

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
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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
	:	

**SUPPLEMENTAL BRIEF OF
THE DAYTON POWER AND LIGHT COMPANY**

Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Attorneys for The Dayton Power
and Light Company

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	DP&L'S DMR REMAINS LAWFUL AFTER THE FIRSTENERGY DECISION	4
A.	THE DMR WILL INDUCE DP&L TO TAKE ACTIONS THAT IT WOULD NOT HAVE OTHERWISE TAKEN.....	4
1.	The DMR Will "Induce" DP&L to Implement Grid Modernization	5
a.	DP&L is "required" to implement grid modernization.....	5
b.	The Commission's order places "real requirements, restrictions or conditions" on the use of DMR funds.....	6
c.	DP&L may be subject to "penalt[ies]" if it fails to implement grid modernization as ordered	7
2.	DP&L Could Not Implement Grid Modernization Without the DMR	8
B.	DP&L IS REQUIRED TO PURSUE "SPECIFIC DISTRIBUTION- MODERNIZATION PROJECTS"	11
C.	THE DMR IS PART OF A BROAD-BASED STIPULATION	13
III.	THE COMMISSION SHOULD APPROVE THE DMR UNDER ALTERNATIVE STATUTORY PROVISIONS	14
A.	THE DMR IS A LAWFUL DISTRIBUTION CHARGE UNDER R.C. 4928.143(B)(2)(h).....	14
B.	THE DMR RESULTS FROM "SINGLE ISSUE RATEMAKING" UNDER R.C. 4928.143(B)(2)(h).....	16
C.	THE DMR IS A LAWFUL STABILITY CHARGE UNDER R.C. 4928.143(B)(2)(d).....	16
D.	THE DMR IS A LAWFUL ECONOMIC DEVELOPMENT CHARGE UNDER R.C. 4928.143(B)(2)(i).....	19
IV.	CONCLUSION.....	20

**SUPPLEMENTAL BRIEF
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I. INTRODUCTION AND SUMMARY

The Distribution Modernization Rider ("DMR") that the Commission approved for The Dayton Power and Light Company ("DP&L") is materially different than the DMR that the Commission approved for the FirstEnergy utilities (collectively, "FirstEnergy"). Those material differences demonstrate that DP&L's DMR remains lawful despite the Supreme Court's ruling that FirstEnergy's DMR was not an "incentive" under R.C. 4928.143(B)(2)(h).

Specifically:

1. DP&L is "required" to implement grid modernization: The Court's plurality explained that the "critical problem" with FirstEnergy's DMR was that FirstEnergy was not "required" to make any investment to modernize the distribution grid. In re Application of Ohio Edison Co., Cleveland Elec. Illuminating Co., and Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to 4928.143 in the Form of an Electric Security Plan ("FirstEnergy Decision"), 2019-Ohio-2401, ¶ 18 (emphasis is original). In contrast, the Commission specifically held that DP&L was "required to implement the modernization plan." Sept. 19, 2018 Third Entry on Rehearing, ¶ 22 (emphasis in original).

2. The Commission placed "restrictions" upon DP&L's use of DMR funds: FirstEnergy was free to use its DMR funds for whatever purpose it wished. The plurality explained that the DMR was not an incentive because there were not "real requirements, restrictions, or conditions imposed by the Commission for the use of DMR funds." FirstEnergy Decision, 2019-Ohio-2401, ¶ 19. Accord: id. ¶ 71 ("With extra money, a utility might increase employee salaries, pay its investors a higher dividend, redecorate its offices, or perhaps,

modernize its infrastructure. But because the DMR does not place any meaningful constraints on the money, it does not direct the utility toward infrastructure improvements rather than any of these other things.") (DeWine, J., concurring in judgment only). In contrast, the Amended Stipulation and Recommendation ("Stipulation") in this case has very specific restrictions as to what DP&L can do with the DMR funds, to "position" DP&L to implement grid modernization. Stipulation, p. 5, ¶ II.2.b.

3. DP&L may be subject to "penalt[ies]": The plurality also explained that a problem with FirstEnergy's DMR was that FirstEnergy was not subject to any "penalt[ies]" if it failed to implement grid modernization. FirstEnergy Decision, 2019-Ohio-2401, ¶ 18. In contrast, since DP&L is "required" to implement grid modernization, DP&L may be subject to penalties if it fails to comply with the Commission's order, including a \$10,000 per day fine (R.C. 4905.54), mandamus and injunction (R.C. 4905.60), and treble damages (R.C. 4905.61).

4. DP&L is required to pursue "specific distribution-modernization projects": The plurality also faulted FirstEnergy's DMR because there were "no directives or timelines regarding specific distribution-modernization projects." FirstEnergy Decision, 2019-Ohio-2401, ¶ 18. In contrast, the Stipulation established a deadline for DP&L to file its modernization plan, and identified very specific projects that were required to be in that plan. Stipulation, p. 7, ¶ II.3.b.

5. A Stipulation is entitled to "substantial weight": Unlike FirstEnergy's DMR, DP&L's DMR was the product of a broad-based Stipulation. The terms of a stipulation are "accorded substantial weight" by the Commission. Office of Consumers' Counsel v. Pub. Util. Comm'n, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992).

The Commission should thus conclude that unlike FirstEnergy, DP&L is "required" to implement grid modernization, that DP&L's use of DMR funds is "restrict[ed]," and that DP&L may be subject to "penalt[ies]" if it does not comply with the Commission's order. The DMR will thus act as an "incentive" for DP&L to implement grid modernization under R.C. 4928.143(B)(2)(h). Further, DP&L's DMR was the product of a broad-based Stipulation.

In addition to holding that DP&L's DMR is a lawful incentive under R.C. 4928.143(B)(2)(h), the Commission should hold that DP&L's DMR is lawful under four alternative statutory provisions.

1. The DMR relates to distribution: In addition to authorizing grid modernization incentives, R.C. 4928.143(B)(2)(h) more broadly authorizes provisions related to "distribution service." The evidence at the hearing showed that DP&L's DMR is related to distribution service because DP&L could not provide safe and reliable distribution service without the DMR.

2. DP&L's DMR results from "single issue ratemaking": Section 4928.143(B)(2)(h) also authorizes "single issue ratemaking." DP&L's DMR is lawful under that provision since it addresses a single issue, namely, improving DP&L's financial integrity to allow DP&L to invest in its distribution grid.

3. The DMR is a stability charge: The Commission should hold that the DMR is a lawful stability charge under R.C. 4928.143(B)(2)(d) since it will enable DP&L to provide stable distribution service.

4. The DMR will promote economic development: The DMR is a lawful economic development charge under R.C. 4928.143(B)(2)(i) since it will lead to substantial investment within DP&L's service territory and promote economic development incentives established in the Stipulation.

II. DP&L'S DMR REMAINS LAWFUL AFTER THE FIRSTENERGY DECISION

The Supreme Court ruled that FirstEnergy's DMR was not an "incentive" for FirstEnergy to implement grid modernization under R.C. 4928.143(B)(2)(h), and was thus unlawful. As demonstrated below, DP&L's DMR is materially different from FirstEnergy's DMR, and it remains lawful after the FirstEnergy Decision.

A. THE DMR WILL INDUCE DP&L TO TAKE ACTIONS THAT IT WOULD NOT HAVE OTHERWISE TAKEN

The plurality disagreed with the Commission's definition of the term "incentive" in R.C. 4928.143(B)(2)(h), and defined the term as follows: "An incentive generally serves to induce someone to take some action that otherwise would not be taken but for the incentive." FirstEnergy Decision, 2019-Ohio-2401, ¶ 16. The concurrence offered a similar definition. Id. ¶ 64 ("As the word is commonly used, something is an incentive to perform an act only if it would push a party toward performing that act."). Using the plurality's definition, DP&L's DMR would be a lawful incentive if it will (a) "induce" DP&L to take action to implement grid modernization; and (b) that action "would not be taken but for the [DMR]."

As demonstrated below, DP&L's DMR satisfies the first prong of the plurality's definition since the Commission "required" DP&L to implement grid modernization, "restrict[ed]" DP&L's use of DMR funds, and DP&L may be subject to "penalt[ies]" if it does

not implement grid modernization. The DMR also satisfies the second prong of the plurality's definition because DP&L cannot implement grid modernization without the DMR.

1. The DMR Will "Induce" DP&L to Implement Grid Modernization

a. DP&L is "required" to implement grid modernization

In evaluating whether FirstEnergy's DMR was an incentive, the plurality stated that "the critical problem is that the companies are not required to make any investments to modernize the distribution grid in exchange for DMR revenues." FirstEnergy Decision, 2019-Ohio-2401, ¶ 18 (first emphasis added; second emphasis in original). The concurrence similarly criticized FirstEnergy's DMR because it does not "push" FirstEnergy to implement grid modernization. Id. ¶ 64.

In DP&L's case, intervenors opposing the DMR sought rehearing on exactly that issue. Sept. 19, 2018 Third Entry on Rehearing, ¶ 22 (describing argument by intervenors that "the DMR is unreasonable because it does not require DP&L to invest in grid modernization"). The Commission rejected that argument: "Once the modernization plan is approved by and made the order of the Commission, DP&L will be required to implement the modernization plan." Id. (emphasis in original).

DP&L's DMR is thus materially different than FirstEnergy's DMR. The plurality determined that the "critical problem" with FirstEnergy's DMR was that FirstEnergy was not "required" to implement grid modernization. FirstEnergy Decision, 2019-Ohio-2401, ¶ 18. Since DP&L is "required" to do so (Third Entry on Rehearing, ¶ 22), DP&L's DMR will "induce" DP&L to make grid modernization investments and is an "incentive" under R.C. 4928.143(B)(2)(h).

b. The Commission's order places "real requirements, restrictions or conditions" on the use of DMR funds

Nothing in the Commission's order approving the FirstEnergy DMR required FirstEnergy to use the DMR funds for specific purposes. The plurality faulted FirstEnergy's DMR because it "awards them money up front with no meaningful conditions attached." FirstEnergy Decision, 2019-Ohio-2401, ¶ 19. The plurality concluded that there must be "real requirements, restrictions, or conditions imposed by the Commission for the use of DMR funds." Id. Accord: Id. ¶ 71 ("With extra money, a utility might increase employee salaries, pay its investors a higher dividend, redecorate its offices, or perhaps, modernize its infrastructure. But because the DMR does not place any meaningful constraints on the money, it does not direct the utility toward infrastructure improvements rather than any of these other things.") (DeWine, J., concurring in judgment only).

In contrast, the Stipulation that created DP&L's DMR imposes specific restrictions as to what DP&L can do with the DMR funds:

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

Stipulation, p. 5, ¶ II.2.b (emphasis added).

Further, the Stipulation bars DPL Inc. from making any dividend payments to its parent for the term of DP&L's ESP (p. 3, ¶ II.1.a.) and bars DPL Inc. from making any contractually-required tax sharing payments to its parent for the DMR term (p. 3, ¶ II.1.b.).

Those conditions thus preclude DP&L from using the DMR funds to pay debt, while using other funds to pay shareholders.

Significantly, the Commission's order approving the DMR required that DP&L's use of the DMR funds be audited. October 20, 2017 Opinion and Order, ¶ 43. FirstEnergy was also subject to an audit by the same-third party. The Court found that audit to be ineffective because "the parties will not be able to challenge Oxford's findings," such that it was "not clear what remedy would be available should the commission (or this court on appeal) find that FirstEnergy has misused DMR funds," FirstEnergy Decision, 2019-Ohio-2401, ¶ 26. In contrast, as demonstrated in the following section, the Commission and the Signatory Parties have an independent ability to ensure that DP&L is honoring its commitments set forth in Stipulation, pp. 3-5, ¶¶ II.1.a & b, II.2.b. The audit is a tool available to ensure the appropriate use of the DMR funds. The auditors issued a mid-term report, which concluded that all of DP&L's DMR funds have been used for the required purposes. June 14, 2019, Oxford Advisors Mid-Term Report, pp. 11-14 (Case No. 18-264-EL-RDR). DP&L asks the Commission to take administrative notice of the audit report.

DP&L's DMR is thus materially different than FirstEnergy's DMR because there are "real requirements, restrictions, or conditions imposed by the commission for the use of DMR funds." FirstEnergy Decision, 2019-Ohio-2401, ¶ 19.

c. DP&L may be subject to "penalt[ies]" if it fails to implement grid modernization as ordered

The plurality also held that the DMR was not an "incentive" under R.C. 4928.143(B)(2)(h) because there was no "penalty . . . if the DMR funds did not serve the

intended purpose." FirstEnergy Decision, 2019-Ohio-2401, ¶ 18. In contrast, DP&L may be subject to potential penalties if it does not comply with the Commission's order.

Specifically, since DP&L is "required" to implement grid modernization, it may be subject to penalties if it fails to do so, including a \$10,000 per day fine for failing to comply with an "order, directive and requirement of the [commission]" (R.C. 4905.54), mandamus and injunction if it "has failed or is about to fail to obey any order . . . of the commission" (R.C. 4905.60), and treble damages if it fails to comply with an "order of the [commission]" (R.C. 4905.61). Accord: R.C. 4905.56 (no employee of a public utility shall "willfully fail to comply with any lawful order or direction of the [commission]"; each day is a separate offense).

FirstEnergy was not subject to those same penalties because it was not "required" to implement grid modernization. FirstEnergy Decision, 2019-Ohio-2401, ¶ 18. In contrast, here, the parties to the Stipulation agreed to the DMR and have mechanisms available to enforce provisions of the Stipulation to ensure DP&L's adherence to the terms and conditions to which all parties agreed. DP&L's DMR is thus materially different than FirstEnergy's DMR for the additional reason that DP&L may be subject to "penalt[ies]" if it does not implement grid modernization. Those potential penalties act as an "incentive" for DP&L to implement grid modernization under R.C. 4928.143(B)(2)(h).

2. DP&L Could Not Implement Grid Modernization Without the DMR

The second element in the plurality's definition of the term "incentive" is that the action "would not be taken but for the incentive." Id. ¶ 16. Here, there was ample evidence that DP&L could not implement grid modernization without the DMR.

The Chief Financial Officer of DP&L, witness Jackson, testified that without the DMR, DP&L would "have insufficient cash flows to pay all normal course obligations, including but not limited to operating expenses . . . and planned T&D capital expenditures" and that an inability by DP&L to maintain its financial integrity "would have a deleterious effect on the utility's . . . ability to provide stable and certain utility service to customers." Jackson Test., pp. 17-18 (emphasis added).

DP&L witness Malinak explained that utilities whose financial integrity is at risk make materially lower capital investments than utilities that are financially healthy. Malinak Test., pp. 32-35. He further testified:

"Q. How would DP&L's customers be affected by DPL's and DP&L's financial distress?

A. DP&L's customers would face a number of negative consequences. In fact, the financial condition of both DPL and DP&L is already compromised such that some of these negative consequences may already exist. If no DMR and Reconciliation Rider are awarded, and the financial condition of DPL and DP&L worsens, the impacts will be magnified and more invasive.

- Based on my analysis of capital expenditures by financially distressed firms described above, DP&L likely would reduce or delay such expenditures. All else equal, this reduction would result in a less effective and less reliable infrastructure for delivering electric service, which would harm customers and the state of Ohio more generally.

* * *

- DP&L likely would invest less in service operations, which would reduce the quality of customer service and customer satisfaction."

Malinak Test., pp. 58-59 (emphasis added).

The evidence showed that DP&L could not maintain its financial integrity and provide safe and reliable service without the DMR. Accord: October 20, 2017 Opinion and Order, ¶ 108 ("we agree with DP&L that the purpose of the DMR is to put the Company in a financial position to provide safe and reliable distribution service").

Given DP&L's poor financial position, the evidence also showed that DP&L could not implement grid modernization without the DMR. DP&L witness Jackson testified:

"Q. There was some questions posed to you about how DP&L would fund the SmartGrid rider and the DIR. Can you explain how those would be funded and whether they could be funded in the absence of the DMR?

A. So we would -- in order to fund the capital required for a SmartGrid program or investments that would roll through the DIR, we would need to access the capital markets to do so. We are not in a position to do that today.

The DMR will enable us to pay down debt to put us in a position in the future to be able to access the debt and equity markets. But where we are today, we are not in a position to be able to access capital to fund SmartGrid and DIR."

Trans. Vol. I, pp. 106-07 (emphasis added).

DP&L witness Malinak confirmed that if "DP&L would not have access to the funds from the financial integrity charges, DP&L would be experiencing severe financial distress and would not have the funds to implement robust grid modernization in a timely manner." Malinak Test., p. 66.

Significantly, the Court criticized the FirstEnergy DMR "because it lacks evidence." 2019-Ohio-2401, ¶ 19. In contrast, DP&L supplied detailed evidence from witnesses Jackson, Malinak and Schroder in support of its DMR.

Grid modernization could not occur "but for" the DMR. (Additionally, as demonstrated in Case. No. 19-0162-EL-RDR, DP&L cannot implement grid modernization without the DMR-E.)

In short, the plurality defined the term "incentive" from R.C. 4928.143(B)(2)(h) as follows: "An incentive generally serves to induce someone to take some action that otherwise would not be taken but for the incentive." 2019-Ohio-2401, ¶ 16. The concurrence offered a similar definition for the term. *Id.* ¶ 64.

Here, unlike in the FirstEnergy case, DP&L is "required" to implement grid modernization, DP&L's use of the DMR funds is "restrict[ed]" to specific purposes, and there are substantial "penalt[ies]" if DP&L fails to implement grid modernization. Those items serve to "induce" DP&L to implement grid modernization, and thus constitute an "incentive" under R.C. 4928.143(B)(2)(h).

B. DP&L IS REQUIRED TO PURSUE "SPECIFIC DISTRIBUTION-MODERNIZATION PROJECTS"

The plurality also criticized the Commission's decision because it included "no directives or timelines regarding specific distribution-modernization projects." *Id.* ¶ 18. In contrast, the Commission-approved Stipulation identifies a specific deadline for DP&L to file its distribution modernization plan. Stipulation, p. 7, ¶ II.3.a.¹ The Stipulation also requires DP&L to include specific projects:

"The Modernization Plan will include a proposal for specific technology components, including but not limited to: advanced metering infrastructure (AMI), including smart meters; meter data

¹ The Commission subsequently extended that deadline to December 28, 2018. November 20, 2018 Entry, ¶ 10.

management systems capable of providing bill-quality data, i.e., data that has gone through the validation, estimation, and editing "VEE" process, to CRES providers and authorized third parties; system-wide distribution automation; and volt-VAR optimization."

Stipulation, p. 7, ¶ II.3.b.

On December 21, 2018, DP&L filed its application to implement grid modernization in Case No. 18-1875-EL-GRD. That application is supported by robust testimony and schedules. The components of that grid modernization plan include:

1. Physical and cyber security associated with grid modernization. Fuller Test., pp. 3-9.
2. Distribution/substation automation. Gebele Test., pp. 6-15.
3. Advanced distribution management system. Id. at 15-23.
4. Conservation voltage reduction and volt/VAR optimization. Id. at 23-24.
5. A geographic information system. Id. at 25-26.
6. A mobile workforce management system. Id. at 26-28.
7. Telecommunications infrastructure. Id. at 28-32.
8. An analytics center of excellence. Hulsebosch Test., pp. 24-30.
9. A new customer information system. Narvaez Test., pp. 4-19.
10. Advanced metering infrastructure. Storm Test., pp. 3-11.
11. AMI-related technology systems. Id. at 12-15.
12. A meter data management system. Id. at 15-17.
13. A meter asset management system. Id. pp. 17-19.
14. An enterprise asset management system. Id. at 19-20.
15. Advanced rate options for customers. Tatham Test., pp. 9-13.

DP&L asks the Commission to take administrative notice of its filings in Case No. 18-1875-EL-GRD, as it shows that the DMR has in fact induced DP&L to pursue grid modernization.

C. THE DMR IS PART OF A BROAD-BASED STIPULATION

Unlike FirstEnergy's DMR, DP&L's DMR results from a negotiated Stipulation. The Court has held that the terms of a stipulation are "accorded substantial weight" by the Commission. Office of Consumers' Counsel v. Pub. Util. Comm'n, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) (per curiam) (citing City of Akron v. Pub. Util. Comm'n, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978) (per curiam)); Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n, 68 Ohio St.3d 559, 563, 629 N.E.2d 423 (1994) (per curiam).

The Stipulation was signed by a large group of diverse parties. The interests represented by the Signatory Parties or Non-Opposing Parties include:

1. the Commission's Staff;
2. DP&L;
3. three representatives of residential low-income customers (Ohio Partners for Affordable Energy, People Working Cooperatively, Edgemont Neighborhood Coalition);
4. the largest municipality in DP&L's service territory (City of Dayton);
5. two large statewide organizations representing industrial customers in DP&L's service territory (Industrial Energy Users-Ohio, Ohio Energy Group);
6. a large industrial customer (Honda of America, Mfg);
7. a large statewide manufacturing association (Ohio Manufacturers' Association Energy Group);
8. a statewide organization representing hospitals in DP&L's service territory (Ohio Hospital Association);

9. one of the largest supermarket chains in the country (Kroger);
10. a retail supplier association (Retail Electric Supply Association); and
11. an environmental organization (EnerNoc).

Stipulation, pp. 27-41, ¶¶ X-XI; Schroder Test., p. 8.

Those parties agreed that "as a package, the Stipulation benefits customers and public interest; promotes effective competition and the development of the competitive marketplace; represents a just and reasonable resolution of all issues in this proceeding; violates no regulatory principle or practice; and complies with and promotes the policies and requirements of Chapter 4928, Revised Code." Stipulation, p. 2 (emphasis added).

The Commission should not disrupt a key term of a Stipulation that enjoys such broad support.

III. THE COMMISSION SHOULD APPROVE THE DMR UNDER ALTERNATIVE STATUTORY PROVISIONS

In addition to being a lawful grid modernization "incentive" under R.C. 4928.143(B)(2)(h), this section demonstrates that DP&L's DMR is lawful under other provisions of the Revised Code. The Commission should hold that DP&L's DMR is lawful under those other sections so that all legal and factual bases for the DMR are fully articulated.

A. THE DMR IS A LAWFUL DISTRIBUTION CHARGE UNDER R.C. 4928.143(B)(2)(h)

In addition to grid modernization incentives, R. C. 4928.143(B)(2)(h) also authorizes charges relating to "distribution service." Specifically, that section states:

"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." Id.

The Court has interpreted the phrase "including, without limitation" to mean that items following that clause are a non-exclusive list. State v. Anderson, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 45 (list is illustrative, not exhaustive); State v. Thompson, 92 Ohio St. 3d 584, 588, 752 N.E.2d 276 (2001) (same); State v. Lozano, 90 Ohio St. 3d 560, 562, 740 N.E.2d 273 (2001) (same). See also Chesapeake Expl., L.L.C. v. Buell, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 35 ("[t]he word 'including' indicates a partial list" that is not exhaustive or otherwise limiting).

Here, the evidence showed that DP&L could not provide safe and reliable distribution service without the DMR. Jackson Test., pp. 17-18; Malinak Test. pp. 58-59. The Commission has already concluded that "the purpose of the DMR is to put the Company in a financial position to provide safe and reliable distribution service." October 20, 2017 Opinion and Order, ¶ 108. The DMR thus necessarily relates to distribution service.

Further, pursuant to the Stipulation, DP&L has transferred all of its generation assets to affiliates. Stipulation, p. 4, ¶ II.1.d.; Trans. Vol. VII, p. 1169 (Garavaglia). The DMR thus necessarily relates to distribution service for this reason as well.

The Commission should hold that DP&L's DMR is lawful under R.C. 4928.143(B)(2)(h) as a charge "regarding the utility's distribution service."

B. THE DMR RESULTS FROM "SINGLE ISSUE RATEMAKING" UNDER R.C. 4928.143(B)(2)(h)

R.C. 4928.143(B)(2)(h) also authorizes "single issue ratemaking." DP&L's DMR is a single rate that addresses a single issue -- maintaining DP&L's financial integrity so that it can make necessary investments in its distribution system. DP&L's DMR thus is a lawful result of single issue ratemaking.

C. THE DMR IS A LAWFUL STABILITY CHARGE UNDER 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." In re Application of Columbus S. Power Co., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 43. Accord: Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 97, (Case No. 14-1297-EL-SSO).

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

2. Relating to: 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 ruled recently that a nonbypassable charge relates to a financial limit on shopping. In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Purchase Power Agreement, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶¶ 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 a competitively-bid Standard Service Offer ("SSO"). 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 an SSO be provided via competitive bidding.

The DMR independently meets the second condition because 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 should not disregard that provision.

Second, not all utility 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., the SSO). 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. "Stabilizing or providing certainty regarding retail electric service": Retail electric service is defined to mean "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." R.C. 4928.01(A)(27). As demonstrated at length in the Initial Post-Hearing Brief of The Dayton Power and Light Company (pp. 15-23), DP&L could not provide safe or reliable retail electric service without the DMR. Malinak Test., pp. 58-59; Jackson Test., pp. 17-18. DP&L also could not implement grid modernization without the DMR, which will provide more stability and certainty around the supply of electricity. Malinak Test., 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).

D. THE DMR IS A LAWFUL ECONOMIC DEVELOPMENT CHARGE UNDER R.C. 4928.143(B)(2)(i)

The DMR is also 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 economic development, job retention, 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 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., 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).

In addition, the Stipulation includes an Economic Development Incentive and an Economic Development Grant Fund, both of which will expire when the DMR expires. Stipulation, pp. 9-12, ¶¶ IV, V. The DMR thus directly promotes economic development.

IV. CONCLUSION

The Commission should conclude that the DMR constitutes an "incentive" for DP&L to implement grid modernization under R.C. 4928.143(B)(2)(h). In addition, the Commission should hold that the DMR is lawful under the separate and independent statutory provisions identified above.

Respectfully submitted,

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

Christopher C. Hollon (0086480)

FARUKI PLL

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3747

Telecopier: (937) 227-3717

Email: jsharkey@ficlaw.com

djireland@ficlaw.com

chollon@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Supplemental Brief of The Dayton Power and Light Company, has been served via electronic mail upon the following counsel of record, this 1st day of August, 2019:

Thomas McNamee
Public Utilities Commission of Ohio
30 East Broad Street, 16th Floor
Columbus, OH 43215-3793
Email:
thomas.mcnamee@ohioattorneygeneral.gov

Attorneys for PUCO Staff

William J. Michael (Counsel of Record)
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215-4203
Email: william.michael@occ.ohio.gov
zachary.woltz@occ.ohio.gov

Attorneys for the Ohio Consumers' Counsel

Kimberly W. Bojko
Brian W. Dressel
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: bojko@carpenterlipps.com
dressel@carpenterlipps.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
Email: fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users – Ohio

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

Attorneys for The Ohio Energy Group

Joseph Olikier (Counsel of Record)
Matthew White
Evan Betterton
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Email: joliker@igsenergy.com
mswhite@igsenergy.com
Ebetterton@igsenergy.com

Attorney for IGS Energy

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
Email: schmidt@sppgrp.com

Attorney for The Energy Professionals of Ohio

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Email: jeffrey.mayes@monitoringanalytics.com

Attorneys for Monitoring Analytics, LLC as
The Independent Market Monitor for PJM

Trent Dougherty
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: tdougherty@the OEC.org

Attorney for Ohio Environmental
Council

Miranda Leppla
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: mleppla@the OEC.org

Attorney for the Environmental Defense Fund

Michael D. Dortch
Richard R. Parsons
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
Email: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for Calpine Energy Solutions LLC

Evelyn R. Robinson
2750 Monroe Boulevard
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorney for PJM Interconnection, L.L.C.

Joel E. Sechler (Counsel of Record)
Carpenter Lipps & Leland
280 N. High St., Suite 1300
Columbus, OH 43215
Email: sechler@carpenterlipps.com

Attorneys for EnerNOC, Inc.

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Email: paul@carpenterlipps.com

Attorney for The Kroger Co.

Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Email: cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

Miranda Leppla
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: mleppla@the OEC.org

Attorneys for The Environmental Law &
Policy Center

Richard C. Sahli
Richard C. Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
Email: rsahli@columbus.rr.com

Tony G. Mendoza, Staff Attorney (pro hac vice)
Kristin Henry, Senior Staff Attorney (pro hac vice)
Gregory E. Wannier, Staff Attorney (pro hac vice)
Sierra Club Environmental Law Program
2101 Webster Street, 13th Floor
Oakland, CA 94612
Email: tony.mendoza@sierraclub.org
kristin.henry@sierraclub.org
greg.wannier@sierraclub.org

Attorneys for Sierra Club

Michelle Grant
Dynergy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
Email: michelle.d.grant@dynergy.com

Attorneys for Dynergy Inc.

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, WV 26003
Email: lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
P.O. Box 90
Roanoke, VA 24002-0090
Email: charris@spilmanlaw.com

Steve W. Chriss
Senior Manager, Energy Regulatory Analysis
Greg Tillman
Senior Manager, Energy Regulatory Analysis
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Email: Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Michael J. Settineri
Gretchen L. Petrucci
Ilya Batikov
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
Email: mjsettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
Attorneys for Dynegy Inc.,
PJM Power Providers Group, and
Retail Energy Supply Association

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
Email: gthomas@gtpowergroup.com

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th Floor
Washington, DC
Email: stheodore@epsa.org

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, OH 45402
Email: ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood Coalition

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Mark T. Keaney
Calfee, Halter & Griswold LLP
41 South High Street
1200 Huntington Center
Columbus, OH 43215
Email: slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com

Attorneys for The City of Dayton and
Honda of America Mfg., Inc.

John R. Doll
Doll, Jansen & Ford
111 West First Street, Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com

Attorneys for Utility Workers of
America Local 175

Matthew W. Warnock
Dylan F. Borchers
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: mwarnock@bricker.com
dborchers@bricker.com

Attorneys for The Ohio Hospital Association

Jeanne W. Kingery
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

Carl Tamm, President
Classic Connectors, Inc. 382 Park Avenue East
Mansfield, OH 44905
Email: crtamm@classicconnectors.com

John F. Stock
Orla E. Collier
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, 26th Floor
Columbus, OH 43215
Email: jstock@beneschlaw.com
ocollier@beneschlaw.com

Attorneys for Murray Energy Corporation and
Citizens to Protect DP&L Jobs

Mark Landes
Brian M. Zets
Isaac Wiles Burkholder & Teetor, LLC
Two Miranova Place
Suite 700
Columbus, OH 43215
Email: mlandes@isaacwiles.com
bzets@isaacwiles.com

Attorneys for Adams County Commissioners

Christine M.T. Pirik
Terrence N. O'Donnell
William V. Vorys
Jonathan R. Secrest
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: cpirik@dickinsonwright.com
todonnell@dickinsonwright.com
wvorys@dickinsonwright.com
jsecrest@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

C. David Kelley, Prosecutor
Dana N. Whalen
110 West Main Street
West Union, OH 45693
Email: prosecutorkelley@usa.com
dana.whalen@adamscountyoh.gov

Attorneys for Monroe Township, Ohio, Sprigg
Township, Manchester Local School District,
and Adams County Ohio Valley School
District

Devin D. Parram
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: dparram@bricker.com

Attorney for People Working
Cooperatively, Inc.

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

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