BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.	)))))	Case No. 16-0395-EL-SSO Case No. 16-0396-EL-ATA Case No. 16-0397-EL-AAM

SUPPLEMENTAL BRIEF OF THE ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND SIERRA CLUB

Pursuant to the July 2, 2019 entry of the Public Utilities Commission of Ohio ("PUCO" or "Commission"), all interested parties were invited to submit supplemental briefs on the impact of the recent decision in *In re Application of Ohio Edison Co.*, Case No. 2017-1664, Slip Opinion 2019-Ohio-2401 ("FirstEnergy DMR Decision") on the above-captioned case by August 1, 2019. In the FirstEnergy DMR Decision, the Supreme Court of Ohio ruled that the Public Utilities Commission of Ohio ("PUCO" or "Commission") must immediately remove the Distribution Modernization Rider (the "FirstEnergy DMR") from FirstEnergy's Electric Security Plan. Through the FirstEnergy DMR, the Commission awarded $204 million per year for three years to FirstEnergy with the stated intent that FirstEnergy invest in grid modernization projects. However, the Court overturned the Commission decision because the FirstEnergy "companies are not *required* to make any investments to modernize the distribution grid in exchange for DMR revenues." *FirstEnergy DMR Decision* at ¶ 18.

The Commission's October 20, 2017 Opinion and Order in the above-captioned case awarded Dayton Power & Light ("DP&L") a Distribution Modernization Rider (the "DP&L DMR"), identical in form to the FirstEnergy DMR and under which DP&L collects $105 million per year for three years. It is similarly devoid of any actual requirements that DP&L use the

funds to modernize the distribution grid. *See Opinion and Order*, Case No. 16-395-EL-SSO, et al. at 6 (Oct. 20, 2017) (*available at http://dis.puc.state.oh.us/TiffToPDf/A1001001 A17J20B21255J0 0544.pdf*). As such, for the reasons included in this Supplemental Brief by the Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club ("Environmental Advocates"), as well as those raised in the Environmental Defense Fund and Ohio Environmental Council's Nov. 17, 2017 Application for Rehearing, the Commission should immediately remove the DP&L DMR from DP&L's Electric Security Plan and order DP&L to cease collecting this unlawful and unreasonable rider.

I. Facts and Procedure

A. DP&L Electric Security Plan Proceedings: PUCO Case No. 16-395-EL-SSO, et al.

Dayton Power and Light Company ("DP&L") filed its application for a standard service offer in the form of an electric security plan (ESP) under the laws outlined at O.R.C. § 4928.143 on February 22, 2016. The Environmental Advocates all intervened in the case to represent the interests of their members, hoping to develop with the other intervening parties an equitable ESP. An initial stipulation was reached between certain parties in January 2017 but was later replaced by an Amended Stipulation, filed March 14, 2017. The Amended Stipulation contained the proposed DP&L DMR, and was not joined by the Environmental Advocates.

After the Commission hearing beginning April 3, 2017, various parties, including EDF and OEC, argued against the DP&L DMR in post-hearing briefs. Yet the Commission ruled that the Amended Stipulation satisfied statutory requirements and, specifically relevant to this Supplemental Brief, held that the DP&L DMR benefits the public interest because "grid modernization will improve reliability by reducing the number of outages and improving responses to outages by the EDUs" and that grid modernization "is necessary to deliver

innovative products to consumers, to empower consumers to make informed decision[s] in the marketplace and to improve the efficiency of the grid..." *Opinion and Order* at 19, 28 (Oct. 20, 2017).[1]

The Commission also ruled that the DP&L DMR did not violate any important regulatory principles, holding the DP&L DMR was authorized under O.R.C. § 4928.143(B)(2)(h)[2] because it is purportedly a distribution modernization incentive. The Commission further stated that the "purpose of the [DP&L] DMR is to put the Company in a financial position to provide safe and reliable distribution service and to modernize its distribution grid." *Id.* OEC and EDF filed an Application for Rehearing of the October 20, 2017 Opinion and Order, arguing that the DP&L DMR was unreasonable and unlawful because it does not benefit the ratepayers or the public interest, and that it violated important state regulatory principles and practices. The Application was denied in the Third Entry on Rehearing (Sept. 19, 2018).[3]

As a result, the Commission's decision approved the following provisions, which are the subject of this Supplemental Brief and relevant to the FirstEnergy DMR Decision:

> f. DP&L will implement DMR for years one through three of the term of the ESP. The DMR shall be designed to collect $105 million in revenue per year. With Commission approval, DP&L may have the option of extending the duration of the DMR for an additional two years….
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> g. Cash flow from the DMR will be used to (a) pay interest obligations on existing debt at DPL Inc. and DP&L; (b) make discretionary debt prepayments at DPL Inc. and DP&L; and (c) position DP&L to make

[1] In support of its conclusion, the Commission found that "the possible downgrade of DP&L's credit rating and the actual downgrade of DPL's credit rating has had an adverse effect upon the Company's ability to access capital markets and invest in the grid," *Id.* at 24, that "DP&L and its parent company have taken affirmative steps to address

[2] The relevant text of O.R.C. §4928.143(B)(2)(h) is as follows: "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." (emphasis added by Commission).

[3] IGS withdrew from the Amended Stipulation as a result of the Commission's order making the Reconciliation Rider non-bypassable for customers served by competitive retail electric suppliers, and a brief rehearing was held. It is not addressed here as it is not relevant to the Environmental Advocates' arguments.

> capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure.

Opinion & Order, Case No. 16-0395-EL-SSO, Pub. Util. Comm. Ohio, (Oct. 20, 2017), at 6.

B. FirstEnergy Electric Security Plan Proceedings and Supreme Court of Ohio Ruling

Ohio Edison Company, Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy") filed an application on August 4, 2014 for a standard service offer in the form of an electric security plan (ESP) under the laws outlined at O.R.C. § 4928.143. After lengthy hearings, including rehearing due to a decision by the Federal Energy Regulatory Commission (FERC) rescinding a prior waiver (*see Elec. Power Supply Assn. v. FirstEnergy Solutions Corp.*, 155 FERC ¶¶ 61, 101 (April 27, 2016), Commission Staff first proposed the FirstEnergy DMR. In its Fifth Entry on Rehearing, the Commission held that the FirstEnergy DMR was a valid provision in an ESP authorized under R.C. 4928.143(B)(2)(h), approving recovery of $132.5 million per year for three years under the FirstEnergy DMR, adjusted upward to account for federal corporate taxes to $204 million per year, with a possible two year extension. *Fifth Entry on Rehearing* at ¶¶ 185; 189; 202; 210.

The Environmental Advocates, as well as other parties, filed applications for rehearing, arguing that the FirstEnergy DMR does not incent investment in grid modernization because the FirstEnergy Companies are not required to spend any of the DMR revenues on grid initiatives. *See App. for Rehearing of Fifth Entry on Rehearing of EDF, ELPC, and OEC*, (Nov. 14, 2016); *App. for Rehearing of Fifth Entry on Rehearing of Sierra Club*, (Nov. 14, 2016). The Commission denied those applications, and Environmental Advocates, as well as other parties, appealed the final Commission decision to the Supreme Court of Ohio in late November 2017.

The Environmental Advocates argued, in part[4], that R.C. 4928.143(B)(2)(h) does not permit distribution modernization riders which fail to require any grid modernization or other distribution investments, and that the DMR was unreasonable because, contrary to the Commission's established standards, it does not provide any actual safeguards to ensure the revenues be used for grid modernization. *See* Ohio Supr. Ct. Case No. 2017-1664, *Merit Brief for Appellants Ohio Environmental Council, Environmental Defense Fund, and Environmental Law and Policy Center; Merit Brief of Appellant Sierra Club* (Feb. 26, 2018).

After briefing and oral arguments, the Supreme Court of Ohio agreed with the Environmental Advocates and other Appellants, determining that the FirstEnergy DMR is unlawful and unreasonable. Specifically, the Court held that the FirstEnergy DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h), noting 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 DMR Decision* at ¶¶ 14; 18. There are "no directives or timelines regarding specific distribution-modernization projects." And, "in fact, the commission made it clear there are no plans for FirstEnergy to take on any modernization projects in the immediate future", nor was there "any effective condition or penalty on the companies' receipt of revenues if the DMR funds did not serve the intended purpose" of incentivizing FirstEnergy to take on grid modernization projects. *Id.* at ¶ 18.

The Court further held that the few conditions the Commission did impose were not sufficient to protect ratepayers because: (1) periodic reviews of how FirstEnergy spent the DMR would not be publicly available until well after the DMR funds were recovered and spent, and since R.C. 4905.32 bars refunds for ratepayers there was no remedy available if FirstEnergy

[4] The Environmental Advocates raised additional arguments that were either not addressed by the Supreme Court's decision as moot, or denied based upon a question of jurisdiction, and although not addressed in this limited scope, maintain those arguments as well.

misused the funds (*See In re Rev. of Alt. Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶¶15-20); and, (2) PowerForward delays implementation of grid modernization projects, so the Commission's requirement that FirstEnergy "demonstrate sufficient progress" in the implementation of approved grid modernization programs means FirstEnergy will likely recover most if not all of the funds prior to the Commission ever approving a grid modernization project. *FirstEnergy DMR Decision* at ¶ 27. The Court ordered FirstEnergy to immediately remove the DMR from its ESP. *Id.* at ¶ 56.

II. Argument

DP&L's DMR is identical in structure to the FirstEnergy DMR, which was held to be unlawful and unreasonable by the Supreme Court of Ohio, as the DP&L DMR also merely contains "conditions on the DMR [that] contain no consequences—and offer no protection to ratepayers." *FirstEnergy DMR Decision* at ¶ 27. Based upon the similarity of the two DMRs, there is no question that the FirstEnergy DMR Decision requires the Commission to order DP&L to immediately remove the unlawful and unreasonable DMR from its electric security plan and immediately cease collecting the rider. As with the FirstEnergy DMR, there must be actual requirements and strings attached to money given to utilities up front; otherwise, it cannot be deemed an incentive, and the "PUCO staff's wishful thinking cannot take the place of real requirements, restrictions, or conditions imposed by the commission for the use of the DMR funds." *FirstEnergy DMR Decision* at ¶ 19.

A. The Supreme Court of Ohio has held that a rider structured like the DP&L DMR is unreasonable and unlawful under O.R.C. 4928.143(B)(2)(h) because it does not benefit the ratepayers nor the public interest, and fails to act as an incentive.

The Supreme Court of Ohio has held that "incentives" consisting only of conditions that have no consequences—and therefore offer no protection to ratepayers if the utility fails to honor

them—do not meet the statutory definition of incentive and are unlawful under R.C. 4928.143(B)(2)(h). *See FirstEnergy DMR Decision* at ¶ 29. The DP&L DMR is exactly that—a rider that forks over ratepayer money without any tangible consequences or protections if DP&L fails to use those funds for their purported purposes of grid modernization.

In its October 20, 2017 Opinion and Order in this case, the Commission held that DP&L and its parent company have possible credit issues, that DP&L has taken affirmative steps to combat these problems, and that the DP&L DMR provides an "incentive to DP&L to focus its efforts on grid modernization," making the DMR beneficial and in the public interest. *Opinion and Order*, Case No. 16-395-EL-SSO, at 26-28 (Oct. 20, 2017). The Commission pointed to nothing in the record demonstrating how the revenue from DMR would incentive DP&L to accomplish the goal of grid modernization; requiring the recipient to make some type of investment to modernize the grid in exchange for DMR revenues is necessary for the rider to constitute an incentive. *See FirstEnergy DMR Decision* at ¶ 18. In fact, Staff Witness Patrick Donlon specifically noted that the DMR would be used to improve DP&L's ability to access capital markets—meaning the DMR was designed as credit support—so DP&L could eventually invest in grid modernization. Test. of Donlon at 4 (Mar. 22, 2017). DP&L's Witness Sharon Schroder admitted the DP&L DMR merely put the Company "on a path toward achieving and maintaining investment grade" so it could eventually maintain access to reasonably priced debt and borrow money to make investments in the distribution system. Test. of Schroder, Company Ex. 3 at 10 (Mar. 22, 2017). At no point was evidence introduced indicating DP&L was required to actually fund infrastructure improvement projects. DP&L was given funds up front without requirements, removing any incentive for the utility to actually invest in the distribution grid.

The complete lack of any obligation by DP&L is even more clear when looking at the initial Stipulation filed in this case. The initial stipulation contained Rider DIR-B, which would have provided $35 million per year to "implement back-bone infrastructure projects designed to enable and support a longer term Smart Grid and Advanced Metering Infrastructure (AMI) roll out" and use the remaining years of the ESP for projects enabling and support a grid modernization plan. *Stipulation and Recommendation*, at 7 (January 30, 2017). However, it was removed in the Amended Stipulation and replaced with the DP&L DMR, which has no restrictions or requirements that any portion of the funds be used for grid modernization, and instead would permit every single penny, if DP&L so chooses, to be used to pay down debts.

The bottom line is that, as in the FirstEnergy DMR Decision, there is no requirement for DP&L to make any investment to modernize the grid in exchange for DMR revenue. Hoping DP&L does the right thing and invests in the grid is not the same as requiring DMR revenue be contingent on real progress toward grid modernization: the DMR is not an "incentive" under Ohio law. *FirstEnergy DMR Decision* at ¶ 19.

a. The "conditions" placed on recovery of the DMR revenue are not sufficient to protect ratepayers.

Although the Commission directed Staff to conduct an "ongoing review" of DP&L's use of the DMR revenue, as it did in the FirstEnergy matter, such review does not sufficiently protect ratepayers, who are without any remedy if the funds are collected and misused.[5] *Opinion and Order* at 27 (Oct. 20, 2017). While the Commission tried to establish the reviews as making the DMR equitable and in the public interest of ratepayers, it failed to provide any accountability should DP&L misuse the funds. Staff was given no power to stop DP&L from collecting the

[5] No refund mechanism was included in the DMR, which is required under R.C. 4905.32 in order for utilities to refund money that was unlawfully collected. *See In re Rev. of Alt. Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶¶15-20.

DMR if it failed to use the cash flow for distribution modernization. Requiring the report be included in "any proceeding in which DP&L seeks an extension of the DMR," or after the termination of the DMR, means DP&L could receive over $300 million without spending a cent on distribution modernization before the Commission could do anything to stop them. *Id.*

Such a framework was explicitly rejected by the Supreme Court in the FirstEnergy DMR Decision. Because this type of periodic review will not be publicly available until well after the DMR funds are recovered and spent, there is no remedy available to sufficiently protect ratepayers if FirstEnergy misused their DMR funds, and the same is true for the DP&L DMR. *FirstEnergy DMR Decision* at ¶ 24, 26. Based upon the Commission's construction of the DP&L DMR—identical to the FirstEnergy DMR—DP&L gets the DMR funds whether it uses them to modernize the grid or not. We do not know how much, if any amount, DP&L is spending on grid modernization, precisely because the DMR does not incentivize or mandate any particular action, and there is no penalty for failure to use the funds in such a manner. Put simply, there is no mechanism that pushes DP&L in one direction or another, and as such, the DMR is not an incentive as defined by Ohio law.

Additionally, in approving the DP&L DMR, the Commission noted that DP&L would be required to file a plan, which would be guided by he PowerForward initiative. Third Entry on Rehearing, Case No. 16-395-EL-SSO, et al. at ¶22. However, as was the case with FirstEnergy's DMR, the condition is "esssentially meaningless" because the entirety of the rider may be collected prior to any projects being approved. *FirstEnergy DMR Decision* at ¶ 27-29.

The Commission should order DP&L to immediately remove the DMR from its ESP and cease collecting the DMR revenue.

III. Conclusion

The DP&L DMR is an unlawful and unreasonable rider because it does not benefit DP&L's customers and violates R.C. §4928.143(B)(2)(h). The Supreme Court of Ohio ruled in the *FirstEnergy DMR Decision* that a virtually identical rider was unlawful and unreasonable, and ordered FirstEnergy to immediately remove the DMR from their electric security plan. The FirstEnergy DMR Decision effectively overrules the Commission's decision approving the DP&L DMR, and the Commission should immediately order DP&L to remove the DMR from their electric security plan and cease collecting the illegal charge. DP&L customers are currently being charged for an illegal rider, and because of Ohio law, they will not be able to recoup the money DP&L illegally collected. Therefore, the Commission should order DP&L to immediately remove the Distribution Modernization Rider from its electric security plan and cease collecting the rider. Any future rider related to grid modernization must require monies collected be used for the alleged purpose and impose consequences if those funds are spent in a contrary manner, per the *FirstEnergy DMR Decision*, Ohio Supr. Ct. Case No. 2017-1664.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Supplemental Brief of the Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club has been served upon the following parties via electronic mail on August 1, 2019.

/s/ Miranda Leppla
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Summary: Brief Supplemental Brief of Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club electronically filed by Ms. Miranda R Leppla on behalf of Environmental Defense Fund and Environmental Law & Policy Center and Ohio Environmental Council and Sierra Club