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 REPLY BRIEF OF INTERSTATE GAS SUPPLY, INC.

PUBLIC VERSION

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I. INTRODUCTION

Electric security plan ("ESP") cases involve a myriad of issues and interests. Here, parties attempted to resolve contested legal and factual issues without litigation. Interstate Gas Supply, Inc. appreciates that parties often seek to thread the needle and reach a balanced settlement. But, with the conversion of the Reconciliation Rider ("RR") to a nonbypassable rider, the potentially positive elements of the stipulation are significantly outweighed by the unlawful and unreasonable RR and deceptively named Distribution Modernization Rider ("DMR").

Given the infirmities in the Stipulation, IGS' Supplemental Post-Hearing Brief demonstrated that Stipulation, in its current form, is contrary to the public interest, inconsistent with regulatory principles and the law. Therefore, IGS recommended several modifications for the Commission's consideration.

Particularly, IGS recommended that the Commission adopt the following modifications to enhance the retail electric market:

- Modify the supplier consolidated billing pilot ("SCB") program to ensure that it is a success and that DP&L is not the recipient of a windfall.
- Eliminate switching fees, or, at a minimum, apply switching fees in a non-discriminatory manner.
- Eliminate or reduce DP&L's excessive $150 historical usage fee to permit CRES providers to accurately price prospective customers, rather than blindly offering customers non-customized rates which may be detached from reality.

Moreover, IGS proposed that the Commission reject or modify DP&L's proposed collateral requirements to ensure that CRES providers post collateral commensurate with the risk they pose.

Additionally, IGS identified that the DMR and non-bypassable RR should not be authorized for several reasons. First, IGS demonstrated that DP&L failed to justify the need for additional revenue to provide safe and reliable service. DP&L is doing just fine. DP&L acknowledges that its currently authorized distribution and transmission rates provide it with just and reasonable compensation. If the Commission rejects the DMR, DP&L will have sufficient cash flows to pay its expenses and to make forecasted capital expenditures to provide safe and reliable service.

Second, IGS' Brief showed that DP&L has access to capital markets to fund grid modernization without the DMR. DP&L already has access to $125 million in additional capital through its existing long-term credit agreement. Moreover, DPL Inc's financial situation—or credit rating—will have no impact on DP&L's ability to access the capital markets in the future. Thus, DPL Inc's financial situation cannot be leveraged to require DP&L's distribution customers to provide a subsidy to support DPL Inc., an unregulated entity.

Third, IGS demonstrated that, even assuming arguendo that a DPL Inc. credit rating downgrade may negatively impact DP&L's credit rating, the impact on DP&L's cost of capital would [redacted]

Fourth, IGS demonstrated that the DMR is unlawful and unreasonable for several reasons. The Commission lacks authority to authorize an EDU to recover the cost of debt and interest through a rider. Rates are not established in that fashion. Rather, debt and interest are recovered through the rate of return calculation. And DP&L's concedes that its currently authorized distribution and transmission rates provide it with a just and reasonable return. Authorizing the DMR would permit DP&L to earn a rate of return in excess of 20%, which is over three times its authorized rate of return.

Fifth, in addition to the Commission lacking authority to authorize a rider to recovery debt and interest expense, the Commission further lacks authority to create a rider to recover the debt and interest expenses of an unregulated entity, DPL Inc. Despite this fact, 65% to 70% of the DMR is designed to pay down DPL Inc.'s debt and interest expenses.[1] This outcome is unlawful.

Sixth, IGS demonstrated that the DMR is unlawful inasmuch as it provides ratepayer funded capital to DP&L without appropriately accounting for the revenue as such as on DP&L's balance sheet. As discussed in IGS Initial Brief, testimony, and confirmed by Staff's own witness, when customers advance funds to a utility, 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 capital.

Seventh, IGS demonstrated that if the DMR is authorized in any fashion, it should be reduced to account for the impact of tax reform. Otherwise, AES Corporation will receive a windfall.

[1] Tr. Vo. VII at 1162.

Eighth, IGS demonstrated that, with the inclusion of the DMR and RR, the ESP is less favorable than an MRO. Accordingly, it cannot be authorized without modification.

Finally, IGS' Initial Brief demonstrated that the RR should be bypassable—to the extent that the rider is authorized. Based upon the record evidence, a bypassable RR would not cause rate shock. The impact on customers is much less significant that the unlawful DMR.

IGS' Initial Brief proactively addressed many of the arguments contained in DP&L's, Staff's, and the Office of the Ohio Consumers' Counsel's supplemental briefs. Therefore, IGS will succinctly refute those arguments below.

II. ARGUMENT

A. The Supplier Tariff

1. DP&L's proposed collateral requirements are unreasonable

DP&L argues that the Commission already rejected IGS' arguments supplier about collateral requirements in the distribution rate case.[2] The distribution rate case, however, is not relevant to this proceeding. *The collateral requirements were proposed in this case.*[3] In accordance with R.C. 4903.09, they must be independently authorized or rejected based upon record evidence. The Commission should reject DP&L's proposed

[2] Tr. Vol VII at 1318-19; *See also* DP&L Brief at 29.

[3] DP&L Application Vol. I at 96.

modifications to the collateral requirements for CRES providers because there is no record evidence to support them.[4]

DP&L argues that its proposed collateral requirements are reasonable because they do not treat privately held companies differently.[5] IGS proactively addressed this argument in its Initial Brief.[6] "The evidence that is in the record demonstrates that the proposed changes would disproportionately impact privately held companies with strong balance sheets."[7] "[S]uch 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."[8]

DP&L also criticizes IGS for not providing any supporting calculations of the risk to DP&L if IGS defaulted.[9] Once again, DP&L improperly assumes that its proposal is reasonable and that the burden is on IGS to refute the proposal.[10] That, however, is not the case. DP&L's proposed collateral requirements are entirely unsubstantiated and unreasonable. It is not IGS' fault that DP&L failed to put into the record any evidence to support its proposed change.[11]

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[4] IGS Initial Brief at 15-19.

[5] DP&L Brief at 31.

[6] IGS Initial Brief at 17.

[7] *Id*.

[8] *Id.*

[9] DP&L Brief at 31.

[10] IGS Initial Brief at 16 ("The Commission must issue orders based upon findings of fact derived from the record evidence").

[11] *Id*. at 15-6.

Staff alleges that IGS "believes that it should not have to post collateral."[12] Staff then alleges that IGS should be required to post collateral because without a credit rating, it is impossible to determine the stability of a company.[13] Accordingly, Staff alleges that there is "no reason to change the status quo."[14]

Staff's status quo argument fails to acknowledge that the purpose of the hearing in this case is to evaluate whether the Stipulation—including DP&L's *proposed* collateral modifications—would lead to a just and reasonable outcome that furthers the public interest. The proposed changes are not the status quo. The changes are merely a proposal without record evidence.

Contrary to Staff's claim, IGS has not proposed that the Commission eliminate the requirement to post collateral. Rather, IGS contests DP&L's proposed—yet unsupported—modification to its collateral calculation. Although IGS was not required to fix DP&L's flawed, unsubstantiated proposal, to bring closure to this matter, IGS proposed a more reasonable collateral calculation. IGS' proposal would ensure that DP&L follows its tariff, which requires 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."[15]

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[12] Staff Brief at 5.

[13] *Id.*

[14] *Id.*

[15] DP&L Alternative Generation Supplier Coordination Tariff, sheet G8, page 24 of 30 (the "Supplier Tariff")

Accordingly, DP&L's proposal should be rejected or, at a minimum, modified as recommended by IGS witness Crist.[16]

2. Interval Data fees and Switching Fees

DP&L argues that its $150 interval data fees and switching fees are reasonable for three reasons: (1) the fees were authorized in the distribution rate case and nothing has changed; (2) this case did not propose to change the fees and there is no requirement to substantiate its fees under Commission rules, and (3) DP&L alleges that there is evidence that the fees are reasonable.[17] Staff alleges that IGS should file a complaint if it believes the fees are too high or unreasonable.[18] Each of these reasons lack merit.

In the distribution rate case, the Commission found that there is no reason to change the $150 fee because"[t]he witness did not refer to any decline in competition in the CRES market in DP&L's service territory nor to a failure to achieve any goals set by the Commission when we approved the current interval data fees in the Merger Case."[19] IGS has identified additional evidence that the Commission did not consider in the distribution rate case.

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[16] IGS Initial Brief at 17-9.

[17] DP&L Brief at 30-1.

[18] Staff Brief at 6.

[19] *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, Opinion and Order at 18 (Sept. 26, 2018).

In this case, Mr. White testified that, in addition to their being no cost-basis for the fee, the level of the fee is harming CRES providers and their customers.[20] As result of the high fee, CRES providers may often forego obtaining a customer's actual interval usage prior to offering a product to a customer.[21] Consequently, a customer is less likely to receive accurate pricing that fits their individual needs and commensurate with their actual cost of service. Thus, the record evidence shows that the current fee has a negative impact on competition.

Regarding the switching fee, the distribution rate case order is of no aid to DP&L. In the distribution rate case, DP&L stated that "the switching fee was proposed in DP&L's Amended Application in the ESP case."[22] Ultimately, the Commission stated that "RESA has failed to provide or cite to evidence sufficient to support changing our prior order in ESP III."[23] Of course, the Order the Commission relied upon in the distribution rate is not final. IGS withdrew from ESP III and has been granted an opportunity to contest the Stipulation. Therefore, the Commission must independently evaluate the switching fee in this case. Because the record evidence shows that it is discriminatory and unreasonable, it cannot be authorized without modification.

While DP&L did not propose to change the $150 fee, it proposed several changes to the Supplier Tariff. Such changes should not be evaluated in a vacuum. Moreover,

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[20] Tr. Vol. VII 1324-26; IGS Ex. 1014 at 8-9.

[21] *Id.* IGS Ex. 1014 at 9.

[22] *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, Opinion and Order at 18 (Sept. 26, 2018).

[23] *Id*. (citing Case Nos. 16-395-EL-SSO, *et al.*, Amended Application, Original Sheet No. G8, p. 29 (Oct. 11, 2016).

nothing required DP&L to file any changes to its Supplier Tariff. In so doing, it opened the door to changes to other provisions in the tariff. IGS should not be required to file an independent complaint when the relevant tariff is under consideration anyway. That would simply duplicate litigation and waste resources.

Indeed, one of the proposed changes to the Supplier Tariff involves the terms and conditions of the switching fee.[24] Given this fact, the Commission should evaluate the reasonableness of the fee and its terms and conditions. As IGS proposed in its Initial Brief, for the sake of fairness and to ensure nondiscrimination, the fee should either be eliminated or applied equally to customers for every switch, whether they choose a CRES provider or the SSO.[25] It would be absurd to require IGS to file an independent complaint when DP&L's proposed Supplier Tariff contains redline changes to the terms of the switching fee and therefore placed the charge at issue in this case.[26]

Lastly, DP&L argues that, while there is no cost-basis for the fees, they should be considered market-based because "RESA remains a signatory . . ." and that shows that the fees are the result of a negotiation.[27] DP&L's argument is absurd for several reasons.

The fees are not market-based. The provisions of switching a customer and the providing interval data are non-competitive services. DP&L is the only entity that can

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[24] IGS Ex. 1014 at 14; *see generally* proposed Supplier Tariff (Tariff G8) (Oct. 11, 2016); Tr. Vol. VII at 1323.

[25] IGS Initial Brief at 21-3.

[26] IGS Ex. 1014 at 7.

[27] DP&L Brief at 30.

provide these services. As such, they cannot be subject to market-based rate recovery—there is no market from which a CRES provider can look to receive these services.

Further, RESA's signature on the Stipulation provides no evidence. The presence of a party as a signatory is not a substitute for record evidence.[28] In any event, RESA does not support the fees. While RESA signed the stipulation, it preserved its right to contest the switching fees in a separate case. RESA explicitly inserted Footnote 10 in the Stipulation so that it may challenge any element of the Supplier Tariff in the future. Indeed, since the Stipulation was signed, RESA has challenged the interval data fee and the switching fee.[29] RESA's status as a signatory party for certain provisions therefore cannot be relied upon for support.

Accordingly, the Commission should modify or eliminate the switching and interval data fees.

B. The Supplier Consolidated Billing Pilot

Staff attempts to dismiss IGS' proposed changes to the SCB program, claiming that "this is a pilot" and that the pilot should be permitted to develop in order to "to find out how the program works in practice."[30] Staff further claims that "[t]here is no need to speculate about what sort of details are preferable."[31] IGS recognizes that in the SCB

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[28] *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46 (May 24, 2011).

[29] *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, Opinion and Order at 13 (Sep. 26, 2018); See also *id*. at 12-8.

[30] Staff Brief at 6.

[31] *Id*. at 7.

program is currently a pilot and that it could potentially be improved later. But there are certain changes that should be made now to ensure that that the pilot is not doomed to fail before it gets off the ground. As Mr. White testified, there is no guarantee it will be a success without change.[32] Indeed, there is no guarantee that any CRES providers will elect to participate in the pilot.

To be clear, while Staff says there is no need to speculate about the preferable details, there is no dispute that requiring CRES providers to purchase DP&L's receivables at 100% with discount would be a one-sided deal without parallel in the state. DP&L does not currently purchase CRES providers' receivables, with or without a discount. Moreover, utilities that purchase receivables at no discount recover any associated uncollectible expenses through an uncollectible rider.[33] CRES providers have no such rider to fall back on. Therefore, CRES providers would be required to increase their generation service prices to pick up the shortfall that may relate to DP&L's uncollected distribution service rates. In other words, CRES providers would be required to increase their generation rates to subsidize DP&L's distribution service.

It is important to keep in mind that the SCB program pilot will already increase costs for CRES providers. It requires CRES providers to pay for a portion of DP&L's costs to implement the pilot. CRES providers will also incur their own costs, as well as ongoing administrative costs to bill customers.[34] Under the currently proposed rules, CRES

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[32] IGS Ex. 1014 at 11.

[33] *In the Matter of the Applications of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 17-032-EL-AIR, *et al*., Opinion and Order at 87 (Dec. 19, 2018).

[34] Tr. Vol. VII at 1313-14.

providers will buy DP&L's receivables at no discount, further increasing costs (while decreasing DP&L's uncollectible expenses[35]).

While the SCB pilot will increase costs for CRES providers, the Commission, however, has yet to allocate to SSO service all the costs to support that service. Thus, CRES providers may simply decline to participate in the SCB program. CRES providers may view SCB as taking on additional costs, while distribution rates already provide a subsidy to the SSO rate they must compete against. Thus, SCB could further tilt the playing field in the favor of the SSO. Consequently, the pilot may fail to launch.

By adopting the changes proposed by IGS, the Commission can provide CRES providers with sufficient confidence to move forward with the pilot.

C. Unbundling Rider

DP&L claims that the Commission should not authorize a rider to reallocate SSO-related costs embedded in distribution rates. DP&L argues that: (1) IGS has not submitted evidence to support the $12 million figure identified by Mr. White; (2) the SSO is a distribution function; therefore, DP&L argues it is reasonable to recover SSO-related costs through distribution rates; (3) no customers have raised the issue; (4) if IGS' proposal is granted, additional costs should be allocated to shopping customers. DP&L's arguments lack merit. OCC makes similar arguments, claiming that unbundling SSO-related costs in distribution rates would violate the public interest and the principles of cost causation because it alleges that all customers benefit from the SSO.

[35] Tr. Vol. VII at 1317.

Contrary to DP&L's claim, IGS did not in fact recommend that the Commission allocate $12 million in costs in this case. Rather, IGS recommended that the Commission create a rider to effectuate the terms of the Stipulation under review. Specifically, the Stipulation states that:

> In DP&L's filed 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[36]

The Stipulation itself holds out the cost evaluation as a benefit. But it did not create a rider to ultimately (1) credit SSO-related costs to shopping customers, and (2) reallocate such costs back to the SSO. Because the Commission has already identified the need to create such a rider, IGS recommends that the Commission rectify that matter here. [37] The actual evaluation and quantification of costs has already occurred in a separate case. There is no need to relitigate that cost quantification in this proceeding, outside of a base rate case.

IGS is disappointed that DP&L claims that it is "reasonable that the costs that DP&L incurs to provide SSO service be recovered through distribution rates."[38] This argument is barred by the spirit of the Stipulation. It would make no sense and be disingenuous to

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[36] Joint Ex. 1 at 9.

[37] *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 10-12 (Sept. 26, 2018).

[38] DP&L Brief at 31.

commit time and effort to evaluate the size of the SSO subsidy in a separate case and then do nothing about it.

DP&L even goes so far to argue that if costs are allocated to the SSO, they should also be allocated to choice customers.[39] This argument is also barred by the Stipulation. The Stipulation provides that "[a]ny reallocation of costs to the standard service offer as a result of this evaluation will be revenue neutral to DP&L."[40] Given that the Stipulation provides for an evaluation and reallocation of costs to the SSO only, DP&L should not be permitted to argue for a contrary result.

In any event, the Commission should not indulge DP&L and OCC's suggestion to bless the recovery of SSO costs through distribution rates. Such a result is contrary to Ohio law. The Commission has no authority to regulate or provide compensation to support competitive retail electric service through distribution rates. Indeed, the General Assembly specifically provided that "*a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation* . . . by the public utilities commission under Chapters ***4901. to 4909***., 4933., 4935., and 4963." R.C. 4928.05(A)(1) (emphasis added). Senate Bill 3 ("SB 3") removed the Commission's jurisdiction to regulated competitive retail electric service under Chapter 4909. In other words, the Commission lacks authority to authorize the recovery of costs related to competitive retail electric services in a distribution rate case filed under 4909.18.

[39] *Id*. at 32.

[40] Joint Ex. 1 at 9.

By law, the SSO is a utility offering of a competitive retail electric services.[41] These costs may not be recovered through distribution rates. DP&L and OCC therefore proposes an outcome outside the Commission's jurisdiction and contrary to Ohio law.

Even if the Commission had the authority to authorize recovery of SSO-related costs through distribution rates, there is no good reason to require shopping customers to subsidize the SSO. Ohio law and policy favors competition and prohibits the recovery of competitive retail electric service costs through non-competitive service rate structures.[42] Moreover, it would violate rules of basic fairness to require shopping customers to pay for the services rendered to SSO customers. Under principles of cost causation—principles that OCC alleges to support—all costs necessary to provide a service should be allocated to the users of that service. Here, IGS is simply recommending that the Commission create a rider to permit the appropriate allocation of all SSO-related costs to the SSO in a way revenue neutral to DP&L.

Finally, DP&L argues that IGS' argument should be rejected because no customers have raised the issue and OCC opposes it.[43] DP&L fails to acknowledge that IGS is one of the largest—if not the largest—CRES provider within DP&L's service territory. Consequently, IGS has every right to take positions to eliminate subsidies in an effort to level the playing field but also to reduce the excessive distribution rates that IGS' customers pay to fund SSO-relates services.

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[41] R.C. 4928.03; RC. 4928.141 ("a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.").

[42] *See* R.C. 4928.02; R.C. 4928.03; R.C. 4928.17.

[43] DP&L Brief at 34.

Regarding OCC's opposition, that should not carry any weight. OCC's favoritism of the SSO over customer choice is well documented.

Accordingly, the Commission should create a placeholder unbundling rider that will facilitate appropriate and reasonable allocation of costs in the appropriate case.

D. The DMR is not necessary to provide Safe and Reliable Service or to facilitate Grid Modernization

DP&L's Initial Brief alleges that the DMR is necessary to: (1) to maintain safe and reliable service; and (2) to enable it to undertake grid modernization.[44] Moreover, DP&L alleges that IGS should not be permitted to contest the DMR because IGS was previously a signatory party.[45]

1. IGS never supported the DMR or a non-bypassable RR

Contrary to DP&L's claim, there is no evidence to suggest that IGS ever made a statement or claim to support either the DMR or the non-bypassable RR. IGS found these items so toxic that it required several footnotes within the original Stipulation distancing IGS from providing support for the DMR and the RR (and other provisions) to ensure that the presence of these distasteful provisions could not be held against IGS in a future case.[46]

[44] *Id*. at 15-23.

[45] *Id*. at 7.

[46] Joint Ex. 1 at notes 1, 5,.6, and 11.

IGS' prior briefs very carefully did not provide any support for the lawfulness of the DMR. Likewise, IGS argued that to the extent that the RR is authorized in any fashion, it must be bypassable.[47] Moreover, those briefs simply suggested that the competitive enhancements have the potential to provide customer benefits and that those provisions are in the public interest.[48] As part of a package, IGS did not oppose the DMR and a bypassable RR. But the package was lost in transit. Therefore, IGS opposes the Stipulation, including the DMR.

2.There is no nexus between credit rating, capital expenditures, and reliability

Relying upon the testimony of witness Malinak (DP&L Ex. 1002 at 32-35) and two tables in his testimony, DP&L claims that an EDU's annual capital expenditures is indicative of its ability to maintain reliability.[49] DP&L further argues that a robust investment grade credit rating is necessary to ensure that an EDU can make capital expenditures.[50] Both assertions lack merit.

First, there is no nexus between an EDU's capital expenditures and reliability. The Commission has historically evaluated each EDU's reliability through what are commonly referred to as the customer average interruption duration index ("CAIDI") and system average interruption frequency index ("SAIFI").[51] Those indexes are used to measure

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[47] Joint Initial Brief of IGS and RESA at 5-6 (May 5, 2017); See Also IGS Initial Brief at 46-7.

[48] *Id*.

[49] DP&L Brief at 16.

[50] Tr. Vol. VI at 964.

[51] OAC Rule 4901:1-10-10.

outages—both duration and length—and are therefore indicators of reliability.[52] Mr. Malinak conceded during cross-examination that he never evaluated the CAIDI or SAIFI indexes of any of the EDUs in his sample group.[53] Given his lack of personal knowledge or evaluation of the reliability of any utility within his sample group, his assertion is based upon pure speculation.

Second, the sample group was very limited in size, given that several of the utilities were owned by the same holding company.[54] For example, the only two utilities listed under the Baa3 credit rating were Toledo Edison Company and Cleveland Electric Illuminating Company.[55] Making matters even more interesting, Mr. Malinak's sample included under Baa1 Ohio Edison Company.[56] Based upon their credit ratings and capital expenditures, Mr. Malinak alleges that these three utilities are operated in vastly different ways, with vastly different levels of reliability. It is a matter of common knowledge that each of these utilities is operated under the common umbrella of FirstEnergy Ohio, but Mr. Malinak did not explain how these EDU's reliability metrics differ whatsoever.

Additionally, the witness failed to examine whether any other EDUs in his sample were operated under the FirstEnergy umbrella, for example, Jersey Central Power & Light, Potomac Edison, and Pennsylvania Electric Company, West Penn Power,

[52] *Id*.

[53] Tr. Vol. VI at 965.

[54] *Id.* at 968-73.

[55] *Id.* at 968.

[56] *Id.* at 971-72.

Pennsylvania Power Company, and Metropolitan Edison.[57] Given the wide disparity of credit ratings and capital expenditures with respect to entities under common ownership, it is clear that Mr. Malinak's sample group provides no probative evidence.

Third, Mr. Malinak did not review any of the actual credit rating reports for any of the EDUs in his sample group. Therefore, he lacked insight into the financial wellbeing of the companies. Indeed, Mr. Malinak's testimony was further discredited by the fact that Oncor Electric Delivery was listed as a company with a credit rating of Baa1, effectively in the middle of the pack, and he had no knowledge of the events occurring with respect to Oncor or any other entity within its holding company structure during the time period.[58]

Fourth, the data Mr. Malinak relied upon may have been skewed by factors he failed to evaluate. For example, he indicated that the timing of each EDU's last base rate case could have impacted the statistics in his sample group.[59] But he didn't look at the timing of the last rate case for any EDU in his sample group.[60] Likewise, he did not know whether any of the EDUs were permitted to recover capital investment through a rider.[61] Finally, he did not know whether any of the EDUs had a distribution rate freeze in effect.[62]

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[57] *Id.* at 969-72.

[58] Tr. Vol. VI at 1044-45.

[59] *Id.* at 968.

[60] *Id.*

[61] *Id.* at 971.

[62] *Id.* at 969.

Therefore, DP&L has failed to demonstrate that credit ratings have any relationship to annual capital expenditures or reliability.

3.The DMR is not necessary to ensure safe and reliable service

DP&L claims that the DMR is needed to ensure that DP&L can maintain safe and reliable service.[63] This claim lacks merit because DP&L concedes that it is doing fine. DP&L's claim is based upon the suggestion that it will ignore its regulated operations and responsibilities to funnel revenues up to its unregulated parent, DPL Inc. But, under Ohio law and its own representations, DP&L is not permitted to favor of its unregulated parent company at the expense of its regulated service operations.[64]

Indeed, in its base rate case, two of its officers represented to the Commission under oath,[65] that DP&L has ring fencing provisions in place to safeguard its customers from unregulated activities:

> There are a number of plans 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

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[63] DP&L Brief at 3.

[64] *See* R.C. 4928.17; R.C. 4928.02(H); R.C. 4928.18.

[65] *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.*, Application Vol. I at p. 15-16 (Nov. 15, 2015) (containing the Verifications of Thomas Raga and Jeffrey MacKay).

• 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.[66]

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."[67] DP&L tries to establish a linkage between it and DPL Inc. where there is none, given its ring fencing provisions and the requirements of Ohio law.

4.The DMR is not needed to facilitate grid modernization

Recognizing that it has sufficient cash flows to meet its current expenses, DP&L claims that the DMR is necessary to ensure that it can fund grid modernization down the road.[68] Specifically, DP&L claims that in order for grid modernization to occur, the DMR must be authorized to achieve the following:

1. Pay interest obligations on existing debt at DPL Inc. and DP&L;
2. Make discretionary debt prepayments at DPL Inc. and DP&L;
3. Position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure

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

[67] Tr. Vol. VIII at 1423.

[68] DP&L Brief at 21.

The record shows that these claims are false and not prerequisites to grid modernization.

As discussed in IGS' Initial Brief, testimony, and further below, the DMR has no relationship to any tangible grid modernization.[69]

a. The DMR is not needed to shore up DP&L's credit rating

DP&L argues that it needs the DMR to maintain its credit rating.[70] DP&L argues that if DPL Inc. is downgraded, DP&L will be downgraded as well. The record tells a different story.

Credit rating agencies are not required to downgrade an entity when the parent company is under distress. In fact, credit rating agencies will continue to find an entity is investment grade when they hold the following characteristics: (1) stable cash flows;[71] (2) Supportive regulator; and (3) ring fencing.[72] The record reflects that DP&L ticks each of these boxes. If DP&L adheres to its ring fencing provisions—and the Commission does not indulge DP&L's request to ignore them—the credit rating agencies will look at DP&L as a standalone entity.

[redacted]

[69] IGS Initial Brief at 33.

[70] DP&L Brief at 22.

[71] Tr. Vol. VII at 1169; Tr. Vol. VII at 1288. Tr. Vol. VI at 958-59.

[72] Tr. Vol. VIII at 1424; DP&L Ex. 1a at 15; Tr. Vol. VI at 1059, 1061; Tr. Vol. VIII at 1328; Tr. Vol. VIII at 1391.

[redacted]

[redacted]

[redacted]

Accordingly, there is no basis to conclude that DP&L or DPL Inc. needs the DMR to ensure that DP&L remains investment grade. Indeed, DP&L's CFO conceded that DP&L would be investment grade as a standalone entity.[74] The DMR is not necessary to maintain DP&L's credit rating at investment grade.

b. DP&L does not need a ratepayer subsidy to make capital investments that have neither been quantified nor authorized

Like a mantra, DP&L repeatedly chants that it needs the DMR to be able to invest in modernization of the distribution grid. It relies upon the testimony of Craig Jackson,

[73] DP&L's outstanding debt is less than $600 million.

[74] Tr. Vol. VII at 1198.

which was submitted over three years ago to make this point.[75] But DP&L provides no tangible, credible evidence with respect to the amount of investment it needs to make. Given the utter lack of evidence regarding the amount of capital DP&L may allegedly need, there is no basis to determine that DP&L lacks such capital.

Regardless, DP&L has access to the capital markets today, despite Mr. Jackson's stale claims. Under its existing long-term credit agreement, DP&L has the ability to incur an additional $125 million in long-term debt.[76] Moreover, on May 22, 2019, DP&L received Commission authorization to refinance and enter into new debt at a stable long-term rate.[77] To the extent that DP&L needs additional capital, it is free to apply to the Commission to enter additional debt instruments.

Even if DP&L's credit rating is downgraded, the evidence suggest that it could access the capital markets at a reasonable cost. The impact [redacted] the cost of the DMR.[78] 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.[79] It does not take an expert to identify that a significant borrowing increase—an amount that DP&L has failed to demonstrate

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[75] DP&L Brief at 8; See also DP&L Ex.1B at 11.

[76] IGS Ex. 1001 at Section 7.01; See also Tr. Vol. VI at 996-98.

[77] *In the Matter of the Application of the Dayton Power and Light Company for Authority to Issue First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Notes*, Case No. 18-1795-EL-AIS, Finding and Order (May 22, 2019).

[78] IGS Ex. 1016C at 22.

[79] Tr. Vol. VI at 1036.

whatsoever in this record—would have to occur before the increased cost of borrowing exceeded the cost of the DMR.

c. Paying off interest and debt would violate the law and regulatory principles in place for over a century

The Staff claims that bedrock regulatory policies and principles do not apply in an ESP case. Staff's argument misses two critical points.

First, the ability to establish an ESP is a privilege, not a right. An ESP may include distribution-related provisions outside of a rate case filed under Chapter 4909 but the provisions in an ESP, such as riders, must be more favorable than the outcome that would exist under a market rate offer.[80] Because an MRO does not permit the inclusion of distribution-related provisions, any distribution provisions must be available for recovery—at least on a comparable monetary basis—within the context of a distribution rate case.[81]

Here, it is clear that a distribution rate case cannot authorize the recovery of a rider to recover debt and interest expense for either DP&L or DPL Inc. Distribution rates do not explicitly recover interest expense or debt principle.[82] Recovery of those costs occurs through the rate of return calculation. Yet, DP&L concedes that its regulated distribution and transmission rates are currently providing just and reasonable compensation.[83] Such rates are calculated to ensure that DP&L may recover its distribution expenses, capital

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[80] See R.C. 4928.143(C).

[81] IGS Ex. 1015 at 34.ci

[82] IGS Ex. 1015 at 25-26.

[83] Tr. Vol. VII at 1130.

investment costs, and a sufficient rate of return to pay equity investors and lenders. Since DP&L is already earning—by its own admission—sufficient compensation, there cannot be any legitimate basis to further increase DP&L's compensation for the provision of distribution service.

Moreover, it would be an abuse of discretion to authorize a 20% rate of return in a distribution rate case, especially given that DP&L concedes that its currently authorized rate of return of 7.27% provides just and reasonable compensation for distribution service.[84] Therefore, the DMR is unlawful.

Additionally, even if an ESP may authorize provisions that cannot be authorized in a distribution rate case, the provisions in an ESP must relate to services provided *by an EDU*. There is nothing in R.C. 4928.143 that permits an EDU to impose charges to pay off the debt principle and/or interest expenses of non-regulated entities such as DPL Inc. Because $.65-.70 on the dollar of the DMR is proposed to pay off DPL Inc's debts, the DMR provides an inappropriate and unlawful subsidy to an unregulated entity.[85]

Second, Staff's position ignores the fact that a Stipulation must comport with regulatory policies and principles. The DMR violates core ratemaking and regulatory principles; therefore, it runs afoul of the three-prong test.[86]

[84] *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).

[85] Tr. Vo. VII at 1162.

[86] *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).

Increasing DP&L's distribution revenues to pay for debt expenses and principle would authorize a double recovery, given that DP&L is already being compensated for (1) debt interest expense through the rate of return calculation, and (2) principle through depreciation expense embedded in its distribution rates. Therefore, the DMR conflicts with over 100 years of ratemaking principles/the regulatory compact and would result in DP&L recovering rates related to costs incurred by an unregulated entity, and, with respect to DP&L's debt, the DMR would provide for a double recovery, given that DP&L is already compensated for its debt expenses in distribution and transmission rates.

d. The DMR is anticompetitive

Staff and DP&L argues that IGS has failed to show that the DMR is anticompetitive. Staff relies upon a FERC order authorizing the transfer of generation to AES Ohio.[87] Moreover, Staff argues that the DMR cannot be competitive because DPL Inc. has no subsidiaries that operate in the generation market at this juncture.

The FERC order that staff cites did not address the impact of the DMR on competition within Ohio. Rather it addressed the transfer of the generation assets without debt. The FERC did not provide an opinion on whether the DMR provides DPL Inc., AES Corp., or DP&L a competitive advantage over IGS.

Staff's position regarding competition in the generation market is based upon a myopic view of the competitive wholesale and retail electric markets. Within the AES Corp. holding company structure, DPL Inc. and its subsidiaries are minnows within a vast

[87] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 16-0395-EL-SSO, *et al*., Opinion and Order at 51 (Oct. 20, 2017).

sea. Without the DMR, AES must make a tough decision—provide capital to DPL Inc. or risk losing the company and all its assets in bankruptcy court. The DMR insulates AES Corp. from having to address this difficult decision and permits it to allocate its capital to other subsidiaries—affiliates of DP&L and DPL Inc.—to compete in the wholesale and retail electric market. As Mr. White testified, "AES sells a number of products and services that we sell, whether it's distributed generation, batteries, other products and services."[88]

Thus, the DMR is clearly anticompetitive.

e. DP&L has failed to show that a parent company bankruptcy would be worse than the DMR

In response to claims that restructuring DPL Inc's debts through bankruptcy would be cheaper than authorizing the DMR, DP&L alleges that banks would ultimately want to be paid. To the extent that the banks exchanged their debt interest for equity, DP&L implies that the banks would be worse owners than DP&L.[89] This is false. The banks would have ample opportunity to earn their money without degrading distribution service. They could simply sell off DP&L to the highest bidder and accept whatever reduction—if any—to their principle. To the extent that the banks must take a reduction from their outstanding principle in some amount, it would be better that they take a haircut rather than putting the bill on customers.

[88] Tr. Vol. VIII at 1392-93; *see also id* at 1394, 1425

[89] DP&L Brief at 27-28.

The notion that the banks would reduce capital expenditures to extract additional profits makes no sense.[90] DP&L is a regulated EDU. Moreover, the Commission has encouraged EDUs to make capital investments and provided expedited capital recovery through a favorable ROE and capital structure—including a capital structure more weighted toward equity than reality would suggest—and through capital investment riders which reduce regulatory lag. Thus, if anything, a bank is more likely to invest additional dollars in DP&L to build the rate base to earn the generous regulated rate of return the Commission has authorized.

f. The DMR is customer funded capital

DP&L and Staff allege that the DMR should not be considered customer-funded capital.[91] DP&L alleges that the DMR should not be treated as such because the "Stipulation establishes that the DMR will be treated as revenue."[92] Likewise, DP&L claims that the DMR funds do not relate to any specific capital project, rather the funds pay off debt. Staff submits a similar argument. These arguments miss the mark.

Calling the DMR funds "revenue" is a red herring. Customer provided capital is collected as "revenue" but that has no bearing on the manner in which such revenue should be treated from an accounting or ratemaking perspective.

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[90] *Id.*

[91] DP&L Brief at 28.

[92] DP&L Brief at 28.

It is irrelevant that the DMR does not apply to any specific capital project. As DP&L itself testified, the DMR increases the total amount of cash that is available to DP&L.[93] The aggregate impact of the DMR is to increase the net income and retained earnings of DP&L.[94] Consequently, all retained earnings that are not provided to DPL Inc. as a dividend are added to the balance sheet as shareholders equity.[95] But the DMR is not capital provided by shareholders—it is capital provided by customers.

Moreover, to the extent that the DMR funds apply to offset debt and interest at DP&L, DP&L's distribution rates are too high. DP&L is already receiving just and reasonable compensation—through depreciation and the authorized rate of return—for the exact same costs. To the extent that customers are required to provide cash flows to pay off DP&L's debt principle and interest—similarly to the manner in which an electric cooperative is operated—they should receive value in return. As recommended by IGS witness Hess, all DMR funds should be recorded on the balance sheet as customer provided capital.[96]

g. The ESP is more expensive than an MRO

i. The DMR is a cost

[93] Tr. Vol VII at 1134.

[94] Tr. Vol. VII at 1161-62; Tr. Vol. VI at 1007-09.

[95] *Id.*

[96] IGS Ex. 1015 at 11.

DP&L suggests that Commission precedent holds that the DMR could be authorized in an MRO.[97] That argument is based upon a Commission Order citation to a FirstEnergy case from 1988 which granted FE to obtain interim rate relief to avoid an emergency.[98] That case, however, relates to a completely different set of facts not applicable here.

In that case, FirstEnergy filed an emergency rate increase. FirstEnergy had just completed the construction of two nuclear power plants. It had also filed a rate increase to include the power plants in rate base and thus to obtain rate recovery for its investment. Due to regulatory lag, its cash flows were not sufficient to cover its expenses. FirstEnergy was permitted to increase its rates to ensure it had sufficient cash flows.

The Commission held, it "will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency."[99] To determine whether an emergency exist, "[t]he ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired [sic]. If the applicant utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end."[100] Moreover, "[f]or large utility, the emphasis in on interest coverage ratios, financial ratings, and cash flow analysis."[101]

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[97] DP&L Brief at 33.

[98] *Id*.; *see also In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, *et al*., Opinion and Order (Aug. 23, 1988).

[99] *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, *et al*., Opinion and Order at 6 (Aug. 23, 1988).

[100] *Id*.

[101] *Id*.

Here, DP&L cannot show that it faces an emergency. Unlike the FirstEnergy example, DP&L is doing just fine. It has sufficient cash flows to meet its ongoing expenses. As a standalone entity, DP&L would receive an investment grade credit rating, even without the DMR or RR.[102]

The problem is not DP&L, the problem is its parent company. But an EDU is not permitted to file an emergency rate case on behalf of its parent company. DP&L's financial metrics as a standalone entity are investment grade. DPL Inc.'s financial situation does not impact DP&L's ability to pay its bills. Therefore, there is no financial emergency to support including the DMR in an MRO.

Also, it is important to acknowledge that there is a distinct difference between having cash flows to pay debts as they come due and having the ability to finance unidentified elective expenditures at some point in the future. While the former situation may represent an emergency that warrants Commission intervention, the latter does not. Therefore, the lack of cash flows or capital to fund grid modernization—a dubious claim—does not provide a basis to authorize an emergency rate increase under R.C. 4909.16. Therefore, the DMR cannot be authorized in an MRO. As such, it must be considered a cost in excess of $500 million. And the ESP would flunk the test.

ii. Other benefits do not change the result of the test

[102] Tr. Vol. VII at 1198.

DP&L further alleges that other "benefits" cause the ESP to pass the MRO test.[103] DP&L identifies $9-$11.5 million in such benefits.[104] Based upon simple math, however, such benefits cannot wash out over $500 million in costs. Accepting DP&L's argument is equivalent to dismissing armed robbery charges because the assailant donated a few dollars after the heist.

Moreover, it is not a benefit that shareholder dollars are being used.[105] DP&L is taking over $500 million out of customers' pocket. Just because it might give a few million dollars back, it has no bearing on the net wealth transfer.

Finally, DP&L incorrectly claims that no witness disputed that a distribution rate case could authorize the riders identified in the Stipulation.[106] IGS witness Hess addresses this matter at length.[107] Neither the DMR nor the RR could be authorized in a distribution rate case or an MRO.

iii. Non-quantifiable benefits do not tilt the balance

DP&L attempts to prop up the results of the ESP proposal by pointing to non-quantifiable benefits.[108] Specifically, DP&L claims the following benefits (1) accelerated

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[103] DP&L Brief at 32.

[104] *Id*. at 33.

[105] *Id*. at 12.

[106] DP&L Brief at 35.

[107] IGS Ex. 1015.

[108] *Id*. at 34.

grid modernization, (2) commitment from AES to not collect a dividend or tax sharing payments, (3) subjecting DP&L to the SEET test, (4) future opportunity to file an ESP or an MRO, (5) transfer of the generating assets, (6) A sale process for certain assets, (7) Other Customer benefits, and (8) competitive market enhancements.[109] These benefits are illusory, meaningless, and at times even a cost rather than a benefit.

Regarding grid modernization, IGS previously testified that it *may* provide benefits to customers.[110] But, as discussed at length in this brief, DP&L has failed to demonstrate that this ESP is a prerequisite to grid modernization. Thus, this benefit is illusory and unsubstantiated.

Similarly, AES' commitment to not collect a dividend from DPL Inc. is meaningless.[111] DPL Inc. has enough trouble paying its own bills. It is highly unlikely that it could pay a dividend to AES. Additionally, there is no evidence to suggest that AES tax forgiveness will ever amount to any tangible benefit. First, while this could hypothetically be a benefit to DPL Inc., it is a meaningless provision to DP&L. It will continue to pay all taxes to DPL Inc. Second, DP&L and DPL Inc. continue to take economic impairments.[112] Although such impairments have no cash flow impact, they reduce net income and therefore the tax bill. Third, even if DPL Inc. and DP&L report net

[109] DP&L Brief at 34-35.

[110] Tr. Vol. VIII at 1372, 1375.

[111] *Id*. at 8.

[112] IGS Ex. 1015 at 9.

income, the federal government has slashed the tax rate from 35% to 21%. Thus, any purported benefit from AES has been so watered down to lack meaning.

Regarding the SEET test applying under and ESP and not an MRO, this is not a benefit for several reasons. At this juncture, customers would welcome an MRO with open arms to avoid the DMR and the RR. In any event, the SEET test is of no protection to customers, given that the Stipulation proposes to exclude the DMR revenues from the test. As IGS witness Hess identified, the Stipulation would permit DP&L to earn a rate of return in excess of a 20%.[113] That return—an amount higher than the return on equity such a return would produce—is greater than what the Commission has already determined constitutes significantly excessive earnings.[114]

The Generation Asset transfer should actually be viewed as a cost. According to the Stipulation, DP&L will transfer the non-debt liabilities.[115] In other words, DP&L will transfer the assets but leave all the debt principle and interest behind. Making matters worse, although DP&L was supposed to pay down a portion of the residual debt with the sale proceeds, that did not occur. Rather, AES used all of the proceeds to pay down debt at DPL Inc.[116] Thus, as a result of the generation asset transfer, DP&L has been left holding the bag on additional costs while the revenue from the sale was used to pay off

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

[114] *In the Matter of the Application of Columbus Southern Power Co. and Ohio Power Co. for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Opinion and Order at 22-7 (Jan. 11, 2011).

[115] *See* Joint Ex. 1 at 4.

[116] Tr. Vol. VII at 1170-71.

other unregulated debts. Such a result is contrary to the Stipulation and Commission precedent that holds that costs and benefits must be matched in the regulatory process. *See In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, Opinion and Order at 12 (Jan. 23, 2012).

In that case, AEP Ohio was a party to a below market long-term coal contract. The producer sought to terminate the contract. AEP Ohio and the producer settled their differences. In exchange for letting the producer buyout the contract, AEP received a cash payment and reserves of coal. AEP Ohio then had to procure higher cost replacement coal on the market. It passed the higher cost of coal onto its customers, but it kept the cash payment and coal reserves for itself. The Commission determined that "all of the realized value from the Settlement Agreement should be credited against [AEP Ohio's] FAC under-recovery." [117] This situation is eerily similar. DP&L's generation assets have been transferred and sold. The ongoing costs of the debt were left behind, yet DP&L has not applied a single dollar from the proceeds to burn down that debt. Thus, the generation asset transfer should be considered a cost.

The additional benefits that DP&L identifies cannot offset the cost of the DMR. While DP&L has alleged that it employs over 1000 people in the state, that number is not accurate.[118] IGS employs more people in the state of Ohio than DP&L and DPL Inc. combined, and without a $500 million subsidy. By subsidizing DPL Inc. and AES'

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[117] *In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.,* Opinion and Order at 12 (Jan. 23, 2012).

[118] Tr. Vol. VII at 973.

unregulated activities, the Stipulation makes it more difficult for IGS and its affiliates to compete in Ohio and throughout the United States.

Lastly, any potential value associated with the competitive market enhancements does not outweigh the cost of the DMR and the RR. To be clear, just as IGS previously argued, these provisions of the Stipulation have potential. But IGS has identified additional improvements that would increase the likelihood of success of (1) supplier consolidated billing, and (2) unbundling. Indeed, absent the unbundling rider proposed by IGS, the unbundling exercise proposed in the Stipulation is of questionable value.

Accordingly, given that neither the DMR nor RR could be authorized under an MRO, the Commission should conclude that the ESP is less favorable than an MRO by more than $500 million. The additional provisions of the ESP simply are insufficient to dig DP&L out of this hole, and some of the provisions make the hole deeper and worse for customers.

E. The Non-bypassable Reconciliation Rider is against the public interest and violated regulatory practices and principles

DP&L and Staff claim that the Supreme Court has held that OVEC-type charges are lawful.[119] While there is some precedent from the court, it did not address IGS' arguments and the order was issued under different facts.

The case referenced by DP&L did not address whether the PPA at issue was a hedge. As the court stated, OMA made note of a "substantive challenge to the commission's finding" with respect to its conclusion that the rider is a hedge. *In re*

[119] DP&L Brief at 3.

Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement, 2018-Ohio-4698 at ¶ 47. IGS' Initial Brief, however, directly refuted any notion that the RR is a hedge.[120] Moreover, in that case, AEP Ohio alleged that the PPA would result in bill credits to customers. Here, the record shows that OVEC has been losing money for years.[121] And, [redacted][122]

Likewise, the Court's decision was issued under unusual circumstances, not based upon the reasoning of the Commission, but based upon an argument raised by Ohio Power in a reply brief. The court has not considered the issue within the context of a fully developed pleading cycle and based upon an uncontested record.

Staff attempts to discount IGS' testimony, which identified that DP&L may be prohibited from earning capacity revenues for its OVEC interest.[123] Staff alleges that this uncertainty is an example of why the RR is a valuable hedge.[124] This reasoning does not make sense. Even with capacity revenue, OVEC has been unprofitable for years. The risk identified by IGS witness Haugen is one directional, making OVEC and the RR less profitable.[125] To the extent that DP&L is prohibited from receiving capacity revenues or

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[120] IGS Initial Brief at 45.

[121] Tr. Vol. VII at 1197-98.

[122] IGS Ex. 1007C at 8.

[123] Staff Brief at 5-6.

[124] *Id.*

[125] See generally IGS Ex. 1018.

if customers must pay twice for capacity, it will negatively impact customers in the DP&L service territory. Therefore, the RR does not provide a hedge to market prices.

Staff attacks Mr. White's conclusion that the RR is not hedge. Staff alleges that Mr. White "cannot even give an example of a hedge," and "he does not even claim to follow energy markets." But Staff's evidence to support such a claim (Tr. Vol. VIII at 1459-60) is based upon the cross-examination of an entirely different witness. Therefore, Staff's criticism of Mr. White should be given no weight.

Ohio Consumers' Counsel ("OCC") alleges that the Commission should not authorize the RR as bypassable charge because it would violate the three prong Settlement Standard Test.[126] OCC argues that no party bargained for a bypassable RR, since IGS was the only party to withdraw from the Stipulation after the Commission modified the bypassable proposal based upon the potential for rate shock. OCC's reasoning lacks merit.

In yet another case, OCC again argues that a provision in a settlement violates the first prong.[127] This argument is a waste of ink and time. No party was excluded from settlement negotiations; therefore, the bypassable RR was the product of serious bargaining. And, of course, every party to the Stipulation bargained for the bypassable RR. This is evident by the amount of applications for rehearing that were filed after the Commission modified that provision.

[126] OCC Brief at 8-15.

[127] OCC Initial Brief at 7-9.

OCC also argues that a bypassable RR would violate principles of cost causation because allegedly all customers benefit from a default service safety net but only the SSO would pay for the charge.[128] OCC's argument confuses the principle of cost causation. The principle requires costs to be allocated to cost causers. With respect to a bypassable RR, all of the costs and any potential benefits were proposed to be assigned to default service. While IGS agrees that the likelihood of any benefits is unlikely, Ohio law favors customer choice with respect to competitive retail electric services. It would be inappropriate and contravene regulatory practices and state policy to make the RR nonbypassable. Moreover, shopping customers have made an affirmative choice to receive their electric service from a CRES provider. OCC's proposal is akin to slamming shopping customers into a competitive service that they have affirmatively rejected.

OCC's cost causation arguments are not credible given that it opposes allocating administrative costs to the SSO through an unbundling rider.[129] OCC cannot tout cost causation principles on one hand and propose to force shopping customers to subsidize the SSO on the other hand.

OCC's advocacy places the default service on a pedestal as if it should be embraced as the end state for all customers. OCC's deeply ingrained position is in conflict with Ohio law and policy. The General Assembly restructured the retail electric market nearly twenty years ago. The stated preference is competition and choice. Default service is simply the residual rate for those customers that do not make a choice. It is not

[128] *Id*. at 9.

[129] *Id*. at 20.

the preferred end state. If it was, there would be no choice. Given the state policy in favor of choice, if the Commission is going to authorize an RR in any fashion, clearly the more appropriate outcome is a bypassable rider that preserves the ability of customers to pick and choose the competitive services that they want and need.

OCC further claims that the RR should be nonbypassable because rate shock may occur if customers flee the SSO to avoid the charge.[130] The RR is currently projected to be approximately $1.39 to $1.85 per month for a residential customer on a bypassable basis. Even if the charge doubled, there is no evidence to suggest that it will create a mass exodus from the SSO that would cause rate shock. In any event, the RR is much smaller than the SSO subsidy embedded in base distribution rates.

OCC further claims that the rider would fall disproportionately on low-income customers.[131] There is no evidence in the record to suggest that the RR would harm low-income customers. Percentage of Income Payment Plan customer's bills are based upon their income. Moreover, OCC provided no evidence of a CRES provider declining service to a customer based upon credit.

Accordingly, OCC's arguments against a bypassable RR lack merit.

F. The Commission made a Material Modification to the Stipulation

[130] *Id*. at 11.

[131] *Id*. at 9.

DP&L asserts in its Brief that IGS should not have been permitted to withdraw from the Stipulation. DP&L alleges that the Commission's modification was not material and thus IGS should not have been permitted to withdraw.[132] DP&L alleges that the modification should not be considered material for two reasons. First, DP&L alleges the Stipulation included a footnote indicating that IGS did not support the specific section of the Stipulation that was amended; thus, IGS waived its right to object to any amendments to that specific section. Second, DP&L's argues that IGS failed to provide evidence going to show that the change was material to IGS.[133] Because DP&L's arguments have already been rejected by the Attorney Examiner, IGS will respond briefly below.

There is no merit to DP&L's argument that IGS waived its ability to withdraw due to a footnote. Regardless of the footnote, IGS was a signatory party. Therefore, IGS held the right to withdraw based upon a material modification. Attorney examiner Price correctly determined that the change was "plainly material, *especially* to IGS."[134]

Indeed, the presence of the footnote goes to show that the provision was incredibly material to IGS, so much so that IGS made an effort to indicate that it was viewing the provision as part of the entire Stipulation package despite not directly supporting the issue. IGS does not support the rider as an overarching concept, but it viewed the inclusion of a bypassable OVEC rider as part of the entire package of the Stipulation and was thus able to overlook its objections to the OVEC rider and come to a position of non-

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[132] DP&L Brief at 4-5.

[133] *Id*. at 5.

[134] Transcript of Prehearing Conference p. 8-9 ln. 23-25;1-3 (Dec. 5, 2018).

opposition. As IGS stated, generation supporting riders are not beneficial to Ohio and are not typically supported by IGS outsides of comprehensive settlement packages.[135] But to the extent that such riders are authorized, they should be bypassable.

DP&L asserts that IGS presented no evidence that the estimated $1.85 monthly charge per residential customer would lead to a "material number of customers" switching to competitive service. DP&L mischaracterizes the standard of materiality at issue in the Stipulation. IGS was simply required to show that any modification by the Commission was material to IGS—IGS was under no obligation to put on evidence in a hearing to support the reason that IGS withdrew. The purpose of the hearing is to evaluate the Stipulation itself.

DP&L ignores any impacts other than direct switching of customers. Making the rider non-bypassable would impact the competitive landscape in the retail space by depriving customers of the ability to fully select competitive generation. For an individual customer, a $1.85 may or may not influence their choice to switch. Either way, customers should be permitted to choose the competitive services that they want and need.

IGS was not alone in its view of the Commission's material modification. The bypassable RR was one of the most important provisions in the Amended Stipulation. Indeed, five different Signatory and Non-Opposing Parties filed applications for rehearing in response to the Order's modification of the RR.[136] Clearly, the bypassable RR was a material element of the stipulation. It was not a matter of form over substance—IGS

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

[136] Applications for Rehearing were submitted by RESA, IGS, Industrial Energy Users-Ohio, Ohio Manufacturers' Association Energy Group, and Kroger.

would not withdraw and commit significant resources to litigate a proceeding over an immaterial modification.

G. IGS has standing to challenge the DMR

DP&L argues that IGS does not possess the appropriate standing to challenge the DMR provision based on a lack of injury as required by the "irreducible constitutional minimum" test promulgated in *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. DP&L further argues that IGS is not harmed by the DMR because IGS does not pay the charge, does not compete against DPL Inc. and DP&L, and the DMR is necessary to facilitate grid modernization. DP&L's argument is procedurally and substantively flawed.

First, the criteria set forth in *Moore* are different than the criteria applied in Commission proceedings. The criteria for standing in Commission cases is set forth in the intervention criteria under R.C. 4903.221 and OAC 4901-1-11. Those sections provide that the Commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

> (1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.[137]

In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384 (2006), the Supreme Court of Ohio held that "intervention ought to be liberally allowed so that the

[137] R.C. 4903.221

positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Id.* at 388.

Moreover, since the restructuring of the retail electric and gas markets, the Commission has routinely found matters that may impact the competitive market constitute a substantial interest that may cause injury to a market participant. For example, in the audit of Duke Energy Ohio's gas cost recovery mechanism, the Commission determined that IGS had a substantial interest in the resolution of competitive matters at issue in the proceeding:

> The examiner finds that issues related to the competitive market, competitive gas suppliers, and their customers may arise in this proceeding. Such issues have been a part of the utility's prior GCR cases before the Commission. Moreover, the competitive program was specifically addressed by CG&E's most recent management and performance audit report and the parties in that GCR proceeding agreed to discuss CG&E's choice program further. Therefore, the examiner finds that a real and substantial interest has been stated and the motion by IGS for intervention should be granted.[138]

Likewise, the Commission permitted IGS, over FirstEnergy's opposition, to intervene in the audit of FirstEnergy's corporate separation plan case.[139]

DP&L has waived the right to contest IGS' standing. IGS was granted intervention in the case nearly three years ago.[140] IGS' Motion requested authority to "intervene in

[138] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters,* Case No. 05-218-GA-GCR, Entry at 2 (Nov. 15, 2005).

[139] *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Ch.Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at 3 (Sep. 20, 2018).

[140] Entry at 3-4 (Aug. 16, 2016).

these proceedings with the full powers and rights granted to intervening parties."[141] Under OAC 4901-1-11(D)(1), DP&L could have sought to limit IGS' intervention to only participate with respect to certain issues. No such opposition was filed and IGS' intervention was not limited in any fashion.[142] DP&L is seeking a second bite at the apple now. But the ship has sailed. IGS was granted the right to intervene with the full powers and rights granted to intervening parties.

Second, in any event, IGS has demonstrated that it satisfies the inapplicable criteria in *Moore*. In that case, the Court set forth three criteria, which must be satisfied in to establish standing. A party must have an injury, that the injury must be traceable to the defendant's unlawful content, and that the injury can be redressed by the relief being requested (*Moore* ¶ 22). DP&L does not challenge IGS' the second or third prong of the test. The argument that IGS lacks standing and would suffer no injury from an unaltered DMR is meritless and faulty on many fronts.

The DMR injures IGS and its customers in several ways. As discussed at length in testimony and brief, the DMR provides excessive compensation to pay for the debts of DPL Inc., an unregulated entity. The DMR is contrary to Ohio policy and corporate separation laws, which prohibit the utilization of regulated services to subsidize or provide a preference and/or competitive advantage to unregulated entities.[143] These laws and

[141] Motion to Intervene and Memorandum in Support of Interstate Gas Supply, Inc. at 3 (Mar. 23, 2016).

[142] Case Nos. 16-395-EL-SSO, *et* al., Entry at ¶53-4 (Aug. 16, 2016).

[143]*See* R.C. 4928.17; R.C. 4928.02; R.C. 4928.141; *see generally In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend Its Corporate Separation Plan*, Case No. 13-2442-EL-UNC, Finding and Order (Sep. 17, 2014).

policies were enacted to protect companies such as IGS from distribution utilities abusing their non-competitive service functions to put in place charges such as the DMR (and the RR).

DP&L's claim that IGS is not a competitor of DPL Inc. is misleading and based upon a myopic view of reality. DPL Inc. is an unregulated entity. The Commission has no authority to control it. Therefore, DPL Inc. is free to compete with IGS in any way it so desires. By paying off DPL Inc.'s debts, the DMR sets up DPL Inc. to compete against IGS in the competitive retail and wholesale electric markets.

The injury does not stop with DP&L Inc.'s subsidization of DPL Inc. DPL Inc. is a tiny fish in the sea that is the AES Corp. Many of the other fish compete against IGS in the wholesale and retail market in Ohio and elsewhere.[144] It takes capital to operate those businesses, particularly businesses that construct renewable generation projects with large up front capital costs. But for the DMR, AES would have to provide additional capital to DPL Inc. or risk losing its investment in bankruptcy restructuring. Instead, the DMR bails out AES Corp., and enables it to deploy its capital to compete against IGS. If IGS' investments do not pan out, IGS has no ratepayer backstop to pick up the tab. Thus, the DMR provides AES Corporation with a fundamentally unfair ratepayer guarantee to enable it to compete against IGS. Therefore, the DMR most definitely harms IGS in not only Ohio but across the United States.

The Commission should take a moment to let this last point sink in. IGS is a privately held, family owned company that employs more people in this state then DP&L

[144] Tr. Vol. VIII at 1392-93; see also id at 1394, 1425

and DPL Inc. combined. AES Corp. is not headquartered in Ohio and its shareholders are dispersed around the globe. By authorizing the DMR, the Commission puts a local company at a competitive disadvantage, and sends money of out of Ohio.

III. 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 Reply Brief of Interstate Gas Supply, Inc. was served this 30h day of May 2019 via electronic mail upon the following:

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