BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING REPLY BRIEF OF THE DAYTON POWER AND LIGHT COMPANY

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THE DAYTON POWER AND LIGHT COMPANY'S INITIAL POST-HEARING BRIEF

I. INTRODUCTION AND SUMMARY

The initial brief of Dayton Power and Light Company ("DP&L") already has refuted most of the arguments that the Interstate Gas Company ("IGS") makes in its initial brief. As demonstrated below, the Commission should reject IGS' arguments for the following reasons.

- IGS has failed to establish that the Commission's modification to the Amended Stipulation and Recommendation ("Stipulation") was material to IGS.

- IGS does not dispute that the Stipulation was the product of serious bargaining.

- IGS does not have standing to challenge the Distribution Modernization Rider ("DMR"), and even if it did, the DMR will benefit customers by enabling DP&L to continue to provide safe and reliable service and to implement grid modernization

- The Stipulation does not violate any important regulatory principle.

The Commission should thus reject IGS' arguments and should again approve the Stipulation.

II. IGS HAS FAILED TO SHOW THAT THERE WAS A MATERIAL CHANGE TO THE STIPULATION

DP&L's Initial Post-Hearing Brief (pp. 4-5) demonstrated that the Commission's modification of the Reconciliation Rider (making it nonbypassable) was not material to IGS for two reasons: (1) IGS expressly did not support the provision in the Stipulation that provided that the Reconciliation Rider would be bypassable and thus should not be permitted to withdraw from the Stipulation when that provision is modified; and (2) the financial impact of the modification to customers was small, and IGS offered no evidence that making the Reconciliation Rider bypassable would have induced customers to switch or that any switching would have been financially material to IGS.

IGS' initial brief does not address the first point, but its arguments actually support the second point. Specifically, IGS argues (pp. 13-14, 47) that if the Reconciliation Rider was bypassable, then it would be a modest price increase for SSO customers that would not cause "rate shock." IGS has offered no evidence that the modest price differential would induce switching if it was bypassable, or that any switching that might occur would be sufficient to have a material impact on IGS financially. IGS' argument that the Reconciliation Rider would lead to a modest price increase for SSO customers if it was bypassable is inconsistent with IGS' claim that IGS was somehow injured by the modification, presumably because they assumed, although did not submit evidence, that the Rider would induce switching. The Commission should conclude that IGS cannot establish that the Commission's modification to the Reconciliation Rider was material, and that IGS thus does not have the right to withdraw from the Stipulation.

III. THE STIPULATION WAS THE PRODUCT OF SERIOUS BARGAINING

DP&L's initial brief (pp. 6-7) demonstrated that the Stipulation was the product of serious bargaining. IGS does not dispute that point.

IV. THE STIPULATION BENEFITS CUSTOMERS AS A PACKAGE

DP&L's initial brief demonstrated (pp. 7-13) that the Commission should reject IGS' arguments related to customer benefits for two reasons. First, IGS signed the Stipulation and thus agreed that "as a package, the Stipulation benefits customers and the public interest." Stipulation, p. 2. IGS cannot establish that the Stipulation became worse for customers after the Commission modified it. Second, IGS' witnesses failed to address many of the provisions in the Stipulation that benefit customers, and IGS thus has no evidence as to whether the Stipulation benefits customers as a "package." IGS does not address either of those points in its initial post-hearing brief, and the Commission should reject IGS' arguments related to the customer-benefit element for those reasons.

IGS' initial brief addresses supplier terms in DP&L's tariffs, the DMR and the Reconciliation Rider. DP&L responds to those points below.

A. SUPPLIER TERMS

1. The Commission Should Reject IGS' Arguments Regarding Collateral Requirements, Historical Usage Fees and Switching Fees

IGS asserts (pp. 15-22) that DP&L failed to introduce evidence supporting the reasonableness of the collateral requirements, historical usage fees and switching fees that are included in DP&L's tariffs. As demonstrated in DP&L's initial brief (pp. 29-31), the Commission should reject those arguments for the following reasons:

1. Distribution Rate Case: The Commission recently rejected arguments related to those fees in DP&L's distribution rate case. Sept. 26, 2018 Opinion and Order, ¶¶ 42, 43 and 47 (Case No. 15-1830-EL-AIR). IGS does not claim, much less cite evidence to show, that circumstances have changed since that decision was issued.

2. No legal basis: IGS does not cite any provision in the Ohio Revised Code or in the Commission's rules that required DP&L to file cost support for those items. Each of

those requirements and the fees that are contained in tariffs that have been reviewed and approved by the Commission.

3. RESA supports the Stipulation: There is evidence that those provisions are reasonable -- RESA signed the Stipulation. Stipulation, p. 40. IGS' witnesses admitted that prices could be set via cost-based or market-based mechanisms (Tr. Vol. VIII, p. 1458 (Hess); Tr. Vol. VIII, p. 1486 (Crist)), and the Stipulation was a negotiated document that constitutes a market-based mechanism for setting those fees. Indeed, before the Commission's modification, IGS witness White filed testimony supporting the Stipulation; the Commission did not modify the supplier terms.

4. IGS' Proposed Collateral Requirements do not equal DP&L's Risks: Based upon the testimony of IGS witness Crist, IGS proposes (pp. 15-19) that DP&L's collateral requirements for CRES providers be lowered significantly. The purpose of the collateral requirements is to protect DP&L from costs that DP&L could incur in the event that a CRES provider defaulted. In the event of a default, DP&L could be responsible for providing power (both energy and capacity) to the affected customers for a period of time before they could be switched to the SSO.

The principal defect in IGS' argument is that neither IGS nor Mr. Crist claims that the amount of collateral that IGS would post under IGS' proposal is commensurate with the risks that DP&L would face if IGS defaulted. Indeed, Mr. Crist admitted:

> "Q: .... It's true, isn't it, that your testimony doesn't include an estimate of the costs to DP&L if IGS were to default.
>
> A: That's correct."

Tr. Vol. VIII, p. 1474.

The Commission should reject IGS' proposed revisions to DP&L's collateral terms because IGS has no evidence to show that the amount of collateral that IGS would post under its proposed terms is commensurate with the risks of an IGS default.

2. The Commission Should Reject IGS' Arguments Regarding the Supplier Consolidated Billing Pilot

The Stipulation established a supplier consolidated billing pilot, which will allow CRES providers to bill for their own services and utility services. Stipulation, pp. 21-23. Although IGS formerly supported that provision, IGS now asserts (pp. 22-23) that the pilot should be modified so that CRES suppliers would purchase utility receivables at a discount. The Commission should reject that argument because RESA signed the Stipulation and IGS is a member of RESA. Stipulation, p. 40; Tr. Vol. VIII, p. 1368. IGS signed the Stipulation containing those terms, demonstrating that they are reasonable. IGS now would like what it views as a better deal, but the time to seek better deals was at the negotiating table. RESA's signature on the Stipulation shows that the terms are reasonable.

The Stipulation provides an Uncollectible Rider whereby DP&L may recover uncollectible expenses. Stipulation, pp. 19-20. That Rider is designed such that DP&L will recover "uncollectible expense associated with bypassable standard service offer rates through a bypassable component of the Uncollectible Rider." Id. IGS has not proposed the inverse for uncollectible expense associated with shopping customers on the supplier consolidated billing pilot. IGS appears to want the benefits of a competitive market by having a customer interface through the bill, but wants the protection of a regulated monopoly by not having to purchase receivables, thereby subsidizing the costs of the retail market on the shoulders of SSO customers.

3. The Commission Should Reject IGS' Arguments Regarding Allocating Costs to the SSO

IGS (pp. 23-25) also asserts that DP&L incurs certain costs to provide services to SSO customers, and that those costs should be allocated to SSO customers. As demonstrated in DP&L's initial brief (pp. 31-32), the Commission should reject IGS' arguments because: (1) IGS has no evidence in this case as to the amounts that it claims should be allocated to the SSO; (2) SSO service is a distribution company function, and it is thus reasonable that associated costs be recovered from distribution customers; (3) if such an allocation were to be made, then the costs that DP&L incurs to support shopping should be allocated to shopping customers; and (4) no customers have raised the issue, and IGS' is simply trying to raise the costs of the SSO so that more customers will switch. In fact, IGS overlooks the point that the Stipulation did unbundle the Uncollectible costs through which "uncollectible expense associated with bypassable standard service offer rates through a bypassable component of the Uncollectible Rider." Stipulation, pp. 19-20. The remaining costs serve a distribution function.

B. THE DMR

1. IGS Does Not Have Standing to Challenge the DMR

DP&L's initial brief (pp. 14-15) demonstrated that IGS was not injured by the DMR and thus does not have standing to challenge it. IGS argues (pp. 55-56) that the Attorney Examiners erred by striking portions of the testimony of Ed Hess that purported to show that the DMR would have a negative impact on IGS' ability to compete with AES. In that stricken testimony, Mr. Hess claimed that after the Stipulation was signed in this case, AES acquired a solar and wind developer ("sPower") that Mr. Hess claims may compete in Ohio. Hess Test, pp. 14-16 (IGS Ex. 1015). The Commission should reject IGS' argument for the following reasons.

Although the stricken testimony was included in a section of Mr. Hess' testimony regarding the DMR, Mr. Hess does not claim that the DMR was in any way related to AES' acquisition of sPower. Mr. Hess states that the acquisition of sPower occurred "[s]hortly after the execution" of the Stipulation, but he never claims that there was a causal relationship between the two events. Id. at 15. The fact that one event occurred after the other is not sufficient to establish causation or that any relationship exists.

Nor could Mr. Hess establish a causal relationship. Mr. Hess admitted that the AES acquisition of sPower "was funded by primarily cash/equity." Id. However, DPL Inc. has not paid any cash to AES since 2012 (Jackson Test., pp. 11-12 (DP&L Ex. 1B), Tr. Vol. I, p. 49 (Jackson)) and committed in the Stipulation not to do so through the DMR term (Stipulation, p. 3). Further, the DMR funds are required to be used to pay interest and principal for debt at DP&L and DPL Inc. (Stipulation, p. 5) and IGS admitted that it does not compete against either of them (Tr. Vol. VIII, pp. 1392, 1394 (White)). IGS thus cannot establish that the DMR funds have in any way been used to cause injury to IGS.

The Commission should thus affirm the Attorney Examiners' ruling striking the portions of Mr. Hess' testimony addressing sPower, since the evidence is irrelevant. Even if the evidence were to be admitted, it does not help IGS to establish standing to challenge the DMR because Mr. Hess does not claim that there is a causal relationship between the DMR and the AES acquisition of sPower, and the evidence at the hearing shows that there was not.

2. The DMR Will Provide Significant Customer Benefits

DP&L's initial brief already refuted most of IGS' arguments relating to whether the DMR would benefit customers. Specifically:

1. IGS claims (pp 29-30) that DP&L could provide safe and reliable service without the DMR. The evidence at the hearing showed otherwise, as demonstrated in DP&L's Initial Brief, pp. 15-19.

2. IGS claims (pp. 31-35) that DP&L could pursue Smart Grid without the DMR. Again, the evidence showed otherwise. <u>See</u> DP&L's Initial Brief, pp. 19-23.

3. IGS argues (pp. 31-35) that DP&L would not be harmed if it stopped paying dividends to DPL Inc. and DPL Inc. went bankrupt. Again, that is not true. DP&L's Initial Brief, pp. 23-27.

IGS also argues (p. 33) that the terms of DP&L's existing Credit Agreement would allow DP&L to implement Smart Grid. DP&L has two points to make regarding that Credit Agreement. <u>First</u>, the evidence at the hearing showed that DP&L issued debt shortly before the original hearing in this case in the junk bond market and that the terms of the Credit Agreement would preclude DP&L from implementing Smart Grid. Jackson Test. (DP&L Ex. 1B), p. 9; Tr. Vol. I, pp. 109-10. In another case, the Commission recently authorized DP&L to refinance that debt (May 22, 2019 Finding and Order, ¶ 12 (Case No. 18-1795-EL-AIS), which DP&L plans to do in the investment grade debt market since it has been upgraded to investment grade due to the approval of the DMR.

The fact that DP&L expects to be able to refinance that debt in an investment-grade debt market shows that the DMR is doing its job -- DP&L has been able to pay down debt and improve its credit rating. Further, if the DMR was disallowed, future debt issuances would likely be in the junk bond market and contain similar terms.

<u>Second</u>, IGS asserts (p. 33) that under that Credit Agreement, DP&L could access a $200 million revolver, $100 million for capital and $25 million in unsecured debt. However, at the hearing, DP&L's Chief Financial Officer explained that DP&L could not fund its planned

$576 million in Smart Grid expenses using those funds because (a) the $200 million revolver is for short-term working capital needs (Tr. Vol. VII, p. 1151(Garavaglia)); (b) the $100 million for capital investment includes a condition that it "not increase the outstanding principal amount" (id. at 1152-53); and (c) the $25 million is not sufficient to fund Smart Grid (id. at 1154-55).

V. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE

A. THE STIPULATION PASSES THE ESP V. MRO TEST

IGS asserts that the DMR prevents the Stipulation from passing the ESP v. MRO test in R.C. 4928.143(C)(1). As an initial matter, as demonstrated above, IGS does not have standing to challenge the DMR. In any event, the MRO statute allows the Commission to adjust the SSO price "by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity." R.C. 4928.142(D)(4). As demonstrated in DP&L's initial brief (pp. 32-36), the evidence at the hearing showed that without the DMR, DP&L's financial integrity would be threatened, and the DMR would thus be lawful under an MRO.

B. THE DMR IS LAWFUL

IGS makes various arguments in its brief that the DMR is not lawful. However, IGS largely ignores the statutory bases for the DMR. As demonstrated below, the DMR is lawful.

1. The DMR Is Lawful Pursuant to R.C. 4928.143(B)(2)(h)

The Commission has previously held that a DMR is authorized under R.C. 4928.143(B)(2)(h). Oct. 12, 2016, Fifth Entry on Rehearing, ¶¶ 189-191 (Case No. 14-1297-EL-SSO). That section provides that an electric security plan 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 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." (Emphasis added.)

R.C. 4928.143(B)(2)(h).

In FirstEnergy's ESP case, the Commission found that FirstEnergy's DMR was related to distribution, not generation, and it was "intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems." Oct. 12, 2016 Fifth Entry on Rehearing, ¶¶ 190-91 (Case No. 14-1297-EL-SSO).

IGS claims (pp. 30-31) that the DMR does not relate to distribution service. However, Staff witness Donlon testified that the primary purpose of the DMR was "to allow the company to be able to invest in the distribution grid." Tr. Vol. V, pp. 875-76. Similarly, DP&L

witness Jackson explained that without the DMR, the financial integrity of DP&L and DPL Inc. will continue to be imperiled, and DP&L will not have "access to debt and/or equity to finance capital expenditures necessary to maintain, modernize or grow existing transmission and distribution infrastructure." (Emphasis added.) Jackson Test. (DP&L Ex. 1B), pp. 17-18. Accord: Malinak Test., (DP&L Ex. 2B), p. 66. IGS witness Hess admitted that the DMR would be an incentive for DP&L to build Smart Grid. Tr. Vol. VIII, pp. 1455-56.

DP&L's DMR is thus a distribution charge that incentivizes and makes grid modernization possible. It would improve the performance of DP&L's distribution grid, and without the DMR, grid modernization, with its significant benefits, may be unattainable. In addition, the DMR constitutes single-issue or incentive ratemaking as it concerns a specific issue (i.e., ensuring DP&L's financial integrity) and is intended to incentivize DP&L's ability to obtain capital for grid modernization. Thus, the charge is authorized pursuant to R.C. 4928.143(B)(2)(h).

The evidence at the hearing also established that DP&L has been placing sufficient emphasis on the reliability of its distribution system and its expectations are aligned with the expectations of its customers. R.C. 4928.143(B)(2)(h). Specifically, the testimony of Staff witness Nicodemus, DP&L witness Hall (sponsored by DP&L witness Schroder) and OCC witness Williams agree that DP&L has been achieving its reliability targets and DP&L's customer satisfaction scores are acceptable. Nicodemus Test. (Staff Ex. 1), pp. 5-7; Hall Test. (DP&L Ex. 4), p. 4; Tr. Vol. IV, pp. 781-82 (Williams). Further, a survey of DP&L's residential and business customers shows that it is important to them that DP&L continue to improve its reliability. Williams Dir. Test. (OCC Ex. 13A, Ex. JDW 14, pp. 6034, 6046) (showing that it was important to DP&L's residential and business customers that DP&L reduce by half the frequency of sustained outages, the duration of sustained outages, and the number of monthly outages). It is undisputed that grid modernization will improve reliability, so DP&L's and its customers' expectations are aligned. However, the evidence in the case also demonstrated that DP&L would not only fail to improve reliability or modernize its grid, but also would not be able to provide safe and reliable service absent the DMR. DP&L's initial brief, pp. 15-23.

2. The DMR Is Lawful Pursuant to R.C. 4928.143(B)(2)(d)

The DMR is also authorized by R.C. 4928.143(B)(2)(d), under which an electric security plan may include:

> "without limitation . . . [t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

"[A] proposed item in an ESP is authorized if it meets three criteria: (1) it is a term, condition, or charge, (2) it relates to one of the listed items (e.g., limitations on customer shopping, bypassability, carrying costs), and (3) it has the effect of stabilizing or providing certainty regarding retail electric service." <u>In re Application of Columbus S. Power Co.</u>, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 43. <u>Accord</u>: Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 97, (Case No. 14-1297-EL-SSO).

1. <u>A charge</u>: The DMR satisfies the first condition of subsection (B)(2)(d) because it is a charge.

2. <u>Relating to</u>: The DMR satisfies the "relating to" prong because it relates to a financial limitation on shopping. Mar. 31, 2016 Opinion and Order, p. 109 (Case No. 14-1297-

EL-SSO); Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 101 (Case No. 14-1297-EL-SSO); Feb. 25, 2015 Opinion and Order, p. 22 (Case No. 13-2385-EL-SSO); Nov. 3, 2016 Second Entry on Rehearing, ¶ 211 (Case No. 14-1693-EL-RDR) ("The Commission's analysis of the scope of R.C. 4928.143(B)(2)(d) begins with the plain language of the statute. As the Commission interprets the statute, the General Assembly did not specify the scope or particular type of limitation on customer shopping under the statute, as opposing intervenors argue. Therefore, the Commission interprets the statute to permit various types of limitations on customer shopping, which gives the Commission the discretion to determine the types of limitations that meet the criteria set forth in the statute."); Apr. 2, 2015 Opinion and Order, p. 45 (Case No. 14-841-EL-SSO); Aug. 08, 2012 Opinion and Order, p. 31 (Case No. 11-346-EL-SSO).

The Supreme Court of Ohio has recently ruled that a nonbypassable charge relates to a financial limit on shopping. <u>In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Purchase Power Agreement</u>, Slip Op. No. 2018-Ohio-4698, ¶¶ 25-32. The DMR similarly satisfies that element.

The DMR also relates to "default service" since it ensures the financial integrity of DP&L, thus enabling DP&L to continue providing competitively bid SSO service. Sept. 4, 2013 Opinion and Order, p. 21 (Case No. 12-426-EL-SSO); Jan. 30, 2013 Entry on Rehearing, p. 15 (Case No. 11-346-EL-SSO). There is no requirement in R.C. 4928.143 that SSO service be provided via competitive bidding.

The DMR also meets the second condition for the separate and independent reason that it relates to "bypassability" as a nonbypassable charge. DP&L is aware that the Commission has questioned whether it is sufficient for a charge to relate to "bypassability" to satisfy the "relating to" prong under R.C. 4928.143(B)(2)(d), because "nearly every charge may be bypassable or non-bypassable." E.g., Oct. 12, 2016, Fifth Entry on Rehearing, ¶ 100 (Case No. 14-1297-EL-SSO). DP&L asks the Commission to reconsider that reasoning for two reasons. First, "[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute." Canton Storage & Transfer Co. v. Pub. Util. Comm'n, 72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995). Accord: In re Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 32 ("Fundamentally, [t]he PUCO, as a creature of statute, has no authority to act beyond its statutory powers.") (alteration in original) (internal quotation marks and citation omitted). The General Assembly determined that a charge would satisfy the "relating to" prong if the charge related to "bypassability," and the Commission cannot and should not disregard that provision.

Second, not all charges are bypassable or nonbypassable. Specifically, a charge is bypassable if a customer can avoid it by switching to an alternative generation supplier (e.g., a charge for SSO service). A charge is nonbypassable if all customers must pay it (e.g., the DMR or a charge for distribution service). However, utilities have various charges that do not fall into either category. For example, utilities charge customers to have distribution lines extended to their homes or businesses. Ohio Adm. Code 4901:1-9-07. Utilities charge third parties (e.g., cable or telephone companies) to attach wires to utility poles. R.C. 4905.51 and 4905.71. Utilities charge customers in certain instances things such as deposits, late payment charges, reconnection charges, and charges associated with damages relating to fraudulent or damaging practices by the customer.

Utility charges for pole attachments, line extensions or other items do not relate to "bypassability," since they are neither bypassable (they cannot be avoided by switching to an alternative generation supplier) nor nonbypassable (all customers do not have to pay them). Thus, not all charges are bypassable or nonbypassable. The Commission should thus hold that the DMR also satisfies the "relating to" prong of R.C. 4928.143(B)(2)(d) since it is nonbypassable.

3. <u>"Stabilizing or providing certainty regarding electric service"</u>: As demonstrated at length in DP&L's initial brief (pp. 15-23), DP&L could not provide safe or reliable service without the DMR. Malinak Test. (DP&L Ex. 2B), pp. 58-59; Jackson Test. (DP&L Ex. 1B), pp. 17-18. DP&L also could not implement grid modernization without the DMR. Malinak Test. (DP&L Ex. 2B), p. 66; Tr. Vol. I (Jackson Test.), pp. 106-07, 109-10. The DMR thus easily satisfies the third prong of the test.

The Commission should thus conclude that the DMR is authorized by R.C. 4928.143(B)(2)(d).

3. <u>The DMR Is Lawful Pursuant to R.C. 4928.143(B)(2)(i)</u>

The DMR is authorized pursuant to R.C. 4928.143(B)(2)(i), which provides that electric security plans may include:

> "Provisions under which the electric distribution utility may implement <u>economic development</u>, <u>job retention</u>, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system." (Emphasis added.)

R.C. 4928.143(B)(2)(i).

Witness Malinak's testimony (p. 64) explains that "all residential, commercial, industrial, and governmental customers in West Central Ohio would benefit from the economic development, new jobs, and investment in human and physical capital that would be caused by the grid modernization projects." Malinak Test. (DP&L Ex. 2B), p. 64. OCC witness Kahal conceded that the economy would be adversely affected if DP&L could not provide safe and reliable service. Tr. Vol. IV, p. 708. Thus, the DMR also satisfies the requirements of R.C. 4928.143(B)(2)(i).

4. The Commission Should Reject IGS' Arguments Regarding the DMR

IGS argues (p. 28) that the DMR violates R.C. 4928.17 and R.C. 4928.02(H) because the DMR would subsidize DPL Inc. The Commission should reject those arguments for two reasons. First, as demonstrated above, the DMR is authorized by R.C. 4928.143(B)(2)(d), (h) and (i). R.C. 4928.143(B) provides that a charge authorized by that section is lawful "[n]otwithstanding any other provision of Title XLIX" with exceptions not relevant here. R.C. 4928.143(B)(2)(h) has its own "notwithstanding" clause. The Supreme Court has held that the "[n]otwithstanding" clause in R.C. 4928.143(B) establishes that charges authorized by that Section are lawful even if they might be unlawful under other sections of the code. In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Purchase Power Agreement, Slip Op. No. 2018-Ohio-4698, ¶¶ 13-24.

Second, those sections were enacted before R.C. 4928.143, which authorizes the DMR. It is well settled that an after-enacted statute controls. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

Third, as demonstrated in DP&L's initial brief (pp. 15-23) the DMR is needed to allow DP&L to provide safe and reliable service and to implement grid modernization. The DMR is thus necessary for distribution service.

IGS also argues (pp. 35-38) that the "DMR violates bedrock regulatory practices and principles." Notably absent from IGS' argument is any citation to R.C. 4928.143, the section under which the DMR was approved. The DMR is authorized under R.C. 4928.143, and DP&L has explained in this Reply and in its initial brief (pp 15-23) why this is necessary to provide safe and reliable service and grid modernization. Thus, the Commission should reject IGS' arguments that are based upon inapplicable authority.

5. <u>The DMR Is Not Customer Contributed Capital</u>

IGS also argues (pp. 38-40) that the DMR constitutes customer-contributed capital and should be an offset to DP&L's rate base. As demonstrated in DP&L's initial brief (pp. 28-29), that doctrine applies only when customers supply capital for specific projects. Here, all of the DMR funds have been used to pay interest and principal for debt. Tr. Vol. VII, p. 1237 (Garavaglia). The doctrine thus does not apply to the DMR.

The cases that IGS cites (pp 39-40) do not help IGS' argument, because in each, the funds at issue were provided to the utility to be used for specific capital projects. <u>Ohio Util. Co. v. Pub. Util. Comm'n</u>, 58 Ohio St.2d 153, 159-61, 389 N.E.2d 483 (1979) (contributions by development companies to aid in the construction of facilities were properly excluded from utility rate base); <u>Cincinnati v. Pub. Util. Comm'n</u>, 161 Ohio St. 395, 405-06, 119 N.E.2d 619 (1954) ("We are of the opinion, and so hold, that customers' contributions in the form of accruals for the payment of taxes, deposits to secure the payment of customers' bills for services or as advances on installation charges, and collections for rents to be paid at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for working capital and for investment in materials and supplies, should be used to offset the rate-base allowance for working capital, including the investment in materials and supplies for the normal operations of the company and for plant maintenance and repair."); Ohio Suburban Water Co. v. Pub. Util. Comm'n of Ohio, 62 Ohio St.2d 17, 17-20, 402 N.E.2d 539 (1980) (real property that was donated to utility as a contribution in aid of construction should be excluded from the utility's rate base).

6. The DMR Should Not be Reduced as a Result of the Tax Cuts and Jobs Act ("TCJA")

"IGS asserts (pp. 41-42) that the DMR should be reduced now that the Tax Cuts and Jobs Act ("TCJA") has lowered the corporate tax rate. The Commission should reject that argument for three reasons. First, the sophisticated parties involved in this matter have demonstrated the knowledge and capability of identifying which riders should be grossed up for taxes and which should not. For instance, the DMR in First Energy's ESP case was grossed up for taxes. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 202 (Case No. 14-1297-EL-SSO). DP&L's DMR does not state that it is adjusted for taxes; thus, the DMR should not be impacted by any changes in tax laws.

Second, IGS' brief has calculations that purport to show that the DMR should be reduced due to the TCJA, but IGS has no witness to sponsor those calculations. That is inappropriate because the tax laws – including the TCJA – are complex and require expert analysis. Tr. Vol. VI, pp. 1013-14 (DP&L's Chief Financial Officer explained that the tax laws are complex and the consequences of tax law changes require full knowledge of an entities tax books). The Commission should reject IGS' analysis because it is the type of analysis that should have been sponsored by a witness and subject to cross examination.

Third, reinforcing point two, the analysis in IGS' brief is flawed. Specifically, none of the DMR funds are being used to pay taxes. Stipulation § II.2.b (p. 5). Instead, all of the DMR funds are being used to pay debt and/or for grid modernization. Id. As demonstrated at length in DP&L's initial brief (pp. 15-23), DP&L needs all of the DMR funds to pay down debt so that DP&L can maintain its financial integrity and position itself to implement grid modernization.

Indeed, DP&L witness Malinak explained:

> "Q. You were also asked a number of questions, Mr. Malinak, about the potential reduction in the corporate income tax rate. If the income tax rate were to be reduced, would it be reasonable or appropriate to reduce the DMR amount?
>
> A. No.
>
> Q. Why not?
>
> A. Because as we know from the recent downgrade, this -- the level of the DMR and the stipulation right now is not even protection against the downgrade. So if you reduce it even further, you have an even larger downgrade that would produce even more deleterious effects in terms of financial distress on the entity.
>
> Q. And are the DMR proceeds to be used to pay any AES corporate income taxes?
>
> A. No.
>
> Q. What are they used for?
>
> A. They are used for debt reduction. They are going straight to debt reduction."

Tr. Vol. I, p. 226.

For example, under prior tax laws (with a 35% top federal corporate income tax rate), approximately $36 million of the $105 million DMR would be taxable income. Tr. Vol. I, pp. 78-79 (Jackson). Although DPL Inc. had a contractual obligation to pay that $36 million to AES (Jackson Test. (DP&L Ex. 1B), p.12), AES agreed in the Stipulation not to collect that tax sharing liability from DPL Inc. and to use the full $105 million DMR – including that $36 million – to pay down debt. Stipulation, §§ II.1.b (pp. 3-4); II.2.b (p. 5). Now that the top federal corporate income tax rate was reduced to 21%, approximately $22 million of the $105 million DMR would be taxable income. Tr. Vol. I, pp. 78-79 (Jackson). That change in the corporate tax rate, however, would have no effect on the need to use the full DMR to pay down debt. Specifically, DPL Inc. would still have a contractual obligation to pay that $22 million to AES, and the Stipulation would still establish that the full $105 million DMR – including that $22 million – would be used to pay down debt. Stipulation, §§ II.1.b (pp. 3-4); II.2.b (p. 5). DP&L thus needs and will use the full $105 million DMR to pay debt, regardless of whether the corporate tax rate is 35% or 21%. Tr. Vol. I, pp. 78-79 (Jackson); Tr. Vol I, p. 226 (Malinak).

C. <u>THE RECONCILIATION RIDER IS LAWFUL</u>

IGS asserts (pp 45-50) that the Reconciliation Rider is not a hedge and is a transition charge. The Supreme Court recently ruled that an identical OVEC rider for AEP is lawful. <u>In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Purchase Power Agreement</u>, Slip Op. No. 2018-Ohio-4698, ¶¶ 13-32. The Court held that the OVEC rider was a hedge (<u>id</u>. at ¶ 59) and rejected the argument that it is an unlawful transition charge, specifically relying upon the "notwithstanding" argument IGS attempted to anticipate (id. at ¶¶ 13-24). IGS neglected to raise or address this decision; therefore the Commission should thus reject IGS arguments.

VI. THE ATTORNEY EXAMINERS' EVIDENTIARY RULINGS WERE CORRECT

IGS argues (pp. 50-56) that the Attorney Examiners erred by excluding three Moody's Credit Reports relating to Oncor. The Commission should reject IGS' arguments for the following reasons.

First, the Attorney Examiners excluded those exhibits because IGS failed to lay a foundation for them. Tr. Vol. VI, p. 1049. To lay a foundation, IGS must have "evidence sufficient to support a finding that the matter in question is what its proponent claims." Ohio R. Evid. 901(A). Here, IGS does not have any witness who swore under oath that the three exhibits are Moody's credit reports relating to Oncor. IGS asserts (p. 52) that sufficient foundation was laid by DP&L witness Malinak, but he testified that he had never seen the documents in question. Tr. Vol. VI, p.1048. IGS failed to lay a foundation, and the exhibits are thus not admissible.

Second, they are hearsay since they are offered into evidence to prove the truth of the matter asserted. Ohio R. Evid 801(C); Tr. Vol. VI, p. 1057. IGS argues (p. 52) that the documents constitute "admissions by a party opponent and therefore are not hearsay." Specifically, IGS claims that DP&L witness Malinak "has manifested an adoption or belief in its truth" under Ohio R. Evid 801(D)(2)(b) by relying on credit ratings given to Oncor by Moody's. However, Mr. Malinak is not a "party" to the case – he is an outside expert – and that rule applies only to admissions by "part[ies]." In any event, Mr. Malinak never cited to the documents at issue and never affirmed a belief in the statements in them; he in fact testified that he had never seen them. Tr. Vol. VI, p. 1048.

DP&L addressed IGS arguments relating to the exclusion of Mr. Hess' sPower testimony supra § IV.B.1.

VII. CONCLUSION

The Commission should again conclude that the Stipulation as modified passes the Commission's three-part test, and should reject IGS' challenges to the Stipulation.

Respectfully submitted,

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