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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

- In the Matter of the Application of )  
The Dayton Power and Light Company for ) Case No. 08-1094-EL-SSC **PUCO**  
Approval of its Electric Security Plan )
- In the Matter of the Application of )  
The Dayton Power and Light Company for ) Case No. 08-1095-EL-ATA  
Approval of Revised Tariffs )
- In the Matter of the Application of )  
The Dayton Power and Light Company for ) Case No. 08-1096-EL-AAM  
Approval of Certain Accounting Authority )  
Pursuant to Ohio Rev. Code 4905.13 )
- In the Matter of the Application of )  
The Dayton Power and Light Company for ) Case No. 08-1097-EL-UNC  
Approval of its Amended Corporate )  
Separation Plan )

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**POST-HEARING BRIEF**  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**INTRODUCTION**

All parties, except Cargill, Inc.(Cargill), have submitted a Stipulation and Recommendation (Stipulation) that would resolve all of the issues in this case. This level of consensus is extraordinary, and reflects the diligent efforts of all of the parties,

including Cargill, to reach a workable compromise. That effort should be recognized, and the Stipulation should be approved without modification.

The Stipulation provides significant benefits. It will bring substantial stability and predictability to generation prices for years. It will freeze distribution prices for years. It will establish a system for developing and implementing advanced metering systems. It provides a framework for energy efficiency development. These benefits are achieved through stipulated rates lower than a market rate option. This carefully structured stipulation provides benefits for all stakeholders and should be approved without modification.

### **PROCEDURAL HISTORY**

In October of 2008, the Dayton Power and Light Company (DP&L or company) filed an application to establish an electric security plan (ESP) and for associated relief. Many parties filed testimony regarding the application in January, 2009 and the Staff submitted testimony on selected issues in February, 2009.

A pre-hearing conference was held on February 9, which was followed by an intensive series of meetings among all the parties which went on for days. The hearing, originally scheduled to begin February 11, was called and continued to allow further discussions. These negotiations resulted in a stipulation which was filed on February 24 along with both supporting testimony and one piece of opposing testimony. Hearing was held on that same day. This very accelerated schedule was possible because the company and Cargill knew what each others' witnesses would say in testimony due to the extensive and intensive settlement discussions.

A briefing schedule was established to allow the sole non-signatory, Cargill, to make its argument in opposition to paragraph 3 of the stipulation which continued the non-bypassability of the rate stabilization surcharge during the two additional years of stabilized rates provided for in the stipulation.

## **ARGUMENT**

### **Introduction**

There are two questions the Commission must decide. These are: can the stipulation be approved and should the stipulation be approved as proposed. Both questions are readily resolved in the affirmative in the section that follow.

### **The Stipulation complies with Ohio Revised Code Section 4928.143(C)(1)**

To approve an ESP, the Commission must find "... that the plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under..." the market rate option. Ohio Revised Code Section 4928.143(C)(1). The uncontroverted record shows that the stipulation does exactly this. Company witness Neimann did this comparison and concludes that the stipulation will result in rates more favorable than an auction. DPL Ex. 3. On this basis, the Commission can approve the stipulation pursuant to Ohio Revised Code Section 4928.143(C)(1).

Having determined that the Commission may approve the stipulation, the other question is whether the Commission should approve the stipulation. The answer is yes as shown in the following section.

### **The Stipulation Should be Approved Without Modification**

Parties to proceedings before the Commission are permitted by Rule 4901-1-30 of the Ohio Administrative Code to enter into stipulations.<sup>1</sup> Although the terms of such stipulations are not binding on the Commission, they are given substantial weight.<sup>2</sup> In a number of prior proceedings, the Commission has addressed the standard of review for stipulations recommended by the parties.<sup>3</sup> Essentially, the Commission considers whether a stipulation, which is the result of considerable time and effort by the parties, is reasonable and should be adopted. The Commission applies the following criteria, which have been endorsed by the Supreme Court of Ohio, in determining the reasonableness of a stipulation:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

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<sup>1</sup> Ohio Admin. Code § 4901-1-30(A) (West 2008) (“Any two or more parties may enter into a written or oral stipulation concerning issues of fact or the authenticity of documents.”).

<sup>2</sup> *Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370, 1373. (1992) (“The commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight.” (quoting *Akron v. Pub. Util. Comm’n*, 55 Ohio St. 2d 155, 157, 378 N.E.2d 480, 483 (1978))); *see also* Ohio Admin. Code § 4901-1-30(D) (West 2008) (“No stipulation shall be considered binding upon the commission.”).

<sup>3</sup> *See, e.g. In re Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (Opinion and Order) (June 29, 2000); *In re Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (April 14, 1994); *In re Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR (Opinion and Order) (January 31, 1989).

- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?<sup>4</sup>

The Stipulation, as recommended by the parties in this case, complies fully with the Commission's three-part test and should therefore be adopted by the Commission.

**A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.**

The Stipulation recommended in this case is the outcome of serious bargaining by many capable and knowledgeable parties.<sup>5</sup> All parties to this case, except Cargill, are also parties to the Stipulation.<sup>6</sup> The parties regularly participate in proceedings before the Commission and are experienced in regulatory matters. They have taken part in numerous proceedings involving DP&L and other companies in the electric industry and are frequent participants in rate proceedings before the Commission. Accordingly, these parties are particularly well-informed of DP&L's operations and rate structure.

Further, the parties represent diverse interests, including the interests of the utility; residential, industrial, and low-income consumers; marketers; and the state. The parties were represented by competent and practiced counsel of the public utilities bar. Counsel engaged in this case routinely appear before the Commission, representing clients in complex utility proceedings of all types, including electric matters involving

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<sup>4</sup> *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559, 561, 629 N.E.2d 423, 426 (1994); *Consumers' Counsel*, 64 Ohio St. 3d at 126, 592 N.E.2d at 1373.

<sup>5</sup> Stipulation, Joint Ex. 1 at 1.

<sup>6</sup> Joint Ex. 1, Stipulation. The Staff is considered a party for purposes of settlement. Ohio Admin. Code §§ 4901-1-10(C), 4901-1-30 (West 2008).

DPL and other electric companies. In addition to counsel, several of the parties were assisted by technical experts.

The Stipulation is the result of serious bargaining by the parties. All of the parties were encouraged to and did attend a series of lengthy settlement negotiations addressing all of the issues presented by DP&L's application. All of the parties received notice of the time, manner, and place of the settlement discussions. Settlement discussions occurred by meetings at the offices of the Commission, with some parties at times participating by telephone. The Stipulation recommended by the parties is a compromise resulting from this series of serious and lengthy discussions and it resolves all of the issues. The compromise reached by the parties represents a reasonable conclusion to the settlement discussions. The Stipulation represents a true compromise in which each party seriously bargained for its position, conceding on certain issues in exchange for a more favorable outcome on others. The Stipulation recommended by the parties is the outcome of open and extensive negotiations and embodies an equitable and reasonable result. All of the parties to these proceedings, representing diverse interests, have endorsed (or not opposed) the Stipulation and support it as a just and reasonable resolution, except for Cargill who challenges only paragraph 3 of the Stipulation. For these reasons, the Commission should find that the Stipulation is the product of serious bargaining among capable and knowledgeable parties.



**B. The Stipulation benefits ratepayers and the public interest.**

The Stipulation offers substantial benefits to each group of ratepayers and its provisions promote the public interest. It resolves all issues without the need for extensive litigation time and expense. These benefits include:

- Extending the existing rate plan to 2012.
- Freezing distribution rates until 2012.
- Development of a mechanism to implement AMI and Smart Grid.
- Establishment of a collaborative to implement energy efficiency and demand response programs.
- Implementation of an Alternative Energy Rider to fund alternative energy acquisitions.<sup>7</sup>

In light of the Stipulation's many benefits, the Commission should find that the Stipulation represents a fair and reasonable compromise of diverse interests that benefits each class of ratepayers and the public interest.

**C. The Stipulation does not violate any important regulatory principle or practice.**

The Stipulation does not violate any important regulatory principle or practice.<sup>8</sup> Most compelling and convincing is the fact that the Stipulation is unopposed except as to one paragraph by one party. Further, the evidence presented to the Commission fully substantiates the Stipulation.

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<sup>7</sup> DPL Ex. 2 at 7.

<sup>8</sup> DPL Ex. 2, Testimony of Seger-Lawson at 12.

The Stipulation complies with the requirements of Chapter 4928 of the Revised Code, as well as with the Commission's existing regulatory principles and practices. The Stipulation is a fair and reasonable disposition of these proceedings and does not violate any important regulatory principle or practice. Because the Stipulation fully satisfies the Commission's three-part test, the Commission should adopt it in its entirety.

**D. Cargill**

The only challenge to the adoption of the Stipulation *in toto* comes from Cargill who challenges paragraph 3 of the stipulation. To understand Cargill's very limited opposition, it is necessary to examine the Stipulation and the context of DP&L in more detail in the following discussion.

DP&L is in a unique situation compared to the other electric companies in Ohio because its existing rate stabilization plan did not end with calendar year 2008. DP&L's existing plan extended to the end of 2010.<sup>9</sup> That rate stabilization plan includes, among many other provisions, a rate stabilization surcharge (RSS) that is unavoidable.

The Stipulation, at its most fundamental level, extends the terms of the existing rate stabilization plan for two more years. This extension includes an extension of the RSS which is embodied in paragraph 3 of the Stipulation. One change is made in the RSS however. The General Assembly chose to allow governmental aggregation groups to avoid POLR charges if the governmental aggregation groups agree to return to utility service at a market rate.<sup>10</sup> Paragraph 3 of the Stipulation changes the RSS to reflect this

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<sup>9</sup> DPL Ex. 2, Testimony of Seger-Lawson at 2.

<sup>10</sup> Ohio Rev. Code § 4928.20(J).

change in law but otherwise retains the charge as it is in DP&L's existing rate stabilization plan.

This is Cargill's objection. It wants the same deal that the General Assembly created for government aggregation groups. In 2011 and 2012, it wants to be able to avoid the RSS by agreeing to return to utility service at market rates. The law does not require this. Of course if Cargill were involved with a governmental aggregation it could do exactly what is arguing for here.<sup>11</sup> The General Assembly could have required what Cargill advocates here, but it did not. There is no legal reason to give Cargill what it wants in this case.

It may be tempting to examine Cargill's request in isolation. This would be a mistake. The Stipulation is of a whole. All of its parts were negotiated together and it is the sum of all of them that reflect the agreement of the signatories. It is no more possible to reach in and change one component of the agreement than it is to take one gear out of a watch and expect to see the time. This Commission has already found that an unavoidable RSS was a reasonable component of DP&L's existing plan. The Stipulation merely continues that status quo as one part of the overall resolution of the case. Continuity is the basis of the bargain in this case and the Commission should endorse that continuity by approving the stipulation without modification.

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<sup>11</sup> Transcript, February 24, 2009 at 39-40.

## CONCLUSION

The Stipulation and Recommendation is signed by parties who represent a wide diversity of interests, and it resolves all issues in the case. The settlement is the product of extensive bargaining and represents a reasonable compromise among all the parties and should be adopted in its entirety without modification.

Respectfully submitted,

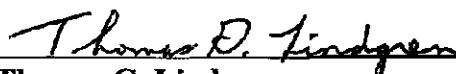
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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, hand-delivered, and/or delivered via electronic mail, upon the following parties of record, this 26th day of March 2009.



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