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**
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**

WAL-MART STORES EAST, LP AND SAM'S EAST, INC.'S POST-HEARING BRIEF

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Dated: May 5, 2017

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POST-HEARING BRIEF

Wal-Mart Stores East, LP, and Sam's East, Inc. (collectively, "Walmart"), by its attorneys, respectfully submits this Post-Hearing Brief to the Public Utilities Commission of Ohio ("Commission") in the above-referenced proceeding concerning the Application of the Dayton Power and Light Company ("DP&L" or the "Company") for approval of its Electric Security Plan ("ESP") and states as follows:

I. FACTUAL BACKGROUND

On March 14, 2017, DP&L filed an Amended Stipulation and Recommendation[1] ("Amended Stipulation") to amend the terms of its ESP. The Amended Stipulation was entered into by a subset of parties to the case ("Signatory Parties"). Under the Amended Stipulation the Signatory Parties agreed to, among other things, a six-year term for the ESP[2] and the creation of a non-bypassable Distribution Modernization Rider ("DMR") that was designed to collect $105

[1] A prior Stipulation and Recommendation had been filed by DP&L on January 30, 2017.
[2] Amended Stipulation at § I.

million per year for a three-year period with a possible two-year extension.[3] Cash flow from the DMR would be used to pay down debt at DP&L and its corporate parent DPL Inc. ("DPL Inc.").[4]

In exchange for the DMR, the Amended Stipulation contains numerous benefits that are limited to the Signatory Parties, including:

1. Certain enumerated Signatory Parties receive direct cash payments to offset the costs of the Amended Stipulation;[5]
2. Some Signatory Parties become eligible for an "economic incentive" that is calculated as a per kWh credit for all kWh;[6] and,
3. Other Signatory Parties and/or the groups they represent are entitled to receive certain funds on an annual basis.[7]

II. STANDARD OF REVIEW

Under Rule 4901-1-30 of the Ohio Administrative Code, this Commission employs a three-prong test to evaluate stipulations presented to this Commission in settlement of a matter, which asks:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
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?[8]

The burden to prove that the Stipulation satisfies this standard rests with the Company.[9] Submission of a stipulation does not satisfy this burden. Rather, a stipulation is nothing more

[3] *Id.* at § II(2)(a).
[4] *Id.* at § II(2)(b).
[5] *Id.* at § V(1)(c).
[6] *Id.* at § IV(1).
[7] *Id.* at § X; *see also* Office of Ohio Consumers' Counsel ("OCC") Exhibit ("Ex.") 4 (reflecting a one-time $200,000 to MAREC).
[8] *See Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St.3d 559 (1994) (citing *Consumers' Counsel v. Pub. Util Comm.*, 64 Ohio St.3d 123, 126 (1992)); s*ee also, e.g., In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Alternative Rate Plan for Continuation of its Distribution Replacement Rider*, Case No. 13-1571-GA-ALT, Opinion and Order at 9 (Feb. 19, 2014).
[9] *See Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St.3d at 562.

than a recommendation, and to withstand scrutiny, a stipulation "must be supported by the evidence of record."[10]

III. INTRODUCTION

The Amended Stipulation does not benefit Ohio customers or the public interest. Under the Amended Stipulation, Ohio customers in DP&L's service territory are not being asked to financially rescue DP&L, the regulated utility from whom they receive electric service, but rather to rescue DPL Inc., the unregulated corporate parent. The extraordinary relief requested ($105 million per year for at least five years) cannot be tied to traditional utility ratemaking and is not linked to cost causation in any way.[11] Rather, DPL Inc. will receive extraordinary financial support from DP&L's customers, while those same customers receive no improvements in the utility service that they are already receiving or any universal benefit from their support of DPL, Inc.

It does not benefit the public interest for DP&L customers to rescue DP&L's corporate parent. If DPL Inc. is in a financial crisis, it is not the fault of customers and yet they are the only ones being asked by DP&L to shoulder the burden without receiving any beneficial return. Before DP&L and DPL Inc. sought such extraordinary relief from customers for the financial crisis of DPL Inc., all other options available to them, such as seeking a capital or cash infusion into DPL Inc. from DPL Inc.'s parent, AES Corporation ("AES"), should have been exhausted. The record evidence reflects this was not done.

In exchange for the $105 million DMR, DP&L and DPL Inc. claim that the Amended Stipulation provides customers with certain concessions from AES. A cursory review of the

[10] *Id.* at 563.
[11] Transcript ("Tr.") Vol. I, p. 100, lines 6-19.

Amended Stipulation reveals this to be misleading. ***AES it is not a Signatory Party*** and, thus, any such concessions are not enforceable.

Moreover, the Company did not demonstrate that the extraordinary relief requested from customers will actually bring DPL Inc. out of financial crisis. In fact, the evidence from DP&L/DPL Inc.'s Chief Financial Officer demonstrates that the DMR will not result in the appropriate credit metrics so as to make DPL Inc. investment-worthy. Rather than providing one-time extraordinary relief, DP&L's customers are likely being obligated to indefinitely fund an unregulated corporate parent, which is certainly not beneficial to customers or this State.

Finally, even if some level of financial assistance were warranted, the method by which it is achieved in the Amended Stipulation may violate fundamental principles of ratemaking. The Amended Stipulation is riddled with quid pro quo concessions that inure only to the benefit of Signatory Parties, creating a situation where similarly situated non-Signatory customers would be treated differently. Because the Amended Stipulation presented here simply cannot satisfy points two and three of the Commission's three-part test for reviewing stipulations, the Commission should reject the Amended Stipulation.

IV. ARGUMENT

A. The Amended Stipulation does not benefit customers or the public interest.

It is neither just nor reasonable to ask DP&L's customers to shoulder the debts of DP&L's parent, DPL Inc. The fundamental unfairness of such a request is made all the more egregious by the fact that the debts placing DPL Inc. in such financial distress are from the prior purchase of DPL Inc. by AES.[12]

[12] *Id.* at 30, lines 3-13.

1. ***It does not benefit customers to assume debts related to AES's prior purchase of DPL.***

It is inaccurate for the Company to claim that DP&L is in financial crisis. DP&L is able to service its existing debt.[13] It is *DPL Inc*. that is in financial crisis. The cause of DPL Inc.'s financial crisis is its debt load, which is largely comprised of debt associated with AES Corporation's purchase of DPL Inc. in 2011 (the "Acquisition-Related Debt"). On a consolidated basis, DP&L and DPL Inc. have approximately $1.8 billion in total debt. As Company Witness Jackson testified, approximately $780 million to $1 billion of total consolidated debt -- approximately 55% of the total[14] -- is Acquisition-Related Debt held at the DPL Inc. level.[15]

The decision to house the Acquisition-Related Debt at the DPL Inc. level as opposed to at AES was a business-decision made by AES. DP&L's customers should not be made to pay for such a decision. Company witness Jackson acknowledged that had AES made the decision to retain the Acquisition-Related Debt at the AES level,[16] then the Company would not be in the financial crisis it is in today.[17] In fact, had AES made the decision to retain the debt, DP&L may not have sought the DMR.[18]

This admission begs the question: who is to blame for the current financial crisis faced by DPL Inc.? There can be no doubt that DP&L's customers are not to blame. The Company would have you believe that market-driven forces unrelated to management practices are at fault.[19] As Company witness Jackson admitted, however, a company exercising sound management does not end up in a financial crisis.[20] In reality, many of the "market-driven"

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[13] *Id.* at 60, lines 5-12.
[14] *Id.* at 91, lines 3-24.
[15] *Id.* at 30, lines 3-13.
[16] As it apparently did with a recent acquisition. *See* OCC Ex. 2.
[17] *Id.* at 93, lines 1-12.
[18] *Id.* at 93, lines 9-12.
[19] Company Ex. 1, Direct Testimony of Craig L. Jackson, p. 8, lines 1-17.
[20] Tr. Vol. I, p. 31, line 22 to p. 32, line 3.

forces that the Company identifies as having contributed to the financial crisis are actually forces that have been in play for a number of years and should have been accounted for in forecasting finances.[21] Under the Amended Stipulation, DP&L's customers (who bear no blame for DPL Inc.'s current financial situation) are paying for the Company's failure to adapt to market-driven forces. Where it is clear, as it is here, that Ohio customers are blameless and either DPL Inc. and/or its parent AES are at fault for the financial crisis faced by DPL Inc., it is inequitable to ask *DP&L's* customers to rescue *DPL Inc*.

As the majority of the debt is Acquisition-Related Debt, the Company should have pursued all other avenues of available relief before seeking relief from the Commission, including seeking a cash or other equity infusion from AES. At no point has the Company ever made such a request[22] even though it could have done so to alleviate the financial crisis in which DPL finds itself.[23] And, in fact, evidence presented at the hearing suggested that AES had the financial wherewithal to make a cash or equity infusion to DPL Inc.[24] Instead, the Company seeks to foist upon customers costs associated with AES' acquisition of DPL Inc. and its subsidiary DP&L.[25] The Amended Stipulation primarily benefits DPL Inc., AES, and its shareholders, not DP&L's customers.

[21] *Id.* at 95, line 13 to p. 96, line 15.
[22] *Id.* at 109, lines 9-11.
[23] *Id.* at 108, line 15 to p. 109, line 1.
[24] *See* OCC Ex. 2.
[25] Interestingly, were AES to forgive the debt or otherwise infuse capital into DPL Inc. to cover the amount of the Acquisition-Related Debt, it would far exceed amounts that would be recovered under the DMR. Assuming the DMR approved for the two-year extension, it is expected to reduce the consolidated debt level from $1.8 billion to approximately $1.2-1.3 billion. *Id.* at 93, line 20 to p. 94, line 1. In contrast, were AES to assume the Acquisition-Related Debt, it would eliminate 55% of the total consolidated debt. *Id.* at 91, lines 16-24.

2. ***The DMR does not achieve its intended goal.***

Even if the Commission might -- as it has in the past[26] -- view a mechanism similar to the DMR as favorable, it cannot view the proposal here as such. In his role as CFO of DPL Inc. *and* DP&L, Company witness Jackson testified that a company's Funds from Operations ("FFO") to debt ratio is the most important factor in the ability of a company to invest or get investment.[27] The DMR does not achieve the FFO to debt level advocated by Company witness Jackson.[28] And, in fact, even factoring in the terms of the Amended Stipulation, which includes the DMR, ratings agencies continue to rate DPL Inc. as non-investment grade.[29] Interestingly, despite the fact the Company bears the burden to prove its case, it did not update Mr. Jackson's testimony or offer it in support of the Amended Stipulation.[30] This simply supports the conclusion that the Amended Stipulation is not beneficial to the public interest or DP&L's customers.

Nor does the Company contend that the DMR, which is outside the normal regulatory compact,[31] will actually correct the Company's alleged financial crisis; at best, it hopes to be placed *on a path* towards maintaining an investment grade rating.[32] Rather than a request for one-time relief, it seems likely that the Company will seek similar payments (beyond the term of the ESP) in the future. There is simply no proof that the DMR will have the intended impact that the Company contends, namely to bring DPL Inc. out of financial crisis. As the Company does

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[26] *See In the matter of the Application of Ohio Edison Company, The Cleveland Illuminating Company, and The Toledo Edison Company for Authority to Provide for Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016).
[27] Tr. Vol. I, p. 85, lines 1-6.
[28] *Id.* at 45, lines 15-24.
[29] *Id.* at 116, lines 7-19.
[30] *Id.* at 46, lines 4-7 (counsel for the company objecting and stating that "Your Honor, let me object. Mr. Jackson *is not testifying in support of the amended stipulation.* His testimony addressed DP&L's as-filed case") (emphasis added).
[31] *Id.* at 100, lines 6-19.
[32] Company Ex. 3, Testimony of Sharon R. Schroder in Support of the Amended Stipulation and Recommendation, p. 10, lines 12-14.

not satisfy its burden to provide such evidence, the Amended Stipulation cannot be shown to be anything more than a burden on customers.

3. ***AES is not a Signatory to the Amended Stipulation.***

To offset the burdens of the Amended Stipulation, the Company claims that AES makes "three substantial financial commitments in the Amended Stipulation" that warrant approval of the Amended Stipulation.[33] Any commitments made by AES in the Amended Stipulation, however, are hollow and unenforceable. AES did not sign the Amended Stipulation,[34] it did not participate in the negotiations that led to the Amended Stipulation,[35] and at least according to counsel for the Company, the Commission does not have jurisdiction over AES.[36]

DP&L's customers are being promised certain benefits that are without a mechanism to enforce. This is the very definition of an illusory promise. If the Company wants to tout the commitments made by AES in the Amended Stipulation -- which it did throughout the hearing on this matter[37] -- then it should have AES sign the Amended Stipulation. As it presently stands, however, there is absolutely no basis for this Commission to conclude that AES made any commitments in the Amended Stipulation. The illusory promises purportedly made by AES cannot serve as evidence that the Amended Stipulation benefits customers or the public interest.

B. The Amended Stipulation may violate important regulatory principles.

It is a fundamental policy of the State of Ohio that consumers be ensured the availability of, among other things, "nondiscriminatory and reasonably priced retail electric service."[38] The

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[33] *Id.* at 18, line 22 to p. 19, line 13.
[34] Amended Stipulation at pp. 39-41; *see also* Tr. Vol. II, p. 266, line 18 to p. 267, line 25.
[35] Company Ex. 3, Testimony of Sharon R. Schroder in Support of the Amended Stipulation and Recommendation, p. 5, line 10 to p. 7, line 2.
[36] Tr. Vol. I, p. 81, lines 19-23 (stating that "this, again, is getting into discovery as to AES which isn't subject to this Commission's jurisdiction, and we believe those questions are entirely irrelevant").
[37] Tr. Vol IV, p. 710, line 3 to p. 712, line 11; p. 766, line 18 to p. 767, line 19; Company Ex. 2B, Testimony of R. Jeffrey Malinak in Support of the Amended Stipulation and Recommendation, p. 4, lines 9-15; p. 6, lines 6-18.
[38] Ohio Rev. Code 4928.02(A).

Amended Stipulation provides exclusive benefits to individual Signatory Parties ranging from direct cash payments to participation in narrowly tailored economic incentive programs. Although there may be instances where such arrangements have been deemed acceptable in the past, such arrangements should avoid creating unfair and unjust advantages that result in some parties faring better than others (even within the same rate classes) to the point that the Amended Stipulation could actually impede the State's efforts to compete effectively in the global economy.[39]

1. Provisions benefitting Signatory Parties may result in unduly discriminatory rates.

Aside from Staff, every single one of the Signatory or Non-Opposing Parties to the Amended Stipulation receives a specific benefit under the Amended Stipulation that appears to be unavailable to non-Signatory customers.[40] In some cases, parties receive direct cash payments to "partially offset the costs of this Stipulation and rate design modifications" incurred by certain customers.[41] By pledging to make direct cash payments to some parties and not to others, the Company could be fostering a situation where some customers will pay less for electric service than other similarly situated customers, in violation of the policy to ensure non-discriminatory rates for all customers. These benefits, as available only to Signatory Parties, also could operate to impair the competitiveness of new entrants into the Ohio economy in DP&L's service territory, who presumably would not be eligible for these implicit rate offsets.

[39] *See* Ohio Rev. Code 4928.02(N) (stating that it is State policy to "facilitate the state's effectiveness in the global economy").
[40] *See* Amended Stipulation at pp. 9-10, 27-36; *see also* OCC Ex. 4.
[41] Amended Stipulation at p. 11.

2. The Economic Development Rider narrowly benefits only Signatory Parties.

The Economic Development Rider ("EDR") contained in the Amended Stipulation raises similar concerns.[42] The alleged goal of the EDR is to "further State policy and enhance the State's effectiveness in the global economy" by offering "several different economic development incentives to large customers that are Signatory or Non-Opposing Parties."[43] By its terms, however, it is narrowly limited to those select customers.

Although the Company tries to couch the EDR as something more,[44] the evidence presented at hearing reveals that the EDR is nothing more than a carrot used to secure the support of the Signatory or Non-Opposing Parties. Although it was described as a means to encourage job creation, the EDR does not require the recipients to create new jobs[45] nor is any effort made to determine who should be eligible for this incentive aside from being a Signatory Party. If the goal was truly to incent job creation or to promote the effectiveness of Ohio's economy, it stands to reason that the Company might want to offer the incentive to all of its existing and prospective customers, not just the Signatory and Non-Opposing Parties.

V. CONCLUSION

DP&L does not need the DMR to meet its financial obligations, and the DMR will not bring DPL Inc. out of financial crisis. Rather than pulling DPL Inc. out of financial crisis, approval of this Amended Stipulation will merely pave the way for future iterations of the extraordinary financial rescue that is the DMR. DPL Inc. is a private company, and it does not benefit Ohio customers to rescue DPL Inc. when the cause of the financial crisis does not stem

[42] *Id.* at § IV.
[43] *Id.* at § IV(1).
[44] Company witness Schroder stated that it is "designed to provide economic incentives to large Ohio employers who contribute substantially to the overall financial condition, jobs and growth in DP&L's service territory. *See* Company Ex. 3, Testimony of Sharon R. Schroder in Support of the Amended Stipulation and Recommendation, p. 12, line 20 to p. 13, line 1.
[45] Tr. Vol. II, p. 331, lines 5-21.

from DP&L's provision of electric service to its customers. Moreover, if a DMR is required, it should not be accomplished by establishing unduly discriminatory rates, granting some parties better rates than others simply because they signed the Amended Stipulation. Because the Company has not carried its burden to meet all elements of the Commission's three-part test, the Amended Stipulation should be rejected.

Respectfully submitted this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Post-Hearing Brief, submitted on behalf of Wal-Mart Stores East, LP and Sam's East, Inc., was served by electronic mail, upon the following Parties of Record on this 5th day of May, 2017.

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Summary: Brief Post-Hearing Brief of Wal-Mart Stores East, LP and Sam's East, Inc. electronically filed by Derrick P Williamson on behalf of Wal-Mart Stores East, LP and Sam's East, Inc.