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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 Approval of Its Electric Security Plan	:	Case No. 08-1094-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. 08-1095-EL-ATA
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13	:	Case No. 08-1096-EL-AAM
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan	:	Case No. 08-1097-EL-UNC
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REPLY BRIEF OF THE DAYTON POWER AND LIGHT COMPANY IN SUPPORT OF THE  
STIPULATION AND RECOMMENDATION

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**REPLY BRIEF OF THE DAYTON POWER AND LIGHT COMPANY  
IN SUPPORT OF THE STIPULATION AND RECOMMENDATION**

**I. INTRODUCTION**

The Stipulation and Recommendation in this case has been signed by parties representing a broad range of diverse interests. The only party to oppose the Stipulation is Cargill, Incorporated. The Commission should reject the arguments made by Cargill because it does not claim (much less prove) that the Stipulation fails to satisfy either the Commission's three-part test for evaluating Stipulations or the Ohio Rev. Code § 4928.143(C)(1) market-rate test. Those are the only tests that apply in this matter, and since Cargill does not dispute that they are satisfied, the Commission should approve the Stipulation.

The Commission should also conclude that Cargill's reliance on the Commission's decision in the AEP ESP case is misplaced. Here, unlike the AEP matter, DP&L's principal customers and principal competitors both agree that the RSC should be unavoidable. The Commission should not upset the balance achieved in the Stipulation to placate a lone hold-out.

**II. CARGILL HAS NOT ADDRESSED THE THREE-PART TEST OR THE SECTION 4928.143(C)(1) TEST**

The Commission has, for years, used a three-part test to evaluate a Stipulation.<sup>1</sup> Cargill admits that the Commission should use the three-part test, but Cargill otherwise ignores that test in its Brief. Specifically:

1. **Serious bargaining:** Although Cargill admits that the Commission should consider whether the Stipulation is the product of serious bargaining (p. 6), Cargill does not

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<sup>1</sup> Industrial Energy Consumers v. Public Utils. Comm'n (1994) (per curiam), 68 Ohio St. 3d 559, 561, 629 N.E.2d 423 (quoting Office of Consumers' Counsel, 64 Ohio St. 3d at 126).

otherwise address serious bargaining in its Brief. The undisputed evidence at the hearing showed that the Stipulation was the product of serious bargaining. D. Seger-Lawson Test. in Support of Stipulation, pp. 9-10.

2. **Benefits Customers as a Package**: Cargill also admits that the Commission should consider whether the Stipulation as a package benefits customers and the public interest (p. 6), but Cargill otherwise ignores that element too. Instead, Cargill asks the Commission to alter Stipulation, ¶ 3 so that after 2010, all switching customers could elect to avoid the RSC and then pay a market-based rate if they return to DP&L.

Cargill has addressed only one portion of one paragraph of the Stipulation, and Cargill has failed to address the significant customer benefits that flow to customers (including to Cargill) in the remainder of the Stipulation. Cargill does not claim (much less prove) that the Stipulation, as is, fails as a package to benefit customers. The evidence at the hearing showed that the Stipulation as a package benefits customers. D. Seger-Lawson Test. in Support of Stipulation, pp. 11-12.

3. **Regulatory principles**: Cargill also admits that the Commission should consider whether the Stipulation violates any important regulatory principles (p. 6), but once again, Cargill otherwise ignores that criterion in its Brief. In fact, Cargill's witness admitted that only government aggregation customers have the statutory right to elect to avoid the RSC, and that Cargill is not a government aggregation customer. 2/24/09 Tr. 33; Ohio Rev. Code § 4928.20(J). The evidence at the hearing showed that the Stipulation does not violate any important regulatory principle. D. Seger-Lawson Test. in Support of Stipulation, pp. 12-13.

In addition, Ohio Rev. Code § 4928.143(C)(1) provides that the Commission should approve an electric security plan if, in the aggregate, the plan is more favorable than the expected results of a market-rate offer. Cargill did not offer any evidence (or argument) regarding whether the Stipulation satisfies that test. The undisputed evidence at the hearing showed that the Stipulation does satisfy that test. S. Niemann Test. in Support of Stipulation, pp. 10-12.

In short, there are two -- and only two -- tests that the Commission needs to consider in this matter. Cargill has not offered any evidence (or even argument) that the Stipulation fails to satisfy either the three-part test or the Section 4928.143(C)(1) test. The evidence at the hearing establishes that the Stipulation satisfies both tests. In light of the broad support for and narrow opposition to the Stipulation, the Commission should approve the Stipulation without alteration.

### **III. THE COMMISSION'S DECISION IN THE AEP CASE IS NOT A BASIS TO ALTER THE SETTLEMENT PACKAGE IN THIS CASE**

Cargill's reliance (pp. 10-11) on the Commission's Opinion & Order in the AEP ESP case is misplaced. As the Commission knows, the AEP ESP was not the product of a Stipulation, and was not subject to the three-part test.

Here, in contrast, there is a Stipulation that has been signed by representatives of all of DP&L's customer groups (residential, low-income, commercial and industrial) and competitive providers. The parties that will be most affected by the RSC -- DP&L's principal customers and principal competitors -- have both agreed that it is reasonable that the RSC be unavoidable. The Stipulation is a carefully crafted package of compromises designed to serve the best interests of all parties, and the Commission should not rely upon a decision from another

case to alter the settlement package in this case. In the Matter of the Complaint of the Office of the Consumers' Counsel (March 30, 1994), Case Nos. 92-1525-TP-CSS, 93-230-TP-ALT, 1994 Ohio PUC LEXIS 252, at \*123-124 ("While the nonsignatory parties may believe that the alternative regulation plan recommended in the stipulation should incorporate additional or different features or commitments, this does not mean that the stipulation is not in the public interest. No plan will ever totally satisfy every party. However, this stipulation strikes a reasonable balance between the competing interests represented in these proceedings and is in the public interest.").<sup>2</sup>

#### IV. CONCLUSION

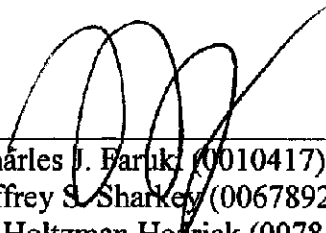
The Stipulation was signed by parties representing a broad range of diverse interests. The Stipulation is a package of compromises in which all Signatory Parties have made significant concessions to arrive at an agreement that is in the best interests of all parties. DP&L's principal customers and principal competitors have signed the Stipulation and thus agree that the RSC should be unavoidable. The Commission should not alter the balance among competing interests reached in the Stipulation to placate a lone hold-out. The Commission should approve the Stipulation in its entirety.

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<sup>2</sup> In addition, Cargill's brief contains two factual errors. First, on pages 4 and 6, Cargill states that the fuel rate will be set at \$0.019 kWh. The fuel rate will be set at \$0.0197 kWh. Stipulation, ¶ 2. Second, Cargill proposes on pages 4, 7, 13 that shopping customers who return to DP&L in 2013 and after would return to DP&L at SSO rates. Not only would that proposal expose DP&L to uncompensated POLR risk (shopping customers could avoid paying the RSC, and nonetheless return at fixed SSO rates), but also, DP&L may file a market rate offer for 2013 pursuant to Ohio Rev. Code § 4928.142, and thus it may not have a fixed SSO.

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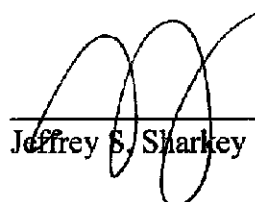
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