally submits that the qualitative benefits of the ESP proposed by DP&L are illusory. OCC avers there is no evidence that grid modernization will occur more rapidly under the ESP. According to

OCC, a grid modernization plan is, at best, several months away from being filed and will then be subject to scrutiny from intervening parties, without any assuredness that it will be approved by the Commission. OCC further submits there is no benefit associated with DP&L's commitment to maintain its headquarters in the city of Dayton as there was no evidence that DP&L was considering relocating its headquarters. (OCC Ex. 12 at 45.)

{¶ 88} In reply, DP&L reiterates that the benefits provided by the shareholder payments and AES's commitments are unique to the proposed ESP. According to the Company, an MRO does not require these specific benefits that were negotiated as part of the Amended Stipulation and they would not exist under a fully litigated MRO. DP&L further maintains that the grid modernization implemented by the Amended Stipulation is a substantial benefit provided by the ESP. Although OCC discounts the speed at which grid modernization could be executed, the Company reasons that grid modernization is a major benefit regardless of whether it occurs now or in the future.

{¶ 89} The Commission finds that the record in these proceedings demonstrates that the proposed ESP is more favorable in the aggregate than the expected results of an MRO under R.C. 4928.142. Under the proposed ESP, the generation rates to be charged SSO customers will continue to be established through a CBP; therefore, generation rates in the ESP should be equivalent to the results which would be obtained under R.C. 4928.142 (Jt. Ex. 1 at 8-9; Staff Ex. 2 at 5). However, the evidence in the record further demonstrates that there are additional quantitative and qualitative benefits contained in the Amended Stipulation that make the proposed ESP more favorable in the aggregate than the expected results under an MRO.

{¶ 90} While OCC submits the DMR and other riders would not be available under an MRO, the Commission finds that equivalent riders would also be available under R.C. 4928.142. Under an MRO, pursuant to R.C. 4928.142 the Commission may assess such charges as the Commission "determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution." Additionally, the Commission notes that electric utilities can seek emergency rate relief under R.C. 4909.16, and the Commission has provided factors for determining whether emergency rate relief can be granted. *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, et al., Opinion and Order (Aug. 23, 1988), 1988 WL 1617994 (Ohio P.U.C). We have previously identified that these factors specified by the Commission for cases brought under R.C. 4909.16 may provide guidance for factors the Commission may examine in a hypothetical application for a charge under R.C. 4928.142. *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at 161-163.

{¶ 91} One of the factors the Commission has previously considered under R.C. 4909.16 is whether the utilities' bonds are considered investment grade. There, we found a utility on the "ragged edge" of investment grade would qualify under R.C. 4909.16. *In re Cleveland Elec. Illum. Co.*, at 8. Similarly, under FirstEnergy's ESP versus MRO comparison, the Commission found that an electric utility still operating above investment grade would likely meet the standards applied by the Commission under R.C. 4909.16. *In re FirstEnergy*, at 163. Here, it is well established that DP&L and DPL Inc.'s credit ratings were respectively, at and even below the "ragged edge" of investment grade (Co. Ex. 105). Thus, it is likely that the Commission would grant relief in response to a hypothetical application under R.C. 4928.142(D). Accordingly, we agree with DP&L and Staff witness Donlon (Staff Ex. 2 at 6) that the DMR should be excluded from a quantitative analysis as the associated charges would be available under either an MRO or an ESP.

{¶ 92} While the SSO cost would be the same under either an ESP or an MRO, through the various economic development provisions, the Commission concludes that the proposed ESP, quantitatively, is more beneficial than an MRO. With the various economic development provisions, Staff witness Patrick Donlon testified that the proposed ESP provides $9 million for economic development that would not otherwise be available. He stated that, if the DMR is extended, that amount would increase. Further, this sum would be provided solely by DP&L shareholders. (Staff Ex. 2 at 5-6)

{¶ 93} We additionally find there are other, qualitative benefits associated with the proposed ESP, which would not be provided under an MRO. We note the various commitments by the Company, and its parent, towards improving DP&L's financial integrity. We discussed these benefits thoroughly above in consideration of the second prong. In sum, first, DP&L and DPL Inc.'s parent, AES, is committed to foregoing dividends from DPL Inc. (Co. Ex. 3 at 10, 18-19; Jt. Ex. 1 at 3). Additionally, AES is also committing to not collect tax-sharing payments from DPL Inc., significantly strengthening its balance sheet (Co. Ex. 2A at 4, 61-62-66-67; Co. Ex. 3 at 19; Jt. Ex. 1 at 3-4). As part of the Amended Stipulation, DP&L is additionally required to transfer its generation assets to an affiliate and, for certain generation assets, to begin a sale process. The proceeds of those sales are to go towards debt repayments. (Co. Ex. 3 at 19; Jt. Ex 1 at 3-4.) These commitments from the Company would not otherwise be available under an MRO and put DP&L in a better financial position to invest in its infrastructure and grid modernization (Tr. Vol. V at 883).

{¶ 94} Therefore, based upon the evidence in the record in this proceeding, the Commission finds that the proposed 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 an MRO pursuant to R.C. 4928.142.

I. *Whether the DMR violates any important regulatory principles*

{¶ 95} According to DP&L, the DMR is authorized by statute and consistent with state policy. Additionally, DP&L states Commission precedent supports approval of the DMR, as the Commission has previously authorized similar DMRs for other utilities. Staff is in agreement with DP&L and asserts that the DMR does not violate any regulatory principles or policies. OCC, as well as the Environmental Groups, argue otherwise, asserting that the DMR is, among other things, an unlawful transition charge.

m. Whether the DMR is authorized under R.C. 4928.143(B)

{¶ 96} The Company maintains that the DMR is a lawful charge pursuant to R.C. 4928.143(B)(2)(h), 4928.143(B)(2)(d), and 4928.143(B)(2)(i). As to R.C. 4928.143(B)(2)(h), DP&L discusses how the statute permits charges going towards distribution infrastructure, including, specifically, infrastructure modernization. DP&L submits that the primary purpose of the DMR is incentivize and make grid modernization possible. Considering the financial difficulties that the Company is facing, DP&L states the DMR is necessary in order to finance the capital expenditures necessary to "maintain, modernize or grow existing transmission and distribution infrastructure." Accordingly, DP&L argues that, like previous riders approved by the Commission, the DMR is related to distribution and is intended to allow the Company to focus on grid modernization. Further, the Company avers that grid modernization improves service reliability, which is inline with customer expectations.

{¶ 97} DP&L further states the DMR is also permissible under R.C. 4928.143(B)(2)(d). The Company states that the statute permits an ESP to include a rider if it: (1) includes a term, condition, or charge; (2) relating to a limitation on customer shopping, bypassability, or carrying costs; and (3) has the effect of stabilizing or providing certainty regarding retail electric service. The Company first states the DMR is indisputably a charge and satisfies the first part of the statute. The DMR also satisfies the second prong of the statute, as, according to DP&L, the rider relates to a financial limitation on shopping, default service, and bypassability. Regarding the third prong, DP&L submits that, without the DMR, the Company would not have the financial integrity in order to provide safe and reliable service or to implement grid modernization. Accordingly, DP&L states the DMR provides certainty regarding electric service.

{¶ 98} The DMR is also permissible under R.C. 4928.143(B)(2)(i), according to DP&L. DP&L notes that R.C. 4928.143(B)(2)(i) allows an ESP to include provisions for economic development, job retention and energy efficiency programs. The Company reasons that with the implementation of grid modernization projects made possible by the DMR, there would be capital investments resulting in economic development and job creation. Therefore, DP&L submits that the DMR meets the requirements of R.C. 4928.143(B)(2)(i).

{¶ 99} OCC disputes DP&L's assertion that the DMR is permissible under R.C. 4928.143(B). OCC states that DP&L arguments regarding the lawfulness of the DMR wrongfully represent that the proceeds of the rider go towards grid modernization. OCC claims that the funds recovered for the DMR would be used to pay down debt. According to OCC, such funds are not necessary in order for DP&L to provide safe and reliable service, so the DMR is not needed to provide certainty regarding electric service, as required by R.C. 4928.143(B)(2)(d). OCC additionally maintains that because the DMR's resources are going towards debt payments and not grid modernization, DP&L's claim that the DMR provides economic development is without merit.

{¶ 100} The Commission finds that the DMR is authorized under R.C. 4928.143(B). R.C. 4928.143(B)(2)(h) allows an ESP to include:

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

{¶ 101} As proposed by the signatory parties, the DMR is a distribution modernization incentive. Under the plain language of the statute, the DMR is an incentive. As we have noted previously, Webster's defines an "incentive" as "something that stimulates one to take action, work harder, etc.; stimulus; encouragement." Webster's New World Dictionary, Third College Edition 682 (1988); *see In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at 90. Staff witness Donlon states that the DMR provides DP&L with the ability to access the capital markets at favorable rates to ensure investment in the distribution system and that accessing the capital markets will enable the Company to procure funds to jumpstart their distribution grid modernization initiatives (Staff Ex. 2 at 4; Tr. Vol. V at 875-76). We find that the record demonstrates that the DMR is intended to incent the Company to focus its innovation and resources on modernizing its distribution system and that the DMR is a distribution modernization incentive authorized by R.C. 4928.143(B)(2)(h).

{¶ 102} In addition, we note that Staff has completed an examination of the reliability of DP&L's distribution system and ensured that DP&L's customers and the Company's expectations are aligned (Staff Ex. 1 at 3-7). We find that this examination complies with the requirements of R.C. 4928.143(B)(2)(h) for a approval of a distribution mechanism enumerated in that provision.

n. Whether the DMR constitutes Transition Revenues, pursuant to R.C. 4928.38

{¶ 103} OCC asserts that the DMR is an unlawful transition charge, as DP&L's underlying need for the rider is tied to its generation assets, not its distribution or transmission business. OCC avers that R.C. 4928.38 expressly prohibits the collection of transition charges, which, generally, are costs tied to generation. According to OCC, the purpose of the DMR is to pay down DPL Inc.'s debt acquired through AES's purchase of DP&L. OCC states that the reason DPL Inc., which gets 96 percent of its revenue from DP&L, cannot make debt payments is because of DP&L's underperforming generation business. Thus, OCC reasons that because the DMR is needed to overcome issues associated with DP&L's generation assets, the DMR is a transition charge and unlawful. OCC further maintains that because DP&L's generation assets have not yet been divested, any money coming in from the DMR will go to support transmission, distribution, and generation.

Because the incoming funds would not be specially separated, OCC submits that DP&L's generation assets would receive money from the DMR.

{¶ 104} DP&L counters that the DMR is not a transition charge as the DMR does not relate to retail electric generation service. The Company first notes that, as part of the Amended Stipulation, DP&L committed to transfer all of its generation assets to an affiliate and to pursue either a sale or closure of its coal-fired generation plants. DP&L thus concludes that the DMR will not be directly assignable or allocable to generation service once the transfers take place. DP&L further maintains that the purpose of the DMR is to put the Company in a financial position to provide safe and reliable distribution service and to modernize its distribution grid. The DMR, then, according to DP&L, is strictly tied to distribution, not generation. (Co. Ex. 2 at 70.)

{¶ 105} DP&L additionally argues that even if the DMR is a transition charge, the rider is still lawful. As discussed above, the Company claims that the DMR is permitted under multiple sections of R.C. 4928.143(B), including, specifically, R.C. 4928.143(B)(2)(h). DP&L avers that both R.C. 4928.143(B) and R.C. 4928.143(B)(2)(h) allow the DMR to be a part of an ESP "notwithstanding any other provision," including the provision prohibiting transition charges in R.C. 4928.38. DP&L further reasons that R.C. 4928.143, as the later-enacted statute, supersedes R.C. 4928.38.

{¶ 106} In response, OCC echoes its claim that the DMR is an unlawful transition charge. OCC maintains that while DP&L states the end purpose of the DMR is to modernize the distribution grid, the Company's means to get there is by using the DMR to pay debts. According to OCC, these debts are associated with generation assets; thus, the funds from the DMR are associated with generation and constitute a transition charge. Similarly, OCC reasons that even if DP&L transfers its generation assets, the debt associated with those assets will remain and be paid with money recovered through the DMR. OCC also discounts the Company's arguments regarding the "notwithstanding" clauses in R.C.

4928.143(B) and R.C. 4928.143(B)(2)(h), noting the Supreme Court of Ohio rejected those arguments.

{¶ 107} The Commission finds that the DMR does not permit DP&L to collect transition revenue or its equivalent. DP&L's SSO is entirely served through a competitive bidding process and DP&L's generation assets no longer serve SSO customers. Further, DP&L has committed to transferring its generation assets to a third-party or to an affiliate and has taken the appropriate steps to implement that commitment. *In re Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Notice Filing (July 24, 2017) (notice of sale of ownership interests in Miami Fort Station 7 and 8 and in Zimmer); *Dayton Power and Light Co./AES Ohio Generation LLC*, 160 FERC ¶ 61,034. Therefore, DMR revenues cannot, and will not, be used to support DP&L's former generation assets. In approving the transfer of generation assets from DP&L to AES Ohio Generation LLC, FERC rejected arguments raised by OCC that the debt associated with the generation assets to be transferred could result in cross-subsidization of an affiliate by DP&L's retail customers. FERC specifically found that the transaction will not result in inappropriate cross-subsidization of a non-utility affiliated company by a utility company or in a pledge or encumbrance of utility assets for the benefit of an affiliate company. 160 FERC ¶ 61,034 at 17, 18.

{¶ 108} Further, we agree with DP&L that the purpose of the DMR is to put the Company in a financial position to provide safe and reliable distribution service and to modernize its distribution grid and that the DMR is tied to distribution, not generation (Staff Ex. 2 at 4; Tr. Vol. V at 875-76, 876-78). Accordingly, the Commission finds that the DMR does not permit DP&L to collect transition revenue or its equivalent.

o. Whether the DMR violates other important regulatory principles or practices

{¶ 109} OCC additionally claims the DMR violates Commission precedent as well as principles of cost causation. OCC states that the DMR was not created with any cost causation principles. Further, according to OCC, residential customers unfairly shoulder a significant portion of the costs. OCC avers that in the only previous case where the Commission approved a DMR, the Commission found that residential customers were excessively impacted by a proposed DMR cost allocation of 44 percent. Instead, says OCC, the Commission assumed a cost allocation of 50 percent energy and 50 percent demand. OCC requests the Commission adopt the same allocation for the DMR in this proceeding.

{¶ 110} DP&L responds that the cost allocation proposed in the Amended Stipulation has 34 percent allocated based on 5 Coincident Peaks, 33 percent allocated based on distribution revenue, and 33 percent allocated based on historic allocation of the currently charged nonbypassable rider. The Company avers that this was negotiated among the signatory parties to balance customer bill impact, fairness, and cost-causation principles. According to DP&L, in considering the Amended Stipulation as a package, residential customers will experience a decrease in rates. Further, DP&L notes that allocating the DMR charges based on the historic allocation of DP&L's current nonbypassable charge promotes gradualism.

{¶ 111} The Commission finds that the cost allocation of the DMR does not violate any regulatory principles. The Supreme Court of Ohio has held that that the Commission has broad discretion in rate design. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 20 (citing *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 35). Moreover, as stated by OCC witness Fortney, cost allocation and rate design are more art than science (Tr. Vol. IV at 806). The Commission notes that the cost allocation for the DMR is based upon the cost allocation of DP&L's existing nonbypassable rider. Therefore, the Commission finds that the principle of gradualism support using a similar cost allocation to reduce impact on customer bills.

{¶ 112} We also note that the cost allocation and rate design of the DMR was negotiated as part of a larger stipulation that took into consideration multiple factors. This differs significantly from our previous consideration of a DMR cost allocation, as that was not the product of a negotiated stipulation. *In re FirstEnergy*, Case No. 14-1297 at 97-98. As discussed above, we found the Amended Stipulation, including the inclusion of the DMR, was negotiated among capable, knowledgeable parties. The resulting cost allocation of the DMR is reasonable and appropriately considers cost-causation principles as well as the overall customer bill impact (Jt. Ex. 1 at 5-6). We additionally note that the Amended Stipulation, as a whole, is expected to result in overall lower rates for residential customers (Co. Ex. 3 at 20-21).

p. Whether the DIR violates any important regulatory principles

{¶ 113} OCC first asserts that DP&L failed to comply with the standard filing requirements for infrastructure modernization plans, as outlined in Ohio Adm.Code 4901:1-35-03(C)(9)(g). OCC submits that DP&L's argument that necessary details regarding the DIR could be provided in a future rate case is without merit, as the filing requirements pertain specifically to an ESP proceeding. OCC further states that the DIR is not necessary as there are no pending reliability concerns. According to OCC, despite being the only utility without an infrastructure modernization plan, DP&L has consistently met or exceeded reliability goals while also maintaining high customer satisfaction scores. Accordingly, OCC reasons that there is no alignment between customers expectations and the need for an accelerated recovery of distribution investments, as required by Ohio Adm.Code 4901:1-35-03(C)(9)(g).

{¶ 114} DP&L responds that the DIR is lawful. DP&L asserts it is impossible to comply with the standard filing requirements at this time because the costs are still unknown. According to DP&L, the DIR will be set at zero and will not be populated until after the conclusion of the distribution rate case. The Company also disagrees with OCC's assertion that the DIR does not align with customer expectations. DP&L avers residential and commercial customers desire greater reliability, which would be provided by the DIR. The Company submits it would be illogical to wait for reliability to suffer before implementing the DIR.

{¶ 115} The Commission finds that OCC's argument that the DIR is unlawful lacks merit. In approving distribution investment riders for other electric utilities, the Commission has discussed how such riders allow utilities to maintain reliability by reducing regulatory lag. In doing so, the DIR promotes cost causation principles and prevents risking rate shock. *See, e.g., In re FirstEnergy*, Case No. 14-1297-EL-SSO at 115-116. Moreover, the Amended Stipulation specifically provides that the DIR will initially be set at zero and be used to recover incremental distribution capital investments. All other matters related to the DIR, including cost allocation, term, rate design, and annual revenue caps will be addressed in DP&L's pending distribution rate case, Case No. 15-1830-EL-AIR, or a future distribution rate case. We note that OCC, and any other interested stakeholder, will have a full and fair opportunity to participate in the pending distribution rate case or any future rate cases.

{¶ 116} Additionally, it was established that maintaining reliability is in alignment with customer expectations (Staff Ex. 1 at 3-7). Thus, because of the benefits associated with the DIR, it is irrelevant whether DP&L is presently meeting reliability standards or not.

q. Whether the Reconciliation Rider violates important regulatory principles

{¶ 117} As with the DMR, OCC asserts that the Reconciliation Rider is also an unlawful transition charge. Because the purpose of the Reconciliation Rider is to bolster the Company's financial integrity, and because the DP&L's financial integrity is struggling due to debt associated with generation assets, OCC claims the rider is a transition charge and barred by statute. OCC further maintains that the Reconciliation Rider violates Ohio law because residential customers will assume all of the costs of the rider even though the rider is not affiliated with SSO service.

{¶ 118} DP&L replies that the Reconciliation Rider is compliant with Ohio law. First, according to the Company, the Reconciliation Rider is not a transition charge. DP&L states that transition charges are nonbypassable and the Reconciliation Rider is bypassable. DP&L also affirms that the Commission has previously approved similar riders and found that those riders were not transition charges. As to the cost allocation of the Reconciliation Rider, DP&L claims that residential customers are not discriminated against. The Company argues that uniformity in utility prices and rates is not required and that, additionally, residential customers can avoid the charges by shopping for generation service.

{¶ 119} The Commission finds that the Reconciliation Rider, as modified by the Commission, is lawful and does not discriminate against residential customers. The Commission rejects the argument that the Reconciliation Rider is a transition charge. As we have discussed in other proceedings with similar proposed riders, 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, 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." 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 customer, the U.S. Department of Energy. Therefore, DP&L was not "entitled an opportunity to recover the costs," within the meaning of the statute. R.C. 4928.39(D). *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR et al. (*Ohio Power*), Second Entry on Rehearing (Nov. 3, 2016) at 100; Fifth Entry on Rehearing (Apr. 5, 2017) at 37-38. There is no evidence in the record of this proceeding to distinguish our determination in *Ohio Power* from the facts of this case. Accordingly, consistent with our decision in *Ohio Power*, we find 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. Further, we find that, as the Reconciliation Rider is now nonbypassable, OCC's arguments regarding discriminatory treatment are now moot.

r. Whether the economic development incentives violate regulatory principles

{¶ 120} OCC, as well as Walmart, submit the discounts and direct payments made to specific parties do not meet the requirements of traditional economic development arrangements. Instead, argues OCC, the discount were only applied in exchange for the parties' support or non-opposition to the Amended Stipulation. According to OCC, there has not been a demonstration of need for the discounted rates or an explanation of how the discounts would further state policy. Additionally, OCC and Walmart state there are no specific commitments by the parties to retain or expand jobs in Ohio.

{¶ 121} Walmart submits that while some parties are receiving cash payments and other, similarly situated customers are not, DP&L may be providing discriminatory rates. Walmart reasons that this impairs competitiveness in Ohio. OCC similarly avers that R.C. 4905.33 prohibits utilities from providing special rates and for specific corporations.

{¶ 122} DP&L submits that the economic development incentives and grants are lawful. The Company first affirms that economic development provisions are expressly permitted in an ESP, pursuant to R.C. 4928.143(B)(2)(i). DP&L further maintains that the economic benefits provided by the incentives justifies the distinction in rates. OMAEG argues similarly, stating that economic development payments offset cost associated with rate design modifications in the Amended Stipulation.

{¶ 123} The Commission concludes that the economic development incentives are lawful. We first note that R.C. 4928.143(B)(2)(i) expressly allows provisions for economic development and job retention. The statute does not require a demonstration of need or specific commitments. Further, we have already discussed the specific benefits derived from the provisions. This includes programs regarding job retention, energy efficiency, and utility assistance to low income customers (Jt. Ex. 1 at 27-35). OCC and Walmart's argument that the provisions are instead financial inducements is unconvincing. In addition to the economic benefits, the provisions offset costs associated with the Amended Stipulation and appear to be negotiated in good faith. Finally, we note that the record demonstrates that a significant number of people in the DP&L service territory live below the poverty line and that median household incomes have fallen. OPAE witness Cronmiller testified that one cause of the high poverty rate is that higher-paying, full-time jobs are being replaced with jobs that don't pay a living wage or jobs that are part-time or temporary. (OPAE Ex. 1 at 3). The Commission finds that this evidence supports the need for the economic development incentives contained in the Amended Stipulations.

s. Whether the Amended Stipulation allows DP&L to earn significantly excessive earnings

{¶ 124} OCC argues that if the Amended Stipulation is approved, along with the DMR, DP&L's return on equity will result in significantly excessive earnings. OCC avers that in DP&L's pending distribution rate case, a 10.5 percent return on equity is recommended. According to OCC, when factoring in the DMR, DP&L's return on equity would greatly exceed that amount. OCC asserts the Commission should impose a limit on the amount of profits that DP&L can earn in order to protect consumers.

{¶ 125} DP&L claims that it is appropriate to exclude the DMR from consideration of whether DP&L is receiving significantly excessive earnings. The Company asserts the purpose of a significantly excessive earnings test is to ensure that shareholderss are not being unjustly compensated. According to DP&L, because funds from the DMR are committed to be used to pay down debt, it is inappropriate to consider the DMR towards DP&L's return on equity. DP&L further argues that OCC is making assumptions from a pending distribution rate case that has not been litigated or resolved.

{¶ 126} Consistent with our previous orders in similar proceedings, the Commission finds that the DMR revenues should be excluded from SEET calculations. *In re FirstEnergy*, Case No. 14-1297-EL-SSO at 98. Including the revenue in SEET would introduce an unnecessary element of risk to DP&L and undermine the purpose of improving the financial integrity of the Company. However, we will reconsider whether to exclude DMR revenues from SEET when we rule upon any possible extension of the rider.

t. Whether a rules review regarding non-commodity billing violates regulatory principles

{¶ 127} OCC notes that the Amended Stipulation requires Staff to request rules regarding non-commodity billing with 18 months of the approval of the Amended Stipulation. According to OCC, this is inappropriate; instead OCC asserts the rules should reviewed as part of the typical five-year review process. OCC states the rules regarding marketers are set to be reviewed in 2019 and that is the appropriate time to review rules concerning non-commodity billing. IGS and RESA reply that OCC's argument should be denied. IGS and RESA aver that the Commission has broad discretion to manage its dockets and to decide the timing of a rule review. Additionally, according to IGS and RESA, non-commodity billing does not necessarily only apply to CRES providers, so it is logical to have a separate, stand alone rules proceeding.

{¶ 128} OCC's argument is both without merit and moot. IGS and RESA are correct that the Commission has broad discretion to manage its own docket. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO et al, Entry on Rehearing (May 28, 2015) at 36. Additionally, the Amended Stipulation merely obligates Staff to request the Commission to initiate a rule review regarding non-commodity billing, and, in any event, the Commission has already opened new dockets for the review of Chapters 4901:1-10 and 4901:1-21, which govern non-commodity billing by utilities and CRES providers. *In the Matter of the Commission's Review of Chapter 4901:1-10 of the Ohio Administrative Code*, Case No. 17-1842-EL-ORD; *In the Matter of the Commission's Review of Chapter 4901:1-21 of the Ohio Administrative Code*, Case No. 17-1843-EL-ORD. In those dockets, the rules will be open to comments from all interested parties and subject to review by the Commission.

u. Whether other riders included in the Amended Stipulation violate regulatory principles

{¶ 129} OCC claims that the RCR, the SCRR, and the Uncollectible Rider should not be approved without first establishing necessary baselines and reviews. OCC avers the components of these riders are more appropriately handled in a distribution rate case. In response, the Company notes that all rider recovery costs are subject to review by Staff. Here, we find that DP&L is correct that the riders identified by OCC are still subject to review, and, ultimately, approval by the Commission. Accordingly, OCC's argument is without merit.

IV. Conclusion

{¶ 130} Upon consideration of the record, we find that the Amended Stipulation, as modified by the Commission, satisfies the three prong criteria employed by the Commission for consideration as to the reasonableness of a stipulation. Additionally, we find that the ESP, as proposed in the Amended Stipulation, is more favorable in the aggregate than an MRO. Thus, having made these determinations, the Commission concludes that the Amended Stipulation should be adopted and approved.

{¶ 131} Furthermore, the Commission finds that the Company should file final tariffs consistent with this Opinion and Order, and that the revised final tariffs shall be approved effective November 1, 2017, subject to final review by the Commission. Accordingly, the term of the electric security plan should commence November 1, 2017.

V. Findings of Facts and Conclusions of Law

{¶ 132} DP&L is a public utility as defined in R.C. 4905.02 and, as such is subject to the jurisdiction of the Commission.

{¶ 133} On February 22, 2016, DP&L filed an application for an SSO in accordance with R.C. 4928.141.

{¶ 134} A stipulation was filed on January 30, 2017, and amended on March 14, 2017. The signatory parties to the Amended Stipulation were DP&L, Staff, Dayton, RESA, IGS, Edgemont, OPAE, PWC, OEG, OHA, and Kroger. Additionally, Enernoc, Honda, IEU-Ohio, and OMAEG signed the Amended Stipulation as non-opposing parties.

{¶ 135} The evidentiary hearing in this proceeding was held starting on April 3, 2017.

{¶ 136} Pursuant to published notice, public hearings were held in Dayton on September 27, 2016.

{¶ 137} DP&L's application was filed pursuant to R.C. 4928.143, which authorizes the Company to file an ESP as its SSO.

{¶ 138} The Commission finds that the Amended Stipulation, as modified by the Commission, meets the three criteria for adoption of the stipulation, is reasonable, and should be adopted.

{¶ 139} The proposed electric security plan, as modified by the Amended Stipulation, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply in under R.C. 4928.142.

VI. ORDER

{¶ 140} It is, therefore,

{¶ 141} ORDERED, That the ESP, as proposed in the Amended Stipulation and modified by the Commission, be adopted and approved. It is, further,

{¶ 142} ORDERED, That the Company shall file final tariffs consistent with this Opinion and Order, and that the revised final tariffs shall be approved effective November

1, 2017, subject to final review by the Commission. The new tariffs shall be effective the later of the date of filing or November 1, 2017. It is, further,

{¶ 143} ORDERED, That the Company file in final form two complete copies of tariffs consistent with this Opinion and Order. One copy shall be filed with this case docket, and one shall be filed with the Applicant's TRF docket. The Company shall also update their respective tariffs previously filed electronically with the Commission's Docketing Division. It is, further,

{¶ 144} ORDERED, That the Company shall notify their customers of the changes to the tariff via bill message or bill insert within 30 days of the effective date. A copy of this notice shall be submitted to the Commission's Service Monitoring and Enforcement Department at least 10 days prior to its distribution to customers. It is, further,

{¶ 145} ORDERED, That the DP&L take all steps necessary to implement the ESP, as proposed in the Amended Stipulation and modified by the Commission. It is, further,

{¶ 146} ORDERED, That a copy of this Opinion and Order 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

NJW/GAP/sc/vrm

Entered in the Journal
OCT 2 0 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

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.*

[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 **any** 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 <u>any</u> 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 <u>any</u> sale of the <u>coal generation assets</u> to make discretionary debt repayments at DP&L and DPL Inc.," it did not agree to use the proceeds from the sale of <u>any</u> 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

PAS/hac
Entered in the Journal
~~SEP 9 2018~~ SEP 19 2018

Barcy F. McNeal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

FOURTH ENTRY ON REHEARING

Entered in the Journal on November 7, 2018

I. SUMMARY

{¶ 1} In this Fourth Entry on Rehearing, the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel on October 19, 2018.

II. DISCUSSION

{¶ 2} The Dayton Power and Light Company (DP&L) is a an electric light company as defined by R.C. 4905.03(C) and a public utility as defined under R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission. On February 22, 2016, DP&L filed an application for a standard service offer pursuant to R.C. 4928.141. DP&L's application is for an electric security plan (ESP) in accordance with R.C. 4928.143. Additionally, DP&L filed accompanying applications for approval of revised tariffs and for approval of certain accounting authority.

{¶ 3} Thereafter, on October 11, 2016, DP&L filed an amended application for an ESP.

{¶ 4} On January 30, 2017, a stipulation and recommendation was filed by DP&L and various parties. Subsequently, on March 14, 2017, an amended stipulation and recommendation was filed by DP&L and various parties, including additional parties that were not part of the first stipulation.

{¶ 5} On October 20, 2017, the Commission issued its Opinion and Order in this proceeding, modifying and approving the amended stipulation.

{¶ 6} On November 17, 2017, an application for rehearing was filed by The Ohio Environmental Council and the Environmental Defense Fund (OEC/EDF). Further, on November 20, 2017, applications for rehearing were filed by Murray Energy Corporation and Citizens to Protect DP&L Jobs (Murray), Ohio Consumers' Counsel (OCC), DP&L, Industrial Energy Users-Ohio (IEU-Ohio), Retail Energy Supply Association (RESA), IGS Energy, Inc. (IGS), Ohio Manufacturers' Association Energy Group (OMAEG), and The Kroger Co. (Kroger).

{¶ 7} On December 6, 2017, the Commission granted the applications for rehearing filed by the parties for further consideration of the matters specified in the applications for rehearing.

{¶ 8} Subsequently, on January 5, 2018, OCC filed an application for rehearing of the Commission's December 6, 2017 decision to grant rehearing. The Commission issued the Second Entry on Rehearing in this proceeding on January 31, 2018, denying rehearing on OCC's January 5, 2018 application for rehearing.

{¶ 9} The Commission issued the Third Entry on Rehearing in this proceeding on September 19, 2018. In the Third Entry on Rehearing, the Commission granted, in part, and denied, in part, the application for rehearing filed by DP&L on November 20, 2017.

Further, the Commission denied the application for rehearing filed on November 17, 2017, by the Ohio Environmental Council and the Environmental Defense Fund and the applications for rehearing filed on November 20, 2017, by Murray, OCC, DP&L, IEU-Ohio, RESA, IGS, OMAEG, and Kroger.

{¶ 10} R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

{¶ 11} On October 19, 2018, OCC filed an application for rehearing regarding the Third Entry on Rehearing. DP&L filed a memorandum contra the application for rehearing on October 29, 2018.

{¶ 12} In its first assignment of error, OCC claims that the Commission erred when comparing the cost of the ESP in the aggregate to the cost of an MRO pursuant to R.C. 4928.143(C)(1) (ESP/MRO Test). OCC claims that the Commission improperly relied upon R.C. 4905.31 as creating independent authority for a public utility to charge consumers for advanced metering. OCC quotes R.C. 4905.31 as stating, in relevant part, that a public utility may enter into a "*reasonable arrangement with* another public utility or with *one or more of its customers, consumers, or employees* providing for . . . [a]ny other financial device that may be practicable or advantageous to the *parties* interested . . . [which] may include . . . any acquisition and deployment of advanced metering, ..." OCC claims, therefore, that R.C. 4905.31 does not create independent authority for a public utility to charge consumers for advanced metering; instead, according to OCC, R.C. 4905.31 permits only certain "reasonable arrangements" *between* parties, and there must be two parties to such reasonable arrangements.

{¶ 13} In its second assignment of error, OCC claims that the Third Entry on Rehearing is unreasonable and unlawful because the Commission's improper reliance upon R.C. 4905.31 results in a misapplication of the ESP/MRO Test. OCC posits that the

Commission's ESP/MRO Test analysis was inherently unreasonable and unlawful due to the Commission's misinterpretation of R.C. 4905.31.

{¶ 14} It its memorandum contra, DP&L responds that OCC's application for rehearing should be denied. DP&L claims that OCC has already conceded, in OCC's initial post-hearing brief, that costs recovered under the Smart Grid Rider would be available under an MRO through a distribution rate case. Since the Commission made the same finding in considering the ESP/MRO Test, irrespective of cost recovery under R.C. 4905.31, DP&L contends that OCC has not shown that the Third Entry on Rehearing is unlawful or unreasonable.

{¶ 15} DP&L also claims that OCC has waived this issue. DP&L notes that, when OCC challenged that ESP/MRO Test in its application for rehearing filed on November 20, 2017, OCC argued that certain riders, including the Smart Grid Rider, had been set to zero and thus imposed unknown costs, but OCC did not argue that Smart Grid Rider costs would not be recoverable under an MRO. DP&L argues that, since that issue could have been raised at that time, OCC has waived the issue and cannot raise it now. R.C. 4903.10; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 865 N.E.2d 213, ¶ 75 (holding that OCC waived issue by not setting forth specific ground in its first application for rehearing).

{¶ 16} Finally, DP&L argues that the Commission is correct that costs under the Smart Grid Rider could be recovered under an MRO through R.C. 4905.31. DP&L asserts that the statute expressly provides that public utilities may file a schedule providing for a device to recover costs incurred in conjunction with any acquisition and deployment of advanced metering, without limiting such schedules to agreements with third parties, as OCC erroneously contends.

III. Conclusion

{¶ 17} The Commission finds that the application for rehearing filed by OCC should be denied as procedurally improper. R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp., et al. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, et al., Second Entry on Rehearing (Sept. 13, 2006) at 3-4; *In re The East Ohio Gas Co. d.b.a. Dominion East Ohio and Columbia Gas of Ohio, Inc.*, Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 4.

{¶ 18} In the Opinion and Order, the Commission determined that the ESP was more favorable in the aggregate than the expected results of an MRO. Opinion and Order at ¶ 89. The Commission specifically rejected OCC's claim that certain riders, or their equivalents, would not be available under an MRO. *Id.* at ¶ 90. In its November 20, 2017 application for rehearing, OCC claimed that the Opinion and Order was unlawful because, in applying the ESP/MRO Test, the Commission could not have considered the cost of several riders created under the ESP but initially set at zero. According to OCC, because these riders have unknown costs, the Commission could not find that the ESP passed the ESP/MRO Test. In the Third Entry on Rehearing, we denied rehearing on this assignment or error, ruling that the record in this case demonstrates that certain zero-based riders created under the ESP will recover costs that are either recoverable in a distribution rate case or are otherwise recoverable under a hypothetical MRO. Such costs, therefore, are a wash. Third Entry on Rehearing at ¶ 80.

{¶ 19} OCC's October 19, 2018 application for rehearing revisits this denial of rehearing, claiming that, in our consideration of the ESP/MRO Test, the Commission improperly determined that one of the zero-based riders, the Smart Grid Rider, could recover advanced metering and infrastructure costs under an MRO, leading to a misapplication of the ESP/MRO Test. However, OCC improperly seeks rehearing upon rehearing of the same issue. The Commission has already rejected, in the Third

Application for Rehearing, OCC's claims that an equivalent to the Smart Grid Rider could not recover advanced metering and infrastructure costs under a hypothetical MRO and that the Commission erred in its consideration of the ESP/MRO Test. Third Application for Rehearing at ¶ 80. OCC improperly seeks rehearing on an issue upon which rehearing has already been denied. Accordingly, rehearing on both assignments of error should be denied.

{¶ 20} Even if OCC's application for rehearing were proper, which it was not, rehearing on OCC's first assignment of error would be denied. OCC's arguments in support of the first assignment of error misleadingly ignore the plain language of R.C. 4905.31.

{¶ 21} As a preliminary matter, the Commission notes that R.C. 4905.30 requires each public utility in this state to file with the Commission tariffs, or "schedules," containing all rates and charges for public utility services:

> A public utility shall print and file with the public utilities commission *schedules* showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. The *schedules* shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such *schedule*, and may prescribe, by order, changes in the form of such *schedules*. The commission may establish and modify rules and regulations for keeping such *schedules* open to public inspection. A copy of the *schedules*, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

R.C. 4905.30(A) (emphasis added). Further, R.C. 4905.32 require public utilities to charge all customers the rates and charges provided for in such schedules:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified *in its schedule filed with the public utilities commission* which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

R.C. 4905.32 (emphasis added). Thus it is clear that, according to R.C. 4905.30 and 4905.32, public utilities are required to file with the Commission "schedules" containing their rates and charges and that public utilities must charge all customers in the same customer class the rates and charges contained in such "schedules."

{¶ 22} In its first assignment of error, OCC argues that R.C. 4905.31 does not create independent authority for a public utility to charge consumers for advanced metering. According to OCC, R.C. 4905.31 permits only certain "reasonable arrangements" between parties, but OCC supports this claim by selectively quoting R.C. 4905.31. OCC alleges that the relevant part of R.C. 4905.31 states that a public utility may enter into a "*reasonable arrangement with* another public utility or with *one or more of its customers, consumers, or employees* providing for . . . [a]ny other financial device that may be practicable or advantageous to the *parties* interested . . . [which] may include . . . any acquisition and deployment of advanced metering, ..." However, in its quotation of the statute, OCC misleadingly omits all references in R.C. 4905.31 to the term "schedules." R.C. 4905.31 states, in actual relevant part:

> Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a *schedule* or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees * * * providing for any of the following:
>
> * * *
>
> (E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a *schedule or arrangement* concerning *a public utility electric light company,* such other financial device may include a device *to recover costs* incurred in conjunction with * * * any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation * * *. No such *schedule or arrangement* is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet. Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such *schedule or arrangement,* the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as

> the commission directs. Every such *schedule or reasonable arrangement* shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

R.C. 4905.31 (emphasis added). Thus, according to the plain language of the statute, DP&L may file a tariff or "schedule" which provides for the recovery of costs related to the acquisition and deployment of advanced metering, subject to the approval of the Commission. For that reason, the Commission did not err in determining, in the Third Entry on Rehearing, that under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31 and that, for purposes of the ESP/MRO Test such costs are a wash as they could be recovered both under the ESP and under a hypothetical MRO.

{¶ 23} OCC's second assignment of error claims that the Commission's misinterpretation of R.C. 4905.31 led to a misapplication of the ESP/MRO Test. Even if OCC's application for rehearing were proper, which it was not, rehearing on OCC's second assignment of error would be denied because the second assignment of error explicitly relies upon OCC's specious arguments in its first assignment of error, which the Commission rejected above.

{¶ 24} Accordingly, the Commission finds that rehearing on the two assignments of error raised by OCC in the application for rehearing filed on October 19, 2018, should be denied.

IV. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That the application for rehearing filed by OCC on October 19, 2018, be denied. It is, further,

{¶ 27} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

GAP/sc

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Secretary