BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

SUPPLEMENTAL POST-HEARING BRIEF OF
INTERSTATE GAS SUPPLY, INC.
PUBLIC VERSION

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May 15, 2019

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I. INTRODUCTION

Ohio law and policy promotes competition for competitive services. The parties to a stipulation and recommendation in this case propose to turn the law on its head. The stipulation proposes an environment that makes it more difficult for competitive providers of energy to compete while simultaneously insulating DP&L from the risk associated with its own investments.

Specifically, the Stipulation would frustrate the ability for customers to select a competitive retail electric service ("CRES") provider inasmuch as it would:

- Maintain discriminatory switching fees, which provide an undue preference to the standard service offer;
- Maintain unsubstantiated data access fees that create an undue burden to offering competitive retail electric products to customers;
- Increase collateral requirements applicable to CRES providers, and disproportionately increase such requirements for privately held companies—without any record evidence to support such changes.
- Recommend an evaluation of SSO costs embedded in distribution rates without establishing a mechanism through which such costs may be reallocated to the SSO.
- Authorize a Supplier Consolidated Billing Pilot Program without establishing appropriate parameters to ensure that the program will be a success, such as a discount rate.

Making matters worse, the stipulation recommends that DP&L's distribution customers provide a bailout under the veil of distribution modernization. In reality, the proposal has nothing to do with the distribution system, DP&L's financial integrity, or stability for customers. As DP&L conceded in the hearing, it is doing just fine—it has more than enough cash flows to meet its ongoing obligations to maintain reliable service. And it is already earning a just and reasonable return for the provision of distribution service.

Instead, the real purpose behind the Stipulation and the DMR is to pay off DP&L's parent company's debts that are owed to out-of-state banks. This ploy is based upon the alleged but unproven notion that DPL's credit problems may impact DP&L through higher borrowing costs. Based upon the testimony of DP&L's own witnesses—[redacted]—this claim rings hollow and does not justify imposing $105 million in non-bypassable charges on DP&L's customer base.

Putting Dayton's customer's aside for a moment, by bailing out AES from its bad investment in DPL, the Stipulation enables DP&L's ultimate parent company to unfairly deploy its capital to compete with Ohio companies rather than to stand behind the promises it made when it acquired DPL and its subsidiaries.

Finally, while the Stipulation contains one provision that IGS supports, the bypassable Reconciliation Rider, the Commission has previously determined to not modify that provision on that basis that it may cause "rate shock." That reasoning, however, is misplaced, given the additional evidence that is in the record. The RR is projected to be less than $2 a month, which is half of the cost of the unlawful DMR. To the extent that the Commission intends to authorize the RR in any form, it should be bypassable.

Therefore, Interstate Gas Supply, Inc. (“IGS”) urges the Commission to modify the Stipulation and Recommendation to address the errors identified herein.

II. BACKGROUND

A. DPL vs DP&L

Until nearly the end of 2011, DP&L operated as a wholly owned subsidiary of DPL Inc. (“DPL”). DP&L was a vertically integrated electric distribution utility (EDU) that owned generation, transmission, and distribution assets but operated its generation, transmission, and distribution businesses in separate units. DPL also owned DP&L Energy Resources (DPLER) which sold competitive retail electric service, and DPLE which engaged in the operation of peaking generation facilities and sold power in the wholesale markets. The total combined long-term debt of DPL at the end of 2010 (which includes DP&L’s debt) was $1,026.6 million. DP&L’s long-term debt at the time was $884.0 million. DPL long-term debt, exclusive of DP&L was approximately $142.6 million at the end of 2010.

On November 28, 2011, AES purchased DPL’s assets for approximately $3.5 billion. After the merger, DPL’s long-term debt increased to $2,628.9 million by the end of 2011. DP&L’s long-term debt at the end of 2011 was reported at $934.0 million. DPL’s long-term debt exclusive of DP&L was $1,694.9, or an increase of $1,552.3 million from the end of 2010. DPL’s long-term debt was significantly impacted by the acquisition by AES. In a nutshell, AES paid too much money for DPL Inc. and its assets.

During 2012, DPL recognized an impairment to the value of the goodwill and realized a loss of $1,817.2 million. The loss significantly impacted 2012 net income and December 31, 2012 retained earnings. The remaining balance of goodwill had been written off as of December 31, 2017.

The acquisition had a significant negative financial impact on DPL. A significant amount of debt was added to DPL's balance sheet (approximately $1,552.3 million), a material amount of assets (approximately $2,489.3 million) had been lost, and all the credit ratings were downgraded immediately after the acquisition. The increased debt has become increasingly difficult to service and the lost assets drove negative retained earnings. DPL's current negative financial position was clearly driven by the acquisition by AES.

Since the acquisition of DPL Inc. by AES, DP&L has consistently attempted to leverage its monopoly service functions to obtain involuntary customer funded assistance to pay off debts at the parent company level. Although its last request for customer-funded assistance was ultimately determined to be unlawful by the Supreme Court of Ohio, DP&L was not dissuaded from returning to the well.

B. The ESP Application

On February 22, 2016, DP&L filed an application to establish a standard service offer in the form of an electric security plan ("ESP"). Following negative rulings from the Federal Energy Regulatory Commission with respect to power purchase agreements with affiliates, DP&L filed a modified ESP application on October 11, 2016. As part of the Amended Application, DP&L proposed the DMR to collect a non-bypassable charge from its customers to the tune of approximately $145 million per year.

As part of the application, DP&L included the testimony of Craig Jackson to support the authorization of the DMR. Although DP&L planned to transfer its generation assets and had such an application pending before the FERC, DP&L made its financial case for the DMR as if it would own generation assets through the duration of the ESP. This somewhat muddied the waters regarding DP&L's true financial condition. Moreover, the application contained no provision for recovery of DP&L's OVEC-related costs.

Although two stipulations were ultimately entered into by DP&L and others, Mr. Jackson's financial projections provide the basis for all other financial projections presented by DP&L in this case.

Also included in the application were provisions related to Tariff G-8, commonly referred to as the "Supplier Tariff." For example, the application proposed to modify the manner in which DP&L calculates the collateral that each CRES provider must post. As discussed later in this brief, the proposed change would increase the amount of collateral that privately held CRES providers must post.

DP&L's proposed Supplier Tariff would maintain the current $5 switching fee, which is only applicable to customers that switch from the SSO to a CRES and from a CRES to a CRES. The switching fee would not be applicable to return to the SSO..

Finally, DP&L's proposed Supplier Tariff would maintain the $150 historical usage fee.

C. The Stipulation and the Amended Stipulation

On January 30, 2017, several parties submitted a Stipulation and Recommendation to resolve the contested issues in this proceeding. As part of that settlement, DP&L agreed to establish a component of the SSO rate to recognize costs related to but avoided by default service.

On March 14, 2017, following additional negotiations and bargaining, the parties to the initial Stipulation, the Commission Staff, and other parties executed an Amended

Stipulation[1] to resolve the outstanding issues in this proceeding.[2] The Amended Settlement made the Reconciliation Rider ("RR") bypassable to customers served by a CRES provider.[3]

Further, the Amended Stipulation acknowledged the existence of SSO-related costs embedded in distribution rates. The unbundling evaluation and reallocation of SSO related costs was delegated to the distribution rate case proceeding:

> *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.[4]

The Stipulation also recommends that the Commission authorize the DMR to permit DP&L to collect $105 million per year. DP&L has alleged that the DMR is necessary to ensure that DP&L can maintain safe and reliable service, but also to ensure that DP&L can modernize its grid. DP&L alleges that in the absence of the DMR, it will have sufficient cash flows to invest in the distribution system, and, to the extent that its parent company is downgraded, it would increase DP&L's cost of borrowing capital to modernize the distribution system.

Since the Stipulation in this case was executed, some time has passed. In the distribution rate case, for example, the Commission ultimately determined that any unbundling exercise would be futile, given that it lacked authorized to establish a rider in

[1]Joint Ex. 1.

[2] ESP Order at 2-3 (Oct. 20, 2017).

[3] *Id.* at 11.

[4] ESP Amended Stipulation at 9.

the distribution rate case.[5] As IGS will discuss later in its brief, this case provides the Commission with an opportunity to address the shortcomings identified in that order.

Unbundling aside, in the distribution rate case, the Commission adopted a stipulation and recommendation, which permitted DP&L to increase its distribution rates, including a 9.99% return on equity.[6] DP&L supported the stipulation. Moreover, DP&L reiterated in this proceeding that its base distribution rates provide it with a just and reasonable compensation for the provision of distribution service.[7] Moreover, as discussed further in this brief, DP&L concedes that its distribution and transmission rates and riders are projected to provide it with sufficient revenues to recover all projected expenses and needed capital expenditures to maintain safe and reliable distribution service.[8]

On October 20, 2017, the Commission issued an Opinion and Order modifying and approving the Amended Stipulation. While the Order authorized many aspects of the Amended Stipulation—including the framework for evaluating costs "that may be necessary to provide the standard service offer"[9] —the Order modified the RR, making recovery of OVEC-related costs non-bypassable.[10] Consequently, IGS and several other entities filed applications for rehearing.

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[5] *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Its Electric Distribution Rates*, Case Nos. 15-1830-EL-AIR, *et al.*, Opinion and Order at 11 (Sep. 26, 2018).

[6] *Id.* at 24.

[7] Tr. Vol. VII at 1130.

[8] Tr. Vol. VI at 990-92; Tr. Vol. VII at 1140-41, 1166 IGS Ex. 1015 at 23-24.

[9] *Id.* at 9.

[10] *Id.* at 35.

On September 19, 2018, the Commission issued its Third Entry on Rehearing denying the applications for rehearing. Up until that point in this challenging proceeding, IGS made every effort to settle the contested legal matters without protracted litigation. But, given the modification of the bypassable RR, coupled with the remaining unsatisfactory provisions in the Stipulation, IGS withdrew from the Stipulation and requested that the Commission establish a procedural schedule.

On December 5, 2018, the Attorney Examiner granted IGS' motion to withdraw from the Stipulation and established a procedural schedule. Following discovery and the submission of prefiled testimony, the Commission held a hearing on April 1, 2019. As IGS will discuss below, there is no legal or evidentiary basis upon which the Commission may authorize DP&L to maintain barriers to customer choice and to impose excessive non-bypassable charges on customers for the benefit of shareholders.

D. The "Redo" Hearing

On February 12, 2019, IGS filed the testimony of J. Edward Hess, Matthew White, Joseph Haugen, and Devin Crist. From a high level, the witnesses recommend several modifications to the Stipulation to ensure that the ESP is in the public interest, compliant with the law, and provides an outcome that is more favorable in the aggregate than a market rate offer.

Specifically, IGS submitted recommendations that will enhance the market, as well as recommendations that will ensure that the market in Ohio does not deteriorate from its present condition. Regarding the former category, IGS recommended that the Commission adopt a discount rate for purposes of the supplier consolidated billing pilot program to ensure that it is a success and facilitates the delivery of more innovative products and service.

IGS recommended that the Commission eliminate barriers to competition that would result from the discriminatory and unsubstantiated switching fees and historical usage fees applicable solely to customers when they shop.

Moreover, IGS recommended that the Commission not authorize the DMR. IGS identified that this charge would increase the rates of all distribution customers to pay off the long-term debt held at an unregulated entity, and without providing any value in return to customers. In so doing, the DMR insulates DPL Inc.'s parent company, AES Corp., from the risks associated with the competitive market and permits AES to allocate its capital to compete unfairly against non-subsidized Ohio companies in the retail and wholesale generation market. Consequently, IGS argued that the DMR should not be authorized for purposes of paying off DPL Inc.'s debts.

And, to the extent that the DMR is authorized in any fashion to permit DP&L to undertake grid modernization—an outcome that is simply not necessary, given DP&L's ability to raise additional capital without the DMR—the Commission should require DP&L to appropriately account for any DMR funds as customer provided funds in the ratemaking process. As such, any DMR funds should be attributed as a credit to ratebase upon which no rate of return or depreciation may be accrued.

Finally, IGS provided additional testimony and evidence to demonstrate that the RR should remain bypassable—if authorized at all—as originally recommended in the Stipulation. The projected impact of the RR in year one is between $1.39 to $1.85 for a residential customer. Schroder at Ex. A at 1 of 36. This amount is less than half of the projected DMR rider. Moreover, the projection of the RR provided by witness Jackson, reflect that the RR is projected to be between $6 million and $9 million per year. The impact of 50% increase in the RR would result in a charge of less than the DMR. Thus, there is no basis to conclude that the RR would lead to rate shock. Moreover, to the extent that the Commission correctly rejects the DMR, making the RR bypassable would result in a total rate increase for SSO and shopping customers alike.

III. SETTLEMENT CRITERIA AND LEGAL STANDARD

Before approving a contested settlement, the Commission must find that: (1) the settlement is a product of serious bargaining among capable, knowledgeable parties; (2) the settlement, as a package, benefits ratepayers and the public interest; and; (3) the settlement package does not violate any important regulatory principles or practices.[11] A settlement is not evidence and it is not binding on the Commission. It is a recommendation by parties to a proceeding on how the Commission should address and resolve contested issues and nothing more. A settlement cannot provide the Commission with authority. A settlement does not allow the Commission to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules.

For example, Monongahela Power relied upon a settlement for its authority to end the five-year market development period early. The Ohio Supreme Court ("Supreme Court") rejected the claim that the settlement provided support for the early termination, stating:

[11] *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St.3d 123, 126 (1992). See, also, *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St.3d 81, 82-83 (2002).

> Nevertheless, to the extent that Section IV of the Stipulation approved by the commission in the ETP Order can be considered an order authorizing the early end of Mon Power's MDP, that order was premature. *It was based upon an optimistic assumption that the requisite levels of the switching rate or effective competition would be achieved by December 31, 2003, an assumption that proved to be unwarranted, making any such order ending the MDP unenforceable because the order exceeded the statutory authority of the commission*.[12]

Here, the stipulation must satisfy the three-prong test, as well as the legal criteria contained with R.C. 4928.143. Thus, the provisions proposed in the Stipulation must be authorizable within an ESP and the proposed outcome must be more favorable than the outcome that would occur under a market-rate offer. As discussed below, the settlement does not pass muster without additional changes.

IV. ARGUMENT

A. There is no record evidence to support increasing the collateral requirements applicable to CRES providers

DP&L has collateral obligations to account for the possibility that a CRES provider defaults on their obligations.[13] Although DP&L provided no evidence to support its request, through the Stipulation, DP&L proposes to modify DP&L Alternative Generation Supplier Coordination Tariff, sheet G8, page 24 of 30 (the “Supplier Tariff”).[14] Under DP&L’s proposal, CRES providers without an investment grade long-term bond would be required to post collateral based upon a set formula.[15] DP&L has indicated that it plans

[12] *Monongahela Power Co. v. Pub. Util. Comm’n.,* 104 Ohio St.3d 571, 2004-Ohio-6896 at 26 (2004) (emphasis added).

[13] IGS Ex. 1017 at 4.

[14] *Id.* at 5.

[15] *Id.* at 4-5.

to require a set formula despite the fact that its current and proposed tariff states that "[t]he amount of the security required must be and remain commensurate with the financial risks placed on the Company by that supplier, including recognition of that supplier's performance."[16] The Commission should reject DP&L's proposal for several reasons.

First, the only discussion of DP&L's proposal is contained in the original application. The Stipulation does not directly address the proposed change—it merely indicates that certain changes to the Supplier tariff will be accepted, but the originally proposed changes will otherwise be approved.[17] But DP&L does not even appear to have marked the application as an exhibit in this proceeding. DP&L has provided no testimony or evidence to support its proposed modification of the collateral requirements.[18]

Stipulations, however, are "considered merely as recommendations to the Commission and, while entitled to substantial weight, they must be supported by the evidence of record to withstand scrutiny." *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 563, 629 N.E.2d 423. "The agreement of some parties is no substitute for the many procedural protections reinforced by the evidentiary support requirement." *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46 (May 24, 2011). Likewise, the Commission must issue orders based upon findings of fact derived from the record evidence. R.C. 4903.09. Given that DP&L failed to provide

[16] *Id.* at 6; *see also* DP&L Alternative Generation Supplier Coordination Tariff, sheet G8, page 24 of 30 (emphasis added).

[17] Joint Ex. 1 at 26.

[18] Tr. Vol. VII 1318-19.

evidence to support its proposed modification, the Commission should reject DP&L's proposed collateral modification.

Second, the evidence that is in record demonstrates that DP&L's proposed collateral requirements would be the most burdensome in the state.[19] It simply does not make sense to increase the cost of doing business in the DP&L service territory without compelling record evidence.

Third, the evidence that is in the record demonstrates that the proposed changes would disproportionately impact privately held companies with strong balance sheets.[20] "Typically speaking, privately held, unrated companies, such as IGS, may have little or no business reason to get a credit rating. . . ."[21] Even if privately held companies have strong financials, such companies are less likely to obtain a credit rating, given that they are not listed on an exchange and may have no need to borrow long-term debt.[22] *Id.* at 10. Consequently, the proposed modification is unsubstantiated and should be rejected.

Fourth, DP&L's proposed collateral calculation is inconsistent with its own tariff and standard industry practice. Specifically, Mr. Crist identified, "It is standard practice for utilities to establish a standard collateral calculation, but to then adjust downward the amount of needed collateral based upon a supplier's financial strength."[23] Consistent with this principle, the proposed tariff indicates that "[t]he amount of the security required

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[19] IGS Ex. 1017 at 9-10.

[20] *Id.* at 3, 10.

[21] Id. at 10.

[22] *Id.*

[23] *Id.* at 7.

must be and remain commensurate with the financial risks placed on the Company by that supplier, including recognition of that supplier's performance."[24] But DP&L has indicated that it will not give any effect to this language.[25]

Given this fact, IGS recommends that—to the extent that DP&L's collateral modification is not rejected out of hand—the Commission direct DP&L to consider specific metrics to apply as a reduction to the otherwise applicable collateral calculation. Using these metrics, DP&L may ensure that financially strong CRES providers are not required to post excessive collateral relative to the risk they impose. Mr. Crist recommended that DP&L apply its proposed collateral calculation, and then reduce the total amount of collateral based upon three factors (1) Capital Structure; (2) Diversity of Portfolio; (3) Past Performance.[26] Specifically, Mr. Crist recommended that DP&L consider the following factors to ensure that the posted credit is commensurate with the risk posed by the CRES provider:

- **Capital Structure**: the lack of debt is an indication of financial strength; thus, for each percent of a supplier's capital structure that is composed of equity over 50%, a 1% reduction in collateral.

- **Diversity of Portfolio**: diversity in business ensures that market dynamics are less likely to negatively impact cash flows; thus, for each percent of a supplier's total business portfolio (revenues) that relates to nonelectric-related business, a corresponding 1% reduction in collateral.

- **Past Performance**: an entities ability to meet its obligations over time is reflective of that entities ability to meet its ongoing obligations through different market dynamics; thus, a supplier should receive a 1% discount

[24] *Id.* 6.

[25] *Id.* at 5-6.

[26] *Id.* at 7-8.

> for each year that they have met their obligations in the DP&L service territory.[27]

To the extent that a supplier can meet more than one of the above requirements, Mr. Crist recommended "that the 1% discount in the second and third factor be reduced to .5%."[28] The adoption of these guidelines will ensure that DP&L is consistent with the spirit of the tariff and the purpose behind collateral—to require CRES providers to post credit commensurate with the associated risk.

B. The Commission should reduce or eliminate unreasonable and unsubstantiated historical usage fees

The Application proposes to modify the Supplier Tariff. As a part of that tariff, DP&L imposes a fee of $150 to access twelve months of hourly load date (historical usage information). DP&L has not attempted to justify this exorbitant fee. The only basis for the current fee is a case that was settled nearly eight years ago. These fees have added up to millions of dollars over the past several years.[29] Of course, these fees must be passed along to customers. "Moreover, in many instances, these costs have become so exorbitant that a CRES provider must provide potential contract pricing to a customer without incurring the $150 price, which simply cannot be justified every time there a prospective customer request a price."[30] It is much more difficult and far less accurate to tailor a product to a specific customer's needs when a CRES provider develops a

[27] *Id.*

[28] *Id.* at 8.

[29] IGS Ex. 1014 at 9.

[30] *Id.*

prospective customer's a quote without reviewing historical usage information. DP&L's own witness conceded as much during the hearing.[31]

The continued existence of such a burdensome fee continues to suppress the retail electric market in DP&L's service territory. DP&L witness Schroder testified that the fee should be viewed as "helping and supporting improved systems so [the $150 historical usage fee] could be done cheaper," yet the fee has remained unchanged since its inception 8 years ago in case no. 11-3002-EL-MER.[32] DP&L provided no justification for the exorbitantly unreasonable fee despite interrogatories on the matter.[33]

The Commission should eliminate the historical usage fee insomuch as the fee is unreasonable and has created a financial barrier for CRES seeking to tailor products for specific customers on a competitive basis. DP&L provides no basis for the high cost to suppliers other than supporting or improving systems so that the fee might decrease, despite the fee remaining unchanged since the data became available and the fee was created.

C. The Commission should eliminate—or at a minimum, equally apply—switching fees

DP&L's Supplier Tariff currently imposes a fee of $5.00 each time a customer leaves SSO service to begin service with a CRES provider.[34] The same fee is not applied to customers returning to SSO service from CRES service.[35] The fee, by only being

[31] Tr. Vol. VII 1324-16; IGS Ex. 1014 at 9.

[32] *Id*. at 1326 Ln. 2-5.

[33] See DP&L Response to IGS-INT-9-7.

[34] IGS Ex. 1014 at 7.

[35] *Id.*

imposed on customers seeking to proactively choose a CRES provider, creates an uneven and discriminatory playing field that provides an indirect subsidy to SSO service in violation of Ohio law.[36] Ohio law does not require complete uniformity across all rates and fees but does require uniform rates and fees when a utility is performing "like and contemporaneous service under substantially the same circumstances and conditions."[37] The customers that are switching, and thus incurring the fee, are similarly situated to the utility in that they need the utility to adjust their account to reflect their action, a power exclusively reserved by DP&L. The fact that a customer is leaving or entering the SSO should not impact the administrative costs of effectuating a switch. During cross-examination, DP&L could not identify any distinguishing differences.[38]

In the case of the switching fee, DP&L is surely performing the "like and contemporaneous service" of administratively changing the appropriate sections of a customer's account in order that they receive the generation service they have selected, be that from a CRES provider or from the SSO. No evidence was provided by DP&L, despite direct interrogatories on the subject, that would go to prove that there are no costs incurred when a customer returns to the SSO pool from competitive service.[39] Additionally, DP&L was unable to provide any evidence as to the actual costs incurred by DP&L when switching a customer from the SSO pool to competitive service.[40]

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[36] See R.C. 4928.02(A) (state policy is to ensure nondiscriminatory and reasonably priced retail electric service).

[37] *Ohio Consumers' Counsel v. PUC*, 109 Ohio St. 3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 23.

[38] Tr. Vol. VII at 1322.

[39] IGS Ex. 1014 at Ex. MW-1 (DP&L Response to IGS-INT-9-11.)

[40] *Id*.

The absence of any evidence to support the need for a switching fee should bolster the recommendation of witness White to eliminate the switching fee in its entirety. Under a cost-causation approach, the applicable fees should be recovered from the entity that caused the fee.[41] DP&L was unable to provide any evidence as to the actual costs associated with the switching fee and furthermore unable to differentiate any cost differences between removing or adding a customer to the SSO pool. The customers, for whom the fee is incurred, are all similarly situated to the DP&L insomuch as they only need DP&L to adjust their accounts per their choice.

The Commission should continue to foster a nondiscriminatory and open electric market in accordance with state policy by either eliminating the switching fee in its entirety or in the alternative require DP&L to apply the fee in a non-discriminatory manner. No evidence was provided by DP&L to support the fee and furthermore no distinction was shown between customers leaving or entering the SSO.

D. The Commission should modify the Supplier Consolidated Billing program to require CRES providers to purchase receivables at a discount

The Stipulation recommends that DP&L commence an SCB Pilot Program. As part of the pilot, CRES providers would invoice and collect customers for all retail charges, including DP&L's distribution and transmission charges. The Stipulation recommends that CRES providers purchase receivables. It is important to keep in mind that DP&L has already assumed that a portion of DP&L's distribution-related receivables will not be

[41] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, et al., Opinion and Order at 55 (Aug. 8, 2012) (holding that "[t]he PIRR balance was incurred primarily by OP customers, and according to cost causation principles, the recovery of the balance should be from OP customers.").

collected. DP&L is being compensated for its uncollected distribution receivables through distribution rates and its uncollectible expense rider.[42] To the extent that CRES providers are required to purchase DP&L's receivables at no discount, DP&L's uncollectible distribution expense will decrease. But CRES providers will be required to increase their generation-related prices to recover the cost of collecting DP&L's distribution receivables. This will result in a windfall to DP&L and customers that are not participating in the Pilot. While this change alone would not result in the Stipulation being in the public interest, it would at least mitigate some of the anti-competitive and anti-consumer elements of the Stipulation.

To establish the appropriate discount rate, the Commission should start with DP&L's embedded uncollectible rate. "But this amount should be increased slightly by 25 basis points to account for the fact that the pilot does not provide CRES providers with the ability to disconnect a customer."[43] Given this fact, "it can be assumed that CRES providers will be at a disadvantage in the collection process and therefore will experience a higher level of write-offs."[44] Accordingly, IGS recommends that the Commission direct that CRES providers purchase DP&L's receivables at a discount. This will ensure that the SCB Pilot is a success and that DP&L is not the recipient of a windfall.

E. The Commission should establish a rider to unbundle SSO and reallocate SSO costs embedded in distribution rates

[42] IGS Ex. 1014 at 11.

[43] *Id.*

[44] *Id.*

The Stipulation proposed to facilitate an evaluation of SSO costs proposed for recovery in distribution rates. But the Stipulation fails to propose any methodology or rider to ultimately reallocate those costs—either through additional charge to the SSO or credits to shopping customers that are currently overpaying for distribution service. While the Commission ultimately recognized in the distribution rate case that "there may be SSO-related costs proposed for recovery in distribution rates, it indicated that it lacked authority to establish a rider in a distribution rate case to effectuate the proposal."[45] Such a clause or rider could only be authorized in an ESP case. "Given this apparent procedural issued holding back the Commission from unbundling SSO-related costs, IGS recommends that the Commission establish a rider here to address the Commission's concern in Case Nos 15-1830."[46]

Therefore, IGS recommends that the Commission establish an SSO unbundling rider, which shall credit to all distribution customers any costs identified in distribution rates that relate to the provision of the SSO. The rider should then reallocate such costs to SSO customers, consistent with principles of cost causation.

Authorizing an unbundling rider would be consistent with Ohio law and policy. Ohio law requires the Commission to "[e]nsure the availability of unbundled and comparable retail electric service."[47] Ohio policy further requires the Commission to ensure that customers have "nondiscriminatory, and reasonably priced retail electric service."[48]

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[45] IGS Ex. 1014 at 10.

[46] *Id.*

[47] R.C. 4928.02(B); *see also* R.C. 4928.05(A)(1) eliminating authority to apply traditional regulatory authority to unbundled competitive services.

[48] R.C. 4829.02(A).

Likewise, the Commission must "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."[49]

The Supreme Court has noted that the General Assembly "restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service."[50] To that end, the General Assembly "required the unbundling of the three major components of electric service — generation, distribution, and transmission — and the components that make up the three major service components."[51] "In short, each service component was required to stand on its own."[52] By establishing an unbundling rider, the Commission can fulfill the General Assembly's directive and ensure a level playing field for the provision of competitive retail electric service.

F. The Commission should reject the DMR

The Stipulation proposes that the Commission authorize DP&L to implement the DMR and collect $105 million year through the rider. According to DP&L, the DMR should be approved for four reasons. First, DP&L claims that its ability to provide safe and

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[49] R.C. 4928.02(H).

[50] *Industrial Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 487 (2008).

[51] *Industrial Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 487 (2008).

[52] *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 452-53 (2004).

reliable service in the absence of the DMR would be in jeopardy.[53] Second, DP&L claims that the DMR will provide a *path to* grid modernization.[54] Third, DP&L alleges that in the absence of the DMR, executives and regulators will be distracted by DP&L's financial distress.[55] Fourth, DP&L claims that DP&L will face increased borrowing costs.[56] DP&L's reasoning has no foothold in the law, and, even if that were the case, DP&L's reasoning is not supported by the facts in the record.

The Commission's jurisdiction is limited by statute. The Supreme Court of Ohio has indicated that the Commission may approve only ESP provisions authorized by R.C. 4928.143*. In re Application of Columbus Southern Power*, 128 Ohio St. 3d 512, (2011). Further, the otherwise applicable outcome of the ESP must be more favorable than the outcome of an MRO. The DMR cannot be authorized because:

- The DMR is not needed to ensure that DP&L maintains safe and reliable service.
- There is no provision within R.C. 4928.143 to authorize a rider to provide credit support to an unregulated entity.
- The rider is not necessary to ensure that DP&L has access to the capital markets
- The rider is contrary to the public interest and would violate core regulatory and ratemaking principles.

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[53] DP&L Ex. 2 at 58.

[54] *Id.*

[55] *Id.*

[56] *Id.*

- The outcome of the ESP would fail the ESP MRO test

1. The DMR cannot be authorized to prop up the earnings of DP&L's parent company DPL Inc.

The issue in this case is not DP&L but rather DPL Inc.'s need for money. There is a substantial amount of debt that resides at the DPL Inc. level.[57] Approximately $1.1 billion at the time the Stipulation was entered.[58] Nearly all of this debt is a consequence of AES Corporation paying too much when it originally acquired DPL. Prior to the acquisition of DPL Inc. by AES, DPL Inc.'s long-term debt was $142 million.[59] According to DP&L, 65-70% of the DMR is intended to pay off DPL Inc.'s debts.[60] The DMR seeks to transfer the risk of DPL Inc.'s unregulated business activities away from its shareholders and onto DP&L's customers. This constitutes an outcome in direct conflict with Ohio law and policy. While DPL Inc. may need additional cash, it is not lawful or reasonable to authorize the DMR to fill the gap.

Initially, both an ESP and MRO relate to services *provided by an EDU*. DPL Inc. is an entity that is not regulated by the Commission; therefore, it would be unlawful and inappropriate to authorize the DMR for DPL Inc.'s benefit.[61] There is nothing in the ESP statute that permits an EDU to put in place provisions that subsidize its affiliates or parent company. This conclusion is further supported by the policies contained in Ohio law and precedent.

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[57] DP&L Ex. 2 at 40.

[58] *Id.*

[59] IGS Ex. 1015 at 9.

[60] Tr. Vo. VII at 1162.

[61] *Id.* at 12.

One of the core tenants of Ohio's restructuring law related to the separation of competitive and non-competitive services. Competitive and unregulated services were subjected to market conditions, while the Commission maintained cost-based regulation over non-competitive services. "SB 3 imposed numerous requirements on an EDU to make sure that retail customers as well as CRES providers are not subjected to an EDU's discretion in ways that would allow the EDU to favor its owned or controlled assets or affiliated lines of business."[62] These requirements are codified in R.C. 4928.17 and R.C. 4928.02(H), with respect to prohibitions against subsidization of competitive and unregulated services. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 14 Ohio St.3d 305 (2007). Based upon the law, it is clear that EDUs may not use their non-competitive service functions to convey a preference or competitive advantage to unregulated and competitive business units within the same holding company structure. Over the past twenty years, the Commission has affirmed this policy several times.[63]

The reasoning for the above policy is clear. From a customer perspective, such behavior of a monopoly is equivalent to rent seeking. Because DPL Inc. is unregulated and provides no value to customers, it would be highly inappropriate to require DP&L's distribution customers to insulate it from the risks associated with its operations. In that respect, the DMR is equivalent to a rent seeking charge—an attempt by a regulated monopoly to manipulate the regulatory process to create wealth without providing

[62] *Id.* at 13.

[63] IGS Ex. 1015 at 17-20.

anything in return.[64] As IGS witness White testified, the clear purpose of the DMR is to extract "above-market revenues from the already economically challenged customers in the Dayton region to pay a few ... out-of-state bankers and their shareholders."[65]

From a market perspective, the DMR is equally unlawful and inappropriate. The DMR permits DP&L to pay off the outstanding debts that would otherwise be left up to AES Corporation.[66] Permitting a regulated distribution utility to utilize its non-competitive operations to support an unregulated entity could destabilize competitive conditions in the market place and tilt the playing field against nonsubsidized market participants.

2. The DMR is not necessary to ensure that DP&L can provide safe and reliable service

In order to find a legal hook for the DMR, DP&L attempts to establish a nexus between the rider and distribution service. But no such nexus exists.

The DMR is not necessary for DP&L to maintain safe and reliable service. The record is uncontroverted that DP&L's distribution and transmission revenues provide it with a reasonable rate of return.[67] As IGS witness Hess testified, based upon DP&L's own estimates, DP&L will have sufficient cash flows to cover its projected expenses and capital expenditures in order to maintain safe and reliable service.[68] DP&L does not dispute this fact. In short, DP&L is doing just fine.

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[64] According to Black's Law dictionary, "rent-seeking is an attempt to obtain economic rent by manipulating the social or political environment in which economic activities occur, rather than by creating new wealth." https://thelawdictionary.org/rent-seeking/.

[65] IGS Ex. 1014 at 6.

[66] Tr. Vol. VIII at 1425.

[67] Tr. Vol. VI at 990-92; Tr. Vol. VII at 1140-41, 1166 IGS Ex. 1015 at 23-24.

[68] IGS Ex. 1015 at 23-24.

Given that DP&L's regulated distribution and transmission rates are providing a fair and reasonable return, there is no basis to authorize the DMR to further increase DP&L's return.

3. The DMR cannot be justified under the guise of distribution modernization

Given that DP&L cannot identify any projected cash flow shortage, it seeks to justify the DMR under the guise of grid modernization. DP&L alleges that it will not have sufficient cash flows to make investments in the future for grid modernization, and, if DPL Inc's credit rating is downgraded, this will ultimately impair DP&L's ability to obtain capital.[69] DP&L alleges that DPL Inc.'s financial condition is inextricably intertwined with DP&L's; thus, the DMR should be authorized to permit DP&L to pay off its parent company's debts. This reasoning is inconsistent with the law and contrary the weight of the record.

a. The DMR does not relate to distribution service

The DMR is not justifiable under R.C. 4928.143(B)(2)(h). Under that section, an ESP may include:

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

[69] DP&L Ex. 2 at 58.

> utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

First, and perhaps most importantly, there is nothing about the DMR that relates to *distribution service*. Based upon DP&L's own testimony, the DMR simply provides revenue to DP&L to pay down debt at DP&L and its parent DPL Inc.[70] There is no service provided by the DMR whatsoever—no generation, distribution, or transmission service—provided to customers in exchange for the rider. Rather, the DMR constitutes revenue to DP&L with nothing in return. Alleging that the DMR will position DP&L to make grid modernization investments in the future is insufficient. Future commitments are not part of this record.

b. DPL Inc.'s financial situation will not impact DP&L.

The financial conditions of DPL should have no bearing on DP&L and its ability to borrow funds. As a standalone entity, DP&L is doing fine. DP&L is a regulated distribution utility with stable cash flows—it has revenue decoupling, lost distribution revenues, and capital investment distribution rider cost recover.[71] These factors all reduce its risk from a credit rating perspective.[72] The Commission has regulated DP&L in a fair and balanced fashion. Indeed, DP&L has now divested its generation assets and reduced its risk

[70] *See* DP&L Ex. 1 and 2.

[71] Tr. Vol. VI at 955-59.

[72] *Id.*

profile.[73] As DP&L conceded, creditors view the generation asset transfer as credit positive.[74]

Moreover, DP&L has ring fencing provisions in place to ensure that the regulated utility is insulated from the actions of unregulated businesses within the same holding structure.[75] Specifically, DP&L has represented to the Commission in its most recent distribution rate case that:

> There are a number of plan and regulations to which DP&L is subject and with which DP&L complies to accomplish ring fencing. Those include:
>
> • Corporate Separation Plan: DP&L has a Fourth Amended Corporate Separation Plan, which the Commission approved in Case No. 13-2442-ELUNC
>
> • Cost Allocation Manual (CAM): DP&L maintains a CAM, as described in its Fourth Amended Corporate Separation Plan
>
> • Cost Alignment and Allocation Manual (CAAM): DP&L maintains a CAAM, as described in its Fourth Amended Corporate Separation Plan
>
> • Merger Stipulation: The Commission approved a Merger Stipulation for DP&L in Case No. 11-3002-EL-MER
> • Ohio Regulations: DP&L is subject to various Ohio corporate separation requirements, including those in Ohio Revised Code § 4928.17 and Ohio Admin. Code §4901:1-37-01, et sec.[76]

Ring fencing will "ensure that the revenue and cash flow of the distribution utility remains within the distribution utility in order to maintain proper credit for the distribution utility."[77]

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[73] Tr. Vol. VII at 1169.

[74] *Id.*; *see also* Tr. Vol. VI at 955.

[75] IGS Ex. 1006 at 7 of 111 (Administrative Notice taken at Tr. Vol. VII at 1349).

[76] IGS Ex. 106 at 7 of 111 (administratively noticed at Tr. Vol. VII at 1349). *See also* Tr. Vol. VIII at 1423:

[77] Tr. Vol. VIII at 1423.

Such a provision insulates DP&L from the credit rating determinations at the parent company.[78] Indeed, while DP&L has alleged that Moody's will apply a notching process to reduce the credit rating of a subsidiary, Moody's itself has determined "[w]hen there is proper ring fencing in place, there is no notching effect necessary."[79]

Thus, DP&L's current situation reflects favorably in the credit rating process. It has ring fencing provisions, stable revenues, and a supportive regulator, which should ensure that DP&L has access to the capital markets at favorable terms.

c. Authorizing the DMR is like providing a cure that is worse than the ailment it would address

Although DP&L complains of potential increased borrowing costs if the DMR is not approved, it failed to present evidence to demonstrate (1) that it in fact needs to borrow additional funds; (2) the amount of any increase borrowing cost without the DMR. First, the record suggest that DP&L already has access to additional funds under its existing Credit Agreement. Specifically, under it current Credit Agreement, DP&L has access to a $200 million revolver, an additional $100 million for purposes of capital investment, and $25 million in unsecured credit.[80] Since DP&L has failed to identify in this record any amount of grid modernization costs that the Commission has authorized, it would put the cart before the horse to conclude that DP&L does in fact need to borrow additional money. Moreover, as Ed Hess testified and DP&L's own witnesses confirmed, DP&L already has

[78] *Id.*; *see also* Tr. Vol. VI at 1058.

[79] Tr. Vol. VIII at 1424.

[80] IGS Ex. 1001 at Section 7.01; *see also* Tr. Vol. VI at 996-98.

sufficient cash flows to cover its ongoing expenses.[81] Therefore, DP&L's plea for additional funds is not supported by the record.

Second, even if DP&L's credit rating is downgraded, DP&L's own evidence suggest that [redacted] the cost of the DMR.[82] DP&L's current outstanding long-term debt is only $580 million. Thus, for each 1% increase in borrowing cost, DP&L would pay an additional $5.8 million per year in interest.[83] It does not take an expert to identify that a significant borrowing increase—an amount that DP&L has failed to demonstrate whatsoever in this record—would have to occur before the increased cost of borrowing approached the cost of the DMR.

d. DPL Inc. Bankruptcy would likely have a positive impact on DP&L

DP&L alleges that the DMR will allow it to stave off bankruptcy at DPL Inc. DP&L alleges that such a bankruptcy would have negative implications on DP&L by involving regulators and distracting DP&L executives. In reality, the opposite is true.

Ironically, DP&L has involved regulators in DPL Inc.'s financial plight since the acquisition of DPL Inc. by AES. Since the transaction took place, DP&L has constantly been on the hamster wheel in an attempt to extract additional revenues from its Ohio customer base for the benefit of its financially besieged parent company. There does not appear to be any end in sight either.

DP&L itself concedes that DPL Inc. will not experience relief until its capital structure is brought into balance. Indeed, DP&L's Chief Financial Officer conceded that

[81] IGS Ex. 1015 at 23-24; Tr. Vol. VI at 990-92; Tr. Vol. VII at 1140-41, 1166.

[82] IGS Ex. 1016C at 22.

[83] Tr. Vol. VI at 1036.

the value of DP&L without the DMR is less than the total amount of debt that is held at the DPL Inc. level.[84] Bankruptcy projection would provide an opportunity to right size the debt of the balance sheet of DPL Inc., either through forbearance of debt (reducing its size) or through a debt for equity exchange with lenders.[85] By de-levering the capital structure of DPL Inc., the DMR would be completely unnecessary.

4. The DMR violates bedrock regulatory practices and principles

The DMR goes against over 100 years of ratemaking policy and principles. Therefore, it is important to take a step back to the beginning to understand how misguided the DMR is within the overall ratemaking context.

Prior to the regulation of public utilities, electric utilities competed for customers for all aspects of electric service, oftentimes with overlapping distribution lines strewn in plain sight in a hodge-podge framework. For example, in 1907, there were 45 different electric utilities within the city of Chicago.[86] Given the capital intensive nature of electric utility industry, it was universally determined that it was not in the public interest to duplicate deploy resources in such an inefficient manner.[87] While monopolies in this country have historically been disfavored, to provide a coherent path forward, the regulatory compact and cost of service regulation was developed.

[84] Tr. Vol. VII at 1155-56.

[85] Tr. Vol. VI at 982.

[86] Bonbright, *Principles of Public Utility Rates* at 7 (1988).

[87] *Id.* at 8-9.

Under this form of regulation, a utility is granted a monopoly, essentially a franchise, for the sale and distribution of electricity to customers in its defined service territory.[88] In return the utility commits to supply the full quantities demanded by its customers at a price calculated to cover all operating costs plus a reasonable return on the capital invested in the enterprise.[89] These principles are not in dispute.

The total rates that the utility is permitted to charge are derived from the revenue requirement calculation, which is intended to achieve the goal of providing the utility with sufficient revenue to cover ongoing expenses and to provide a reasonable rate of return on invested capital.[90] For example, in order to fund capital expenditures (long-term investments), utilities procure capital in the form of debt and equity.[91] The capital itself is returned to the utility in the form of an annual depreciation allowance.[92] The utility is also provided a return on their capital in the form of an annual rate of return.[93] The return is intended to be sufficient to compensate the utility for its cost of obtaining the capital.[94] Because there are different risk profiles associated with different types of capital, there are different rates of return that are necessary for debt and equity.[95]

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[88] Tr. Vol. VI 923-24.

[89] *Id.*

[90] IGS Ex. 1015 at 26-30.

[91] Tr. Vol VI at 924.

[92]IGS Ex. 1015 at 26.

[93] *Id.*

[94] *Id.*

[95] Tr. Vol. VI at 929.

Importantly, in the ratemaking process, rates are not designed to directly recover debt expense. Rather, debt expenses are recovered through the rate of return calculation.[96] For example, when a utility invests $100 million in capital expenditure, if they borrow $50 million at a 5% interest rate, the utility would be permitted to earn a rate of return of $2.5 million with respect to its debt expense, as well as the recovery of their $100 million investment through an annual depreciation expense allowance. Under this form of regulation, customers receive safe and reliable service and in return shareholders and lenders are provided with just and reasonable compensation for their investment.

Although DP&L is already being compensated for its debt expenses through its cost-based distribution and transmission rates, the DMR would provide DP&L additional compensation for the same costs.[97] With respect to DP&L, the DMR would provide a double recovery of debt expenses that is inconsistent with bedrock regulatory practices and principles.[98]

With respect to DPL Inc., the DMR would provide compensation to support an unregulated entity for the purpose of paying off debts that the Commission did not authorize.[99] While it is not appropriate to use DMR funds to pay off debts related to DP&L, at least such debts have been authorized by the Commission at some point in time under R.C.4905.40. The same cannot be said with respect to DPL Inc. It is not a public utility,

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[96] Tr. Vol. VI. At 1006; IGS Ex. 1015 at 26.

[97] IGS Ex. 1015 at 29.

[98] *Id.*

[99] IGS Ex. 1015 at 16.

and the Commission does not authorize its debts.[100] Consideration of these debts is inappropriate given that "DPL is not a public utility as defined by the statute, it is not regulated by the Commission, and it has no defined distribution service territory."[101] It would violate regulatory practices and principles to authorize a non-bypassable rider that operates to provide revenue to pay off the unauthorized debts of an unregulated entity.

5. To the extent that the Commission authorizes the DMR, the revenue should be treated appropriately in DP&L's capital structure to avoid permitting DP&L to earn a return on customer funds

Some distribution utilities fund their capital expenditures largely through funds provided by their customers—rather than shareholders and lenders. They are called cooperatives. They do not earn a rate of return on investment funded by customers. DP&L is not such a utility, DP&L is an investor owned utility that operates on a for profit basis.

As IGS witness Hess testified—and confirmed by both DP&L witnesses Malinak and Garavaglia[102]—under the regulatory compact, EDUs are permitted to earn a reasonable rate of return on investment in order to ensure that they are compensated for their cost of obtaining capital. Mr. Hess further stated:

> Utility ratemaking is premised on the concept that investors and lenders will be compensated for capital used to invest in utility asses. Equity, debt and customer provided funds are sources of capital. When capital is utilized to fund a utility asset or fund operating and maintenance expenses, the source of the capital (principal)is compensated for by depreciating the asset providing service or including the operation and maintenance expenses in the EDU's revenue requirements. The interest on the funds is compensated

[100] IGS Ex. 1015 at 16.

[101] *Id.* at 8.

[102] Tr. Vol. VI at 923-94; Tr. Vol. VII at 1120.

> for in the rate of return allowance which is included in the EDU's revenue requirements.[103]

But, when customers contribute capital to a utility outside of the provision of general service, the funds must be appropriately accounted for in the ratemaking process to ensure that the utility does not earn a return on funds that were not derived from the capital markets. As Mr. Hess testified:

> Whenever customers are required to prepay for plant investment or fund its ability to position itself to invest in plant, the Commission must require the utility to account for those payments as a contributed capital either as customer advances for construction or as contributions in aid of construction. This is standard accounting for funds that are provided by customers to build plant. If this contributed capital is a customer advance, DP&L should be required to debit the cash account and credit the customer advance account when the DMR funds are received from ratepayers. The contribution by customers should accumulate on the balance sheet and will used as a rate base offset in a future base rate case. The amortization of the customer advance account should be used to offset the depreciation expense of the plant that the customers have already funded. The required accounting, the offset to rate base and the amortization of the contributed capital is the mechanism that assures the ratepayer that they are not going to be asked to pay for their contributions twice. If the contributed capital is a contribution in aid of construction, the contribution should be used to offset the plant in service balance.[104]

The Supreme Court of Ohio has embraced this same reasoning time and again, holding that it would be inappropriate to authorize a rate of return on customer provided funds, stating, "[**t]he exclusion from rate base of contributions in aid of utility construction *is so uniformly accepted in other jurisdictions as 'probably not to require detailed citation.*'**" *Ohio Utilities Co. v. Public Utilities Commission*, 58 Ohio St.2d 153, 160 (1979) (emphasis added). "It is thus the investment of the shareholder which comprises the rate base, not contributions of others." *Id.* at 161. Indeed, "[w]here

[103] IGS Ex. 1015 at 26.

[104] IGS Ex. 1015 at 30.

the ratepayers provide such funds, it is not proper that the stockholders should be allowed a return on them by including them in the rate base." *Cincinnati v. Pub. Util. Comm'n*, 161 Ohio St. 395, 405 (1954) (quoting *Chicopee Mfg. Co. v. Pub. Service Comm'n*, 93 A.2d 820, 826 (1953)). "[T]he rational for exclusion of Contributions in Aid of Construction from the value of property upon which a rate of return is guaranteed by the Constitution is the well-settled principle in utility law that it is 'the investment of the shareholder which comprises the rate base," and "not contributions of others.'" *Ohio Suburban Water Co. v. Pub. Util. Comm'n of Ohio*, 62 Ohio St. 2d 17, 20 (1980).

While authorizing the DMR to provide revenues to DPL Inc. would be wholly unlawful and inappropriate, to the extent the Commission authorizes the DMR so that DP&L may invest in grid modernization, such funds must be appropriately accounted for as customer provided funds in the ratemaking process. As Staff witness Donlon[105] and IGS witness Hess, when customers advance funds to a utility in advance of a capital investment, the utility is not permitted to earn a rate of return or recover depreciation on that investment. Customers are already paying for DP&L's interest and debt through their distribution rates. It would not be appropriate to require customers to provide additional funds to pay for DP&L's debt and interest *again*. It simply would not be just and reasonable to permit a utility to earn a rate of return on capital that they did not obtain from either lenders or equity investors. Thus, to the extent that the Commission authorizes for purposes of permitting DP&L to invest in grid modernization, the Commission should treat any such revenues as customer funded revenue contributed in aid of construction.

[105] Tr. Vol. VII at 1343-44.

6. If the DMR is authorized, it should be reduced to reflect the change in tax rate

The DMR is proposed to be set at $105 million. Implicit in this amount is the fact that AES Corporation will potentially pay federal income taxes. At the time of the Stipulation, that amount was assumed to be 35%. One of the touted benefits of the stipulation is that, while DP&L will still pay its share of taxes to DPL Inc., AES will not collect any tax sharing payments from DPL. DP&L alleges that this tax forgiveness is an investment from AES.[106]

Starting in 2018, the Federal Government changed the federal income tax rate to 21%.[107] Consequently, AES Corp.'s taxes will go down, including any taxes associated with income produced by the operations of DPL Inc. and DP&L.[108] As result of this change, AES Corporation would be the recipient of a windfall. To the extent that the Commission authorized the DMR, it should account for the federal income rate change from 35% to 21% and reduce the size of the DMR.

At $105 million per year, DP&L would have made tax payments to DPL Inc. of $36.75 million.[109] This is amount of tax that AES would have foregone. Now, DP&L would be required to make tax sharing payments of approximately $22 million.[110] To ensure that the intent and purpose of the Stipulation is maintained, the DMR should be reduced by $14.75 million (the difference between $36.75 million and $22 million). This

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[106] DP&L Ex. 2 at 4.

[107] Tr. Vol. VI at 1012.

[108] *Id.* at 1023.

[109] $105 million * .35 = $36.75 million.

[110] $105 million * .21 = $22 million.

would ensure that the federal income tax change works to customers' benefit rather than AES Corp.'s shareholders. Such an order would be consistent with the Commission-ordered investigation to ensure that customers receive the benefit of federal income tax reform in the ratemaking process.

7. The DMR would cause the ESP to flunk the MRO price test

Ohio law requires each EDU "to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."[111] With the passage of SB 221, EDU's were given the choice of establishing the SSO through an ESP or MRO. The General Assembly required the outcome of an ESP, including its pricing and all other terms and conditions, to be more favorable than the result that would otherwise apply under the market rate authorized under an MRO.[112] The price comparison test does not apply if the EDU files an MRO, it only applies if the EDU files an ESP.[113] Thus, it can be inferred that the ability to implement an ESP is a privilege that may be exercised only if an ESP is more favorable than a market-based outcome.

As witness Hess indicated, at the time of SB 221, the "EDUs were all providing service under Commission authorized rate stabilization plans which were put into place to ensure stable and reasonably priced default service prices."[114] The EDUs were still

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[111] R.C. 4928.141.

[112] *Id.*

[113] IGS Ex. 1015 at 31.

[114] *Id.*

vertically integrated and were providing the standard service with their own generation or that of an affiliate.[115] The dynamic was very different from today. Customer demand and wholesale electric prices were rising steadily.[116] While the General Assembly preferred competitive markets, it "provided a means through which EDUs could continue to provide retail electric generation service to customers in their service territory if that service was priced more favorably than the outcome that would otherwise apply in a fully market-based paradigm." At the time, the "EDUs that owned coal-fired assets in 2008 could provide SSO services at prices that were below the otherwise applicable market price."[117]

The ESP proposed in this case, however, is not more favorable than the outcome that would occur under R.C. 4928.142. While an MRO permits some price adjustments, none are available to offset the DMR. Specifically:

> the commission may adjust the electric distribution utility's ***most recent standard service offer price*** by such just and reasonable amount that 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.[118]

An adjustment would not be available to permit recovery of the DMR. That charge is a non-bypassable distribution charge. As IGS Witness Hess stated, "The MRO provision

[115] *Id.* at 31-32.

[116] *Id.* at 32.

[117] *Id.*

[118] R.C. 4928.142(D)(4).

is limited to establishing an SSO rate so any adjustments the Commission would deem necessary would be to the to the SSO rate, which is a bypassable charge."[119]

Moreover, the MRO adjustment relates to the legacy portion of the SSO price provided by the EDU. Here, DP&L is not supplying the SSO with its own generation; therefore, the adjustment would not be available.[120]

The "DMR is not necessary to permit DP&L to address an emergency that threatens DP&L's financial integrity. DP&L has conceded that its distribution and transmission businesses are doing just fine."[121] DPL Inc.'s may have some challenges, but it has not filed an ESP.

Finally, "there can be no claim that resulting SSO revenues are so inadequate to result in a taking of property, given that the cost of providing the SSO revenue is treated as a purchase power expense for which DP&L is fully compensated."[122]

Moreover, within a market rate offer, there is no ability to seek recovery of distribution-related cost recovery. An MRO may only authorize a standard service offer, which is bypassable. Thus, the DMR cannot be authorized in a MRO.

Historically, when an EDU has proposed distribution-related provisions, in evaluating their impact on the ESP vs. MRO test, the Commission has compared the proposed outcome to what would occur in a distribution rate case. At times, the Commission has concluded that a distribution-related provision is a "wash" in the MRO

[119] IGS Ex. 1015 at 34.

[120] *Id.*

[121] *Id.*

[122] *Id.*

price test to the extent that the provision could also be authorized in a distribution rate case. Here, however, that is not the case.

There is no explicit recovery of debt expense in a distribution case. The recovery can only be through the rate of return calculation. As IGS witness Hess testified, "using the authorized income from DP&L's last base rate case, I have estimated that the rate of return on rate base with DMR revenues would be approximately 20.07%."[123] DP&L's authorized rate of return for debt expense is 4.8% and its total authorized rate of return is 7.27%.[124] Thus, the DMR would lead to an outcome whereby DP&L's rate of return is several multiples of the amount authorized in the distribution rate case. Even providing some latitude to the Commission's authority to establish reasonable rates of return, such a return would be excessive in any regulated industry. Therefore, the DMR or any equivalent charge could not be authorized under an MRO or a distribution rate case.

Thus, the DMR would result in the ESP flunking the MRO price test by over $500 million.

G. The Commission should reject the RR or make it a bypassable rider.

Through its November 2017 Order, the Commission has expressed some concern with the potential rate impact of a bypassble RR. While IGS appreciates the Commission's concern for customers, in consideration of the additional evidence and reasoning provided below, the RR should be approved as originally proposed or rejected.

1. The RR is not a hedge

[123] IGS Ex. 1015 at 27.

[124] *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Its Electric Distribution Rates*, Case Nos. 15-1830-EL-AIR, *et al.*, Opinion and Order at 24 (Sep. 26, 2018).

DP&L alleges that the RR is a hedge. It is not. A hedge must contain a known amount of risk mitigation. But DP&L does not know the cost of wholesale capacity or energy in any year of the ESP. Likewise, DP&L does not know the rate at which it will purchase power from OVEC in any year of the ESP.[125] Moreover, OVEC may not be permitted to receive capacity revenue at all to the extent that PJM's proposal to reform the capacity market is adopted.[126] Such a change would only impact the economics of the RR negatively. Thus, rather than providing stability to a customer's electric bill, the RR is based upon a mixture of unknown, and unpredictable variables. Consequently, the RR injects additional risk and destabilizes customer's electric bill.

2. To the extent that the Commission authorizes the RR, it should be bypassable

The bypassable RR represented a significant improvement from DP&L's amended ESP application. It preserved the statutory right of shopping customers to select the generation-related services and products that they so desire rather than being made captive to the generation-related decisions and market-based fortunes (or lack thereof) of a public utility. Indeed, RESA/IGS witness White testified that "[m]aking any cost recovery related to DP&L's OVEC entitlement bypassable avoids an anticompetitive subsidy that would result from collecting generation related costs through nonbypassable charges imposed on shopping customers."[127]

[125] Tr. Vol. VII at 1305-06.

[126] *See* IGS Ex. 1018 at 2-7.

[127] RESA Ex. 1 at 11-12.

According to the DP&L witness Schroder, the impact of a bypassable RR for a typical residential customer that uses 750-1000 kWh per month would have been $1.35 to $1.85 in each month of the ESP.[128] Even with the bypassable RR, DP&L projected that monthly rates would decrease for DP&L's residential SSO customers in each of the next three years ($0.25 in 2017, $1.23 in 2018, and $1.84 in 2019).[129]

Moreover, there is no evidence to suggest that these figures will deviate in a significant fashion over the ESP term. DP&L witness Jackson provided a projection regarding OVEC's economics in each year of the ESP. Based upon those figures, the evidence in the record shows that even in the most unfavorable year, [redacted] Given these factors, the Commission could have easily addressed any rate shock concerns through more reasonable means.

3. To the extent that the RR is non-bypassable, it is a transition revenue recovery mechanism

The RR is designed to permit DP&L to recover the difference between a cost-based revenue requirement and market-based revenue. By its very nature, the RR is designed to permit DP&L to recover above-market revenue that could not otherwise be recovered from customers.[131] Thus, the purpose of the RR runs afoul of R.C. 4928.38 insomuch as it provides DP&L with above-market revenue that could not be collected in the absence of the rider. IGS will not harp on the factual reasons as to why the RR is a

[128] DP&L Ex. 3, Ex. A p. 1 Column F.

[129] *Id.* p. 1 Line 7 Column L, p. 13 Line 7 Column L, p. 25 Line 7 Column L.

[130] IGS Ex. 1007C at 8.

[131] Tr. Vol. VI at 1042-43.

transition revenue recovery mechanism, given that the OCC has already established this point spades. But, IGS anticipates that DP&L will argue such recovery is permissible under the notwithstanding clause of R.C. 4928.143(B). This argument, however, cannot pass muster.

The "paramount concern in construing a statute is legislative intent." Ohio *Neighborhood Finance, Inc. v. Scott.*, 139 Ohio St.3d 536 (2014). All statutes which relate to the same general subject matter must be read together. See *Maxfield v. Brooks* (1924), 110 Ohio St. 566, 144 N.E. 725. "Courts must avoid statutory interpretations that create absurd or unreasonable results." *State v. Cabrales*, 118 Ohio St. 3d 54, 59 (2008). Looking at the statutory scheme and its intended purpose, the notwithstanding clause was not intended to permit recovery of transition revenue.

Under principles of statutory interpretation, the goal is to effectuate the intent of the General Assembly. While the notwithstanding clause permits a provision of the ESP statute to override "contrary" provisions of the law, it is obvious the General Assembly did not intend to authorize the recovery of OVEC-related transition revenue through (B)(2)(d). In the interpretation of "related and co-existing statutes [the court] must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372 (1994). Here, there is simply no conflict between R.C. 4928.38 and R.C. 4928.143(B)(2)(d), especially when interpreted in light of the balance of Chapter 4928 and the ESP statute itself.

An ESP must include provisions that are authorized under R.C. 4928.143. Additionally, those terms must also be "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised

Code." R.C. 4928.142 provides for a market-based outcome through an auction process. Thus, it is clear that the General Assembly is that an ESP must be more favorable than the results that would apply under a market-based outcome. Transition revenue, by definition, constitutes the collection of above-market generation revenue. Because the ESP provisions must be better than the market, under any reasonable interpretation of R.C. 4928.143, the law cannot be twisted to permit the collection of above-market revenue. Accordingly, the RR should not be authorized as a non-bypassable rider.

Statutes must be read in *pari materia*, meaning that sections of a statute must be read together to understand the intent of the General Assembly. "It is a general axiom of statutory construction that once words have acquired a settled meaning, that same meaning will be applied to a subsequent statute on a similar or analogous subject" *Brennaman v. RMI Co.*, 70 Ohio St. 3d 460,464 (1994). Likewise, the Supreme Court has stated:

> As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where, as in the cases *sub judice*, the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions.[132]

The words "non-bypassable charge" have a special significance under Ohio law. Specifically, the preceding sections (B)(2)(b) and (B)(2)(c) provide for the recovery of generation-related costs through a non-bypassable charge. The General Assembly's specific directive that a non-bypassable generation-related charge may be authorized under these two sections indicates a lack of authority to authorize such a charge in any

[132] *Montgomery County Bd. of Comn'rs v. Pub. Util. Comm'n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

other circumstances. Thus, the RR should not be authorized as a non-bypassable charge.

H. The Attorney Examiners improperly excluded admission of relevant evidence

During the hearing, the Attorney Examiner improperly excluded cross-examination and admission of (1) Three Moody's Credit Rating Reports regarding Oncore Electric Delivery ("Oncor"), as well as witness testimony regarding Oncore's investment grade credit rating during the bankruptcy of its parent company; and (2) prefiled testimony regarding the wholesale and retail implications of subsidizing DPL Inc. on competition in Ohio and elsewhere. While IGS appreciates that the Attorney Examiners have a very difficult job and that they make every attempt to fairly call balls and strikes, IGS respectfully asserts that the above rulings were made in error.

1. Oncor Electric Delivery Credit Rating Evaluation – IGS Exhibits 1003, 1004, and 1005, and live testimony

Regarding the Oncore exhibits and testimony, the Attorney Examiner concluded that (1) there was no foundation for the exhibits, and (2) the documents were hearsay, and (3) IGS should have submitted the information in its own prefiled testimony.[133]   IGS proffered that the exhibits should either be (1) admitted the into the record, or (2) in the alternative, take administrative notice of the exhibits identifying credit rating actions regarding Oncor from 2014-2016.[134]

The Oncor exhibits should have been admitted (IGS Ex. 1003, 1004, and 1005). The evidence was relevant. Under Ohio Rule of Evidence 401, "'Relevant evidence'

[133] Tr. Vol. VI at 1047-48; *id.* at 1051-58.

[134] *Id; see also* Tr. Vol. IX at 1575-80.

means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Moody's Credit Rating actions with respect to Oncor provide the greatest insight into how a credit agency evaluates regulated utilities in the event of financial distress at the parent company level. Indeed, the exhibits provide an example of what factors Moody would evaluate in the event of a DPL Inc. bankruptcy. As Moody's identified, it will not necessarily downgrade a regulated public utility when its parent enters bankruptcy"

> The affirmation of Oncor's Baa3 senior secured rating and stable rating outlook reflect our belief that the ring-fencing provisions will sufficiently insulate Oncor from any bankruptcy reorganization affects at its parent or affiliates. Oncor primary regulator, the Public Utility Commission of Texas (PUCT), will remain supportive to Oncor's long term credit quality, and we view Oncor's suite of approved regulatory cost recovery mechanisms and timely recovery of prudently incurred costs and investments, favorably. Oncor maintains adequate sources of liquidity to withstand any modest financial impacts resulting from the bankruptcy filings, and a potential write-off of approximately $150 million will not impact Oncor's ratings of the stable rating outlook.[135]

Moody's identified similar factors and scenarios in the other two exhibits to support upgrading Oncore's credit rating, despite its parent company enthralled in bankruptcy proceedings.[136] These same factors would be applied to DP&L. Moreover, as this record reflects, DP&L has stable distribution cash flows, riders that permit timely recovery of distribution costs, ring fencing, and a supportive regulator. While the Commission need not treat the facts in the Oncor situation as identical to DP&L's, the process and factors which were considered are highly relevant to the matters at issue in this case.

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[135] IGS Ex. 1003.

[136] *See* IGS Ex. 1004 and IGS Ex. 1005.

Sufficient foundation was laid by DP&L's own testimony. Witness Malinak's prefiled testimony explicitly relies upon the credit rating of Oncor during the 2014-2015 timeframe to support his own analysis. Regarding the support for Oncor's credit rating, his testimony clearly states on p. 34, Notes and Sources, "Credit Ratings from Moody's."[137] While Witness Malinak later on the witness stand tried to clarify that he did not actually obtain his credit rating information from Moody's, he did not make this change prior to cross-examination. Moreover, while he alleged that he gathered the information from a secondary source such as "Bloomberg or another information provider,"[138] he agreed that the information he relied upon must have initially been provided by Moody's. *Id.* It defies reason to permit Mr. Malinak to testify with respect to Oncore's credit rating while simultaneously determining that there is insufficient foundation to admit Moody's actual Oncore credit rating reports into the record during the relevant time frame. Therefore, IGS demonstrated that there is sufficient foundation to admit the exhibits into the record.

Regarding hearsay, the Exhibits should have been admitted as admissions by a party opponent and therefore not hearsay. Under Ohio Rule of Evidence Rule 801(D)(2), a statement is an admission by a party opponent when "the party has manifested an adoption or belief in its truth." "Under Rule 801(D)(2)(b), it is not only the party opponent's statements that are admissible, but also those statements that he manifests as his own." *State v. Hardison*, 2007 Ohio 366 at ¶ 7 (Ct. App. 9th Dist.). Here, DP&L relies upon Moody's Credit rating of Oncore during the relevant period identified in the documents.

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[137] DP&L Ex.2 at p. 34 and 35; *see also* Tr. Vol. VI at 1046.

[138] Tr. Vol. VI at 1046.

Consequently, DP&L has manifested a belief that Moody's determined that Oncore was an investment grade utility in 2014-2015 and accepted the factors that Moody considered and the conclusions that Moody's reached in its credit rating actions. This is not a case of IGS simply picking documents out of thin air—DP&L's prefiled testimony identifies Moody's as the source of its information. And, while it obtained that information from another source, the information that DP&L relies upon must have ultimately been derived from the documents proffered by IGS.

In any event, even if the Moody's Oncore credit rating report is hearsay, the Commission is not strictly bound by the rules of evidence. "When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony."[139] "[T]he Commission has the expertise to give the appropriate weight to testimony and evidence."[140] However the Commission treats hearsay-like information in a proceeding, it should treat all similar information consistently. In this situation, the ruling does not live up to that standard. For example, both witnesses Malinak and Garavaglia rely liberally on Moody's credit rating reports with respect to DP&L and DPL Inc. *See* DP&L Ex. 1A at p. 7, 9, and DP&L Ex. 2A at FN 25, FN 36, FN 40, FN 47, FN 75. Indeed, DP&L admitted into the record reports issued by S&P Global, another credit rating agency. *See* DP&L Ex. 105. It would be fundamentally unfair to permit DP&L to rely upon credit rating agency reports when the information may further its case, and then prevent an interested

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[139] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Opinion and Order at 13 (Dec. 14, 2011).

[140] *Id.*

intervenor from relying upon similar documents when the evidence suggests a contrary result.

While the Attorney Examiner indicated that IGS should have included in the information in its direct testimony, such ruling was in error. If evidence is relevant, it should be admitted. There is no requirement to include evidence in direct testimony. Indeed, the scope of cross-examination in the State of Ohio is broader than direct testimony, given that "Cross-examination shall be permitted on all relevant matters and matters affecting credibility." Rule of Evidence 611(B).

Accordingly, the exhibits should have been admitted.

To the extent that the exhibits were not admissible for any purpose, the Commission should have permitted IGS to take administrative notice of the exhibits. The "Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction." *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Opinion and Order at 19 (Jul. 18, 2012). Here, IGS sought to take administrative notice during the beginning of the hearing while the record was open. IGS did not seek to place any restriction on DP&L's opportunity to respond. And DP&L cannot argue that it was caught by surprise, given that it had relied upon the financial information related to Oncore in its own testimony. By referencing Oncor's credit rating and financial strength in its own testimony, DP&L opened the door to the admission of evidence on the same subject matter. Thus, the Attorney Examiner should have taken administrative notice of the exhibits.

Finally, even if the Attorney Examiner appropriately excluded actual documents produced by Moody's, IGS witnesses should not have been precluded from providing testimony regarding what transpired during the bankruptcy of Oncore's parent.[141] Both Mr. White and Mr. Hess indicated that they were familiar with that bankruptcy process and the reasons why Oncore was not downgraded, yet each answer they provided was stricken. There was sufficient foundation for their testimony based upon personal knowledge and facts perceived by the witnesses. Moreover, there testimony was of the same form as witness Garavaglia and Malinak. It would be fundamentally unfair to permit DP&L witnesses to provide testimony and opinion regarding credit rating activity in one situation, while prohibiting IGS' witnesses from doing the same in another.

2. The Attorney Examiner should have admitted IGS testimony regarding the negative impact of the DMR on IGS' ability to compete against AES for the construction of renewable generation resources

The Attorney Examiner granted a motion to strike p. 14, L 17 to p. 16, L 4 of the prefiled testimony of Ed Hess (IGS Ex. 1015).[142] IGS proffered the testimony, noting that the Commission should consider how the DMR may negatively impact Ohio businesses ability to compete against AES Corp. for the construction of renewable generation projects in Ohio and elsewhere.[143] While IGS appreciates the Attorney Examiner's effort

[141] Tr. Vol. VIII at 1422.

[142] *Id.* at 1439.

[143] *Id.* at 1437-38, 1493.

to streamline this proceeding and focus matters on issues that are relevant to the proceeding, the ruling erred.

Relevant evidence includes any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule of Evidence 401. According to the state policy, the Commission is required to

- Ensure diversity of suppliers and encourage the development of distributed and small generation facilities;
- Ensure effective competition by avoiding subsidies from non-competitive service to competitive service or products and service other than retail electric service;
- Facilitate the state's effectiveness in the global economy.

Mr. Hess' stricken testimony touched on each of these policies. As Mr. Hess identified in his stricken testimony, the DMR has a negative impact on IGS' ability to compete against AES. It permitted AES to acquire a renewable generation development company and will continue to permit AES to develop solar and wind projects in Ohio and across the country. IGS Ex. 1015 at 15. "With this transaction, AES is now positioned to develop solar and wind projects in Ohio that compete with other Ohio businesses." State policy aside, as a regulator, the Commission constantly evaluates the competitive impact of its decisions on market participants. Given that the testimony is relevant to the impact of the ESP on the competitive playing field in DP&L's service territory and throughout the state, the Attorney Examiner should not have stricken the testimony. It should have been admitted and the Commission could have given it whatever weight it deemed appropriate.

V. CONCLUSION

For the reasons contained herein, IGS urges the Commission to modify the Stipulation. The goal of the regulatory process should be to continually enhance the functionality of markets, improve customers' situation relative to the status quo, and, of course, to follow the law. The outcome proposed by Stipulation fails on all accounts. Not only does the Stipulation fail to address existing barriers to competition, it erects new ones as well. Moreover, the Stipulation puts in place two non-bypassable charges that destabilize the competitive market and provide no value to customers. Given these infirmities, IGS urges the Commission to adopt critical the changes to the Stipulation recommended herein to ensure that DP&L's ESP is beneficial for the market, beneficial to the public interest, and compliant with the law.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc. was served this 15th day of May 2019 via electronic mail upon the following:.

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