

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 16-0395-EL-SSO
The Dayton Power and Light Company for		
Approval of Its Electric Security Plan	:	

In the Matter of the Application of	:	Case No. 16-0396-EL-ATA
The Dayton Power and Light Company for		
Approval of Revised Tariffs	:	

In the Matter of the Application of	:	Case No. 16-0397-EL-AAM
The Dayton Power and Light Company for		
Approval of Certain Accounting Authority	:	
Pursuant to Ohio Rev. Code § 4905.13		

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**THE DAYTON POWER AND LIGHT COMPANY'S  
MOTION TO STRIKE SUPPLEMENTAL BRIEFS**

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Pursuant to Ohio Admin. Code § 4901-1-12(A), The Dayton Power and Light Company ("DP&L") moves to strike the August 1, 2019 supplemental briefs submitted by The Office of the Ohio Consumers' Counsel ("OCC"); Interstate Gas Supply, Inc. ("IGS"); and Environmental Defense Fund ("EDF"), Environmental Law & Policy Center ("ELPC"), Ohio Environmental Council ("OEC"), and Sierra Club (collectively, the "Environmental Parties"). In their supplemental briefs, OCC, IGS, and the Environmental Parties argue – nearly all for the first time – that DP&L's Distribution Modernization Rider ("DMR") is not an "incentive" to implement grid modernization under R.C. 4928.143(B)(2)(h). DP&L disputes that contention, and has shown that its DMR is lawful not only as an "incentive" under subsection (B)(2)(h), but also under other statutory provisions as well. E.g., Aug. 1, 2019 Supplemental Brief of The Dayton Power and Light Company.

Setting aside their meritless arguments, the intervenors' supplemental briefs suffer from two fundamental flaws. First, any party that did not join the March 14, 2017 Amended Stipulation and Recommendation could have challenged the legality of the DMR in briefs and on rehearing. R.C. 4903.10. IGS later had the opportunity to do so after it withdrew from the settlement. Since OCC, IGS, ELPC, and Sierra Club have never argued that the DMR is not an "incentive" until now, they have waived the issue. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75. Second, neither the Environmental Parties nor IGS are adversely affected by the DMR, since they do not pay it and have no evidence showing that it will adversely affect their interests. R.C. 4903.221. They thus lack standing to challenge the DMR. Ohio Contrs. Ass'nt v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). Accordingly, the Commission should strike their supplemental briefs.

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**MEMORANDUM IN SUPPORT OF THE DAYTON POWER AND LIGHT  
COMPANY'S MOTION TO STRIKE SUPPLEMENTAL BRIEFS**

Principles of waiver and standing are rooted in Ohio law. R.C. 4903.10, 4903.11, and 4903.221. Accord: Ohio Admin. Code § 4901-1-38(B) ("The commission may . . . waive any requirement of this chapter for good cause shown, other than a requirement mandated by statute from which no waiver is permitted."). The supplemental briefs submitted by OCC, IGS, and the Environmental Parties violate those principles by raising untimely arguments against DP&L's DMR, and by challenging a charge that does not adversely affect them. Disc. Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2005-Ohio-53, 859 N.E.2d 957, ¶ 56; Ohio Contrs. Ass'nt v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). As shown below, the Commission should strike their supplemental briefs and uphold the legality of the DMR.

I. FACTUAL BACKGROUND

DP&L commenced this proceeding in February 2016 to implement its third Electric Security Plan. OCC, IGS, and the Environmental Parties, among others, moved to intervene, and each articulated an interest in the case under R.C. 4903.221 and Ohio Admin. Code § 4901-1-11. While OCC represents the interests of DP&L's residential customers, the Environmental Parties opposed proposals relating to coal-fired power plants in DP&L's initial application. Mar. 1, 2016 Motion to Intervene by the Environmental Law & Policy Center, p. 2 (asserting "an interest in ensuring the protection and promotion of cost-effective clean and efficient energy in the state"); Apr. 6, 2016 Motion to Intervene by Sierra Club, p. 4 (arguing the organization has an interest in "promoting clean-energy resources and reducing reliance on aging coal-burning generation"); Mar. 24, 2016 Joint Motion to Intervene by the Ohio Environmental Council and Environmental Defense Fund, p. 4 ("EDF and OEC have a real and substantial interest in the stability of retail electricity service and competitive energy markets, and the

positive effect both have on the further deployment of cost-effective, clean, and efficient energy in Ohio"). IGS, meanwhile, asserted an interest in any impact on "the competitive conditions for retail and wholesale electric service in DP&L's service territory." Mar. 23, 2016 Motion to Intervene and Memorandum in Support of Interstate Gas Supply, Inc., p. 6.

After amending its application in October 2016, DP&L and several parties (including IGS) entered into the March 14, 2017 Amended Stipulation and Recommendation ("Stipulation"), which provided for the DMR among other provisions. At the evidentiary hearing on the Stipulation and in their post-hearing briefs, the Environmental Parties did not introduce any evidence that the DMR would adversely affect them, and OCC failed to assert that the DMR was not authorized under R.C. 4928.143(B)(2)(h).

In modifying and approving the Stipulation, the Commission allowed DP&L to collect the DMR, finding "that the DMR is intended to incent the Company to focus its innovation and resources on modernizing its distribution system and that the DMR is a distribution modernization incentive authorized by R.C. 4928.143(B)(2)(h)." Oct. 20, 2017 Opinion and Order, ¶ 101. Following that Order, OCC, IGS, OEC, and EDF filed applications for rehearing under R.C. 4903.10. Although OCC raised various arguments against the DMR on rehearing, it did not challenge the rider's legality under R.C. 4928.143(B)(2)(h), much less dispute whether the DMR is an "incentive" to implement grid modernization. Nov. 20, 2017 Application for Rehearing by The Office of the Ohio Consumers' Counsel. IGS challenged only the Commission's modification of the Reconciliation Rider. Nov. 20, 2017 Application for Rehearing and Memorandum in Support by Interstate Gas Supply, Inc. Sierra Club and ELPC did not seek rehearing.

The Commission denied the intervenors' applications for rehearing, and again found that the DMR is a "provision[] regarding [a] distribution infrastructure and modernization incentive[]" under subsection (B)(2)(h). Sept. 18, 2018 Third Entry on Rehearing, ¶ 22. OCC filed yet another rehearing application, which did not address whether the DMR is an "incentive" under R.C. 4928.143(B)(2)(h). Oct. 19, 2018 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel. After the Commission quickly denied rehearing,<sup>1</sup> OCC appealed to the Supreme Court of Ohio. Jan. 7, 2019 Notice of Appeal by The Office of the Ohio Consumers' Counsel. No other party appealed.

IGS separately withdrew from the Stipulation over the modification to DP&L's Reconciliation Rider. Oct. 19, 2018 Notice of Withdrawal from the Amended Stipulation and Recommendation of Interstate Gas Supply, Inc. The Commission then held an evidentiary hearing to allow IGS to oppose the Stipulation and file briefs. While IGS challenged the DMR on various grounds, it did not argue that the DMR does not qualify as an "incentive" under subsection (B)(2)(h). May 15, 2019 Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc.; May 30, 2019 Supplemental Post-Hearing Reply Brief of Interstate Gas Supply, Inc. In addition, it did not show how it was adversely affected by a charge it does not pay.

II. OCC HAS WAIVED THE RIGHT TO CHALLENGE WHETHER THE DMR IS AUTHORIZED PURSUANT TO R.C. 4928.143(B)(2)(h)

Over the course of this proceeding, OCC has had multiple opportunities to challenge whether the DMR is an "incentive" to implement grid modernization under subsection (B)(2)(h). It has never done so. OCC has, therefore, waived the arguments now raised in its supplemental brief. The Commission should not tolerate this second bite at the apple. Sept. 18, 2018 Third Entry on Rehearing, ¶ 17.

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<sup>1</sup> Nov. 7, 2019 Fourth Entry on Rehearing.

OCC's first opportunity to articulate a legal challenge to the DMR was more than two years ago in its post-hearing briefs. May 5, 2017 Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel; May 15, 2017 Reply Brief by The Office of the Ohio Consumers' Counsel. By failing to specifically challenge the legality of the DMR under subsection (B)(2)(h), OCC waived that argument in this proceeding. In the Matter of the Application of Columbia Gas of Ohio, Inc., Case Nos. 89-616-GA-AIR, et al., May 24, 1989 Entry on Rehearing, 1989 Ohio PUC LEXIS 1396, \*13 ("Since the company failed to rebut OCC's exhibits or to address the issue of double recovery on brief, the company not only failed to meet its burden of proof but it effectively waived the issue by not addressing it on brief.").

In addition, following the Opinion and Order, OCC did not challenge the Commission's express authorization of the DMR under R.C. 4928.143(B)(2)(h) on rehearing. Pursuant to R.C. 4903.10(B), an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds upon which the applicant considers the order [of the Commission] to be unreasonable or unlawful." (Emphasis added.) By failing to set forth this specific ground in its first application for rehearing, the issue is waived. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75; Disc. Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2005-Ohio-53, 859 N.E.2d 957, ¶ 56. Accord: Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 533 N.E.2d 353 (1988) (holding that R.C. 4903.10 is "jurisdictional, permits an application for rehearing after any order, and requires an application for rehearing to preserve the right to appeal an issue").

For each of these reasons, the Commission should strike OCC's supplemental brief.

### III. THE ENVIRONMENTAL PARTIES LACK STANDING TO CHALLENGE THE DMR

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The Supreme Court of Ohio has long recognized that while intervention is liberally permitted before the Public Utilities Commission of Ohio, such proceedings are not a "free-for-all" in which everyone, regardless of interest, is entitled to be heard. City of Cleveland v. Pub. Util. Comm., 127 Ohio St. 432, 440, 189 N.E. 5 (1934). "If such were the law, it would be bad law, as it would run counter to the fundamental rule to the effect that 'He who has no interest in the subject of litigation has no right to be heard.' Such a departure from the established rules of procedure could result in nothing less than bedlam." Id. "But such is not the law." Id. Pursuant to R.C. 4903.221, a "person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding." (Emphasis added.)

In deciding whether to permit intervention, the Commission considers the "nature and extent of the prospective intervenor's interest." R.C. 4903.221(B)(1). These requirements mirror the requirements of traditional standing, which require a party to show that it has "suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." State ex rel. Food & Water Watch v. State, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19. Further, an organization has standing on behalf of its members only when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Ohio Contrs. Ass'nt v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (emphasis added).

Here, there has been no showing that the Environmental Parties or any of their members have been adversely affected by the DMR. None of them claim that they will be paying it. Indeed, the Environmental Parties moved to intervene in this proceeding to ensure that DP&L did not receive a rider to support its fleet of coal-fired power plants.<sup>2</sup> That goal has been accomplished.<sup>3</sup> Mar. 14, 2017 Amended Stipulation and Recommendation, p. 4 ("DP&L (or the affiliate to whom the generation assets are transferred) will commit to commence a sale process to sell to a third party its ownership in Conesville, Miami Fort, and Zimmer Stations."). While DP&L did not challenge the Environmental Parties' intervention in this case, the Commission should not allow a "free for all" in which they and other intervenors may assert any position on any issue regardless of the relationship between that issue and their purported interests. Since the Environmental Parties do not pay the DMR, they should not be permitted to challenge it. R.C. 4903.221; Cleveland, 127 Ohio St. at 440.

In addition, the Commission should strike their supplemental brief insofar the Environmental Parties submit it on behalf of Sierra Club and ELPC, neither of which filed applications for rehearing from the October 20, 2017 Opinion and Order. Since they could have challenged the DMR's authorization under R.C. 4928.143(B)(2)(h) at that time and did not do so,

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<sup>2</sup> Mar. 1, 2016 Motion to Intervene by the Environmental Law & Policy Center, p. 2 ("Additionally, ELPC seeks the Commission's careful scrutiny of the reasonableness of DP&L's application, which implicates ELPC's interests in advocating for alternative energy solutions over reliance on polluting coal plants." ) (emphasis added); Mar. 24, 2016 Joint Motion to Intervene by the Ohio Environmental Council and Environmental Defense Fund, p. 4 ("As environmental advocacy organizations, EDF and OEC have a special interest in the outcome of this case because of the direct impact that decisions on the Application, including the proposed power purchase agreement for over 2,000 MW of coal generation . . . . ") (emphasis added); Apr. 6, 2016 Motion to Intervene by Sierra Club, p. 4 ("First, the nature and extent of Sierra Club's interests in the proceeding are real and substantial, as the issues involved are directly related to Sierra Club's interests in promoting clean-energy resources and reducing reliance on aging coal-burning generation." ) (emphasis added) (footnotes omitted).

<sup>3</sup> Although the Commission authorized the Reconciliation Rider relating to DP&L's interest in the Ohio Valley Electric Corporation, the Environmental Parties did not challenge the Reconciliation Rider on rehearing. Nov. 17, 2017 Application for Rehearing of the Opinion and Order, Entered October 20, 2017, by the Ohio Environmental Council and Environmental Defense Fund.



Sierra Club and ELPC, like OCC, have waived that issue. R.C. 4903.10; Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75.

IV. IGS FAILED TO ADDRESS THE LEGALITY OF THE DMR UNDER R.C. 4928.143(B)(2)(h) AND LACKS STANDING TO CHALLENGE IT

Like OCC, IGS failed to challenge the Commission's authorization of the DMR as an "incentive" to implement grid modernization under R.C. 4928.143(B)(2)(h) in its post-hearing briefs. May 15, 2019 Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc.; May 30, 2019 Supplemental Post-Hearing Reply Brief of Interstate Gas Supply, Inc. Thus, IGS has waived the issue and cannot assert it here. In the Matter of the Application of Columbia Gas of Ohio, Inc., Case Nos. 89-616-GA-AIR, et al., May 24, 1989 Entry on Rehearing, 1989 Ohio PUC LEXIS 1396, \*13. The Commission should strike IGS's supplemental brief for this reason alone.

In addition, like the Environmental Parties, IGS is not adversely affected by the DMR since IGS does not pay the DMR. While IGS may be interested in "competitive conditions for retail and wholesale electric service in DP&L's service territory,"<sup>4</sup> there is no evidence that IGS has been adversely affected (i.e., injured in fact) by the DMR. State ex rel. Food & Water Watch v. State, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19. In fact, RESA remains a Signatory Party to the Stipulation. Stipulation, p. 40. IGS is a member of RESA, and IGS witness White is the President of RESA. Trans. Vol. VIII, p. 1368. The Stipulation, including the DMR, is thus supported by a marketer group of which IGS is a member with a leadership role. The Commission should, therefore, strike IGS's supplemental brief for this reason as well.

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<sup>4</sup> Mar. 23, 2016 Motion to Intervene and Memorandum in Support of Interstate Gas Supply, Inc., p. 6.

V. CONCLUSION

For the foregoing reasons, the Commission should strike the August 1, 2019 supplemental briefs submitted by The Office of the Ohio Consumers' Counsel; Interstate Gas Supply, Inc.; and Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club.

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I certify that a copy of the foregoing The Dayton Power and Light Company's Motion to Strike Supplemental Briefs has been served via electronic mail upon the following counsel of record, this 21st day of August, 2019:

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Jeffrey S. Sharkey

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**Commission of Ohio Docketing Information System on**

**8/21/2019 5:13:49 PM**

**in**

**Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM**

Summary: Motion The Dayton Power and Light Company's Motion to Strike Supplemental Briefs electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company