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

THE DAYTON POWER AND LIGHT COMPANY'S
INITIAL POST-HEARING BRIEF
PUBLIC VERSION

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I. INTRODUCTION AND SUMMARY

The Amended Stipulation and Recommendation ("Stipulation") provides significant customer benefits, the most important of which are that it ensures that The Dayton Power and Light Company ("DP&L") can provide safe and reliable service and implement grid modernization. The Stipulation provides those benefits while at the same time providing a rate decrease to typical residential customers and continuing to charge those customers the lowest rates in the state.

The testimony of DP&L witnesses Jackson and Malinak demonstrates that DP&L could not maintain its financial integrity -- and thus could not provide safe and reliable service or implement grid modernization -- without the Distribution Modernization Rider ("DMR"). Significantly, not a single intervenor witness -- not one -- sponsored testimony claiming that DP&L could provide safe and reliable service or pursue grid modernization without the DMR.

A report issued by a third-party credit rating agency demonstrates that the $105 million DMR is the minimum amount needed for the full five years (i.e., including the two-year extension) to maintain DP&L's financial integrity. Specifically, on March 12, 2017 (two weeks after the Stipulation was filed), S&P Global Ratings ("S&P") issued a research update in which it downgraded the credit ratings for DPL Inc. and DP&L so that they were below investment grade or just barely investment grade. DP&L Ex. 105, p. 2. That report demonstrates that if the Commission fails to approve the Stipulation without material modifications, then further downgrades are likely for DP&L.

It is also important that DP&L's shareholders have made significant equity investments in DP&L. Specifically, AES has not received either a dividend or a contractually required tax-sharing payment from DPL Inc. since 2012[1] and agreed in the Stipulation to forbear such payments during the ESP or DMR terms, respectively. AES further agreed to convert the past and future (during the DMR term) tax sharing liabilities into equity at DPL Inc. DP&L witness Malinak explained that those measures will result in an equity investment of $[redacted]. Malinak Test. (DP&L Ex. 2B), p. 4.

The principal witnesses opposing the Stipulation testified on behalf of The Office of the Ohio Consumers Counsel ("OCC"). As discussed in detail below, those witnesses made numerous concessions at the hearing in this case, including:

1. It is "vitally important" that DP&L have an investment grade credit rating and "prompt action is needed to shore up and improve the credit ratings of DPL Inc. and The Dayton Power and Light Company."[2]

2. The shareholder contributions by AES (discussed above) are benefits of the Stipulation and constitute "an equity infusion from AES into DPL Inc."[3]

3. None of OCC's witnesses performed financial analysis demonstrating that DP&L could provide safe and reliable service or implement grid modernization without the DMR.[4]

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[1] Jackson Test. (DP&L Ex. 1B), pp. 11; Trans. Vol. I, p. 49 (Jackson).
[2] Trans. Vol. IV, pp. 695, 707 (Kahal).
[3] Id. at 710-12.
[4] Trans. Vol. III, p. 634 (Haugh); Trans. Vol IV, pp. 707-08 (Kahal); Trans. Vol. IV, pp. 769-70 (Williams); Trans. Vol. IV, p. 804 (Fortney); Trans. Vol. V, pp. 838-39, 842 (Parcell); Trans. Vol. V, p. 856 (Finnigan).

II. THE COMMISSION'S THREE-PART TEST

Although not binding on the Commission, the terms of a stipulation are "accorded substantial weight" by the Commission. Office of Consumers Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (per curiam) (citing City of Akron v. Pub. Util. Comm., 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978) (per curiam). In considering the reasonableness of a stipulation, the Commission has used the following criteria:

> "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?"

Feb. 23, 2017 Order on Global Settlement Stipulation, ¶ 101 (Case No. 09-872-EL-FAC).

The Supreme Court of Ohio has endorsed the Commission's use of those three criteria to evaluate a stipulation and stated that the Commission may place substantial weight on the terms of a stipulation. Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 629 N.E.2d 423 (1994) (per curiam).

III. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE PARTIES

The Stipulation was signed by a diverse group of knowledgeable and capable parties after serious negotiations occurred. Donlon Test. (Staff Ex. 2), pp. 3-4; Schroder Test. (DP&L Ex. 3), pp. 4-8. There were numerous negotiation sessions held, and DP&L invited all parties who had timely intervened to those sessions. Schroder Test. (DP&L Ex. 3), p. 7. The interests represented by the Signatory Parties or Non-Opposing Parties include the Commission's Staff, DP&L, three representatives of residential low-income customers, the largest municipality in DP&L's service territory, two large statewide organizations representing industrial customers in DP&L's service territory, a large industrial customer, a large statewide manufacturing association, a statewide organization representing hospitals in DP&L's service territory, one of the largest supermarket chains in the country, a retail supplier association, an individual retail supplier, and an environmental organization. Schroder Test. (DP&L Ex. 3), p. 8; OCC Ex. 4.

There is no real question that the Stipulation satisfies the first element. The testimony of Staff witness Donlon and DP&L witness Schroder establishes that there was serious bargaining among capable parties. Donlon Test. (Staff Ex. 2), pp. 3-4; Schroder Test. (DP&L Ex. 3), pp. 4-8. Witnesses for opposing intervenors conceded that there was serious bargaining among knowledgeable parties. Trans. Vol. IV, p. 721 (Kahal) (Staff signed Stipulation; Staff is capable and knowledgeable); Trans. Vol. IV, pp. 763-64 (Williams) (admitting that he does not dispute that there was serious bargaining among capable and knowledgeable parties); Trans. Vol. IV, p. 805 (Fortney) (admitting that he has no reason to believe that the Stipulation was not the result of serious bargaining among capable, knowledgeable parties); Trans. Vol. V, p. 833 (Parcell) (admitting that he does not challenge whether there was serious bargaining among knowledgeable parties).

OCC attempts to add a new element that is not part of the test, i.e., that a Stipulation does not pass the first element unless there is a "signatory party that represents the exclusive interests of all residential customers across DP&L's service territory." Williams Supp. Test. (OCC Ex. 13), p. 6. Not only has that argument been rejected repeatedly by the

Commission,[5] but also, Staff, Ohio Partners for Affordable Energy ("OPAE"), Edgemont Neighborhood Coalition, People Working Cooperatively ("PWC") and the City of Dayton signed the Stipulation. OCC witnesses conceded that: (a) Staff represents all constituents (Trans. Vol. IV, p. 721 (Kahal); Trans. Vol. IV, pp. 764-65 (Williams)); (b) OPAE, Edgemont and PWC represent low-income residential customers (Trans. Vol. IV, pp. 721-22 (Kahal); Trans. Vol. IV, pp. 765-66 (Williams)); and (c) City of Dayton represents all of its residents (Trans. Vol. IV, p. 722 (Kahal); Trans. Vol. IV, p. 766 (Williams)). The Commission should, once again, reject OCC's argument that it has veto power over a stipulation.

IV. THE STIPULATION BENEFITS CUSTOMERS AND PROMOTES THE PUBLIC INTEREST

As demonstrated in detail below, there are four critical points that the Commission needs to consider in evaluating whether the Stipulation benefits the public interest. First, the Stipulation provides DP&L the ability to provide safe and reliable service, which would otherwise be in jeopardy. Second, the Stipulation provides a specific path and means by which DP&L can and will implement grid modernization. Third, DP&L's shareholders agreed in the Stipulation to make significant equity investments, which the Commission could not require without a Stipulation. Fourth, the Stipulation provides those significant benefits while at the same time providing a reduction in rates to typical residential customers and charging such customers the lowest rates in the state. The Stipulation provides many other significant customer benefits, including but not limited to providing a standard service offer via competitive bidding, promoting economic development in DP&L's service territory, providing for the transfer of

[5] E.g., Oct. 12, 2016, Fifth Entry on Rehearing, ¶ 225 (Case No. 14-1297-EL-SSO) ("[w]e also noted that we have rejected proposals that any one class of customers can effectively veto a stipulation," citing cases).

DP&L's generation assets, providing for a sale process for certain DP&L generation plants, providing funding for low-income residential customers, and providing competitive retail enhancements.

A. **The Stipulation Enables DP&L to Provide Safe and Reliable Service by Allowing the Company to Maintain Its Financial Integrity**

There is no dispute that it is critical that DP&L be able to provide safe and reliable service. Trans. Vol. IV, p. 707 (Kahal); Trans. Vol. IV, pp. 768-69 (Williams). There is also no dispute that to provide safe and reliable service, DP&L needs to maintain its financial integrity. Trans. Vol. IV, p. 770 (Williams); Trans. Vol. IV, p. 804 (Fortney).

The testimony of DP&L witness Jackson demonstrates that without the DMR, DP&L would "have insufficient cash flows to pay all normal course obligations, including but not limited to operating expenses . . . and planned T&D capital expenditures" and that an inability by DP&L to maintain its financial integrity "would have a deleterious effect on the utility's . . . ability to provide stable and certain utility service to customers." Jackson Test. (DP&L Ex. 1B), pp. 17-18 (emphasis added).

DP&L witness Malinak shows that DP&L's ability to provide safe and reliable service would be in jeopardy without the DMR. For example, Mr. Malinak explains that utilities whose financial integrity is at risk make materially lower capital investments than utilities that are financially healthy. Malinak Test. (DP&L Ex. 2B), pp. 32-35. He further testified:

> "Q. How would DP&L's customers be affected by DPL's and DP&L's financial distress?
>
> A. DP&L's customers would face a number of negative consequences. In fact, the financial condition of both DPL

> and DP&L is already compromised such that some of these negative consequences may already exist. If no DMR and Reconciliation Rider are awarded, and the financial condition of DPL and DP&L worsens, the impacts will be magnified and more invasive.
>
> • Based on my analysis of capital expenditures by financially distressed firms described above, <u>DP&L likely would reduce or delay such expenditures. All else equal, this reduction would result in a less effective and less reliable infrastructure for delivering electric service, which would harm customers and the state of Ohio more generally</u>.
>
> * * *
>
> • <u>DP&L likely would invest less in service operations, which would reduce the quality of customer service and customer satisfaction</u>."

Malinak Test. (DP&L Ex. 2B), pp. 58-59 (emphasis added).

Witnesses who opposed the DMR conceded that they did not evaluate whether DP&L could maintain its financial integrity or provide safe and reliable service without the DMR. Trans. Vol. III, p. 634 (admission by OCC witness Haugh that he did no analysis of DP&L's financial integrity or its ability to provide safe and reliable service); Trans. Vol IV, pp. 707-08 (admission by OCC witness Kahal that he did no analysis showing that DP&L could provide safe and reliable service without the DMR); Trans. Vol. IV, pp. 769-70 (admissions by OCC witness Williams that he does not contest the projections of DP&L witness Malinak, does not contest that DP&L's financial integrity is at risk, and that DP&L needs sufficient funds to provide safe and reliable service); Trans. Vol. IV, p. 804 (admissions by OCC witness Fortney that he has not analyzed whether DP&L needs the DMR and that utilities need to be financially strong to provide reliable service); Trans. Vol. V, pp. 839, 843 (admissions by OCC witness Parcell that he has no opinions regarding whether DP&L can provide safe and reliable service without the Stipulation, and that customers benefit if their utility is financially healthy); Trans. Vol. V, p. 856 (admissions by Ohio Environmental Council witness Finnigan that DP&L needs sufficient funds to provide safe and reliable service, and he did no analysis of whether DP&L could maintain its financial integrity without the DMR).[6]

The testimony of DP&L witnesses Malinak and Jackson that DP&L could not maintain its financial integrity and provide safe and reliable service without the DMR is thus entirely uncontested.

The evidence at the hearing also demonstrated that DP&L needs at least the $105 million DMR (and the other terms of the Stipulation) to be approved for five years to allow DP&L to maintain its financial integrity. Perhaps the best evidence of that point comes from a report issued by S&P two weeks after the Stipulation was filed. DP&L Ex. 105. That report assumed that the DMR would be approved for three years (p. 2) and issued the following credit ratings:

> "• We are <u>lowering</u> our issuer credit ratings on both parent DPL and utility subsidiary DP&L <u>to 'BB-'</u> from 'BB'. The outlook is <u>negative</u>.
>
> • We are <u>lowering</u> our rating on DPL's senior unsecured debt to '<u>B+</u>' from 'BB' and revising the recovery rating on this debt to '5' from '4' based on deteriorating value of the merchant power assets and the structural subordination of this debt.
>
> • At the same time, we are <u>affirming</u> our '<u>BBB-</u>' rating on DP&L's senior secured debt. We revised the recovery rating on this debt to '1+' from '1', reflecting our assessment of modestly improved recovery prospects for the utility secured debt.

[6] The testimony of other opposition witnesses did not contest the DMR.

- In addition, we are revising our stand-alone credit profile assessment for DP&L to 'bbb' from 'bbb+'."

Id. (emphasis added). The BB- and B+ ratings are not investment grade; the BBB- rating is the lowest investment grade rating; the bbb rating is the second-lowest investment grade rating. Trans. Vol. IV, pp. 698-70 (Kahal).

DP&L witness Malinak explained that the S&P Report shows "that the DMR is, if anything, too low":

> "Q. And what, if any, effect does [the S&P Report] have on your view as to the need for the DMR for DPL and DP&L?
>
> A. Well, it's clear evidence, I think, from this outside source that the DMR is, if anything, too low because they are being downgraded. They are already non-investment grade. They are being downgraded again. And S&P had access to the information in the stipulation, so they are aware of the terms of the stipulation, including the size of the DMR, and they put through a downgrade based on that information, so it's fairly strong evidence that the DMR is likely too low."

Trans. Vol. I, p. 116 (emphasis added).

The testimony of OCC witness Kahal is consistent with Mr. Malinak's testimony. Specifically, he conceded that it was "vitally important" that DP&L have an investment grade credit rating. Trans. Vol. IV, pp. 695-97. He agreed that S&P's ratings were either below investment grade or were barely investment grade. Id. at 698-700.

Mr. Kahal further testified that S&P "is critical of the Stipulation and not supportive at all":

> "Q. I believe you told me at your deposition your view is this report is critical of the stipulation, correct?

A. That's how I read it. That's -- Mr. Sharkey, that's with the caveat that I had before the deposition -- I had gotten this document about 10 minutes before the deposition and hadn't had a -- hadn't spent much time with it. But I didn't see this report as being a ringing endorsement of the stipulation by any means. I think this is critical of the stipulation and not supportive at all.

Q. And by that you mean that the stipulation doesn't really do it for S&P in terms of the amounts DPL Inc. and DP&L need for favorable credit ratings?

A. That's right. S&P doesn't have a high level of comfort with the stipulation."

Id. at 700-01 (emphasis added). The testimony of OCC witness Kahal is thus consistent with Mr. Malinak's testimony that "the DMR is, if anything, too low." Trans. Vol. I, p. 116.

Mr. Kahal also conceded these points:

a. Other credit rating agencies have stated that DP&L is in danger of losing its investment grade credit rating, and DP&L is on negative credit watch (Trans. Vol. IV, p. 701);

b. A credit downgrade will lead to a higher cost of debt for the utility (id. at 701-02); and

c. A higher cost of debt will lead to higher utility rates (id. at 702-03).

Mr. Kahal also testified that he "would support prompt action" to improve the credit ratings of DPL Inc. and DP&L:

"Q. You also agree that prompt action is needed to shore up and improve the credit ratings of DPL Inc. and The Dayton Power and Light Company, right?

A. Yes. I would support prompt action."

Trans. Vol. IV, p. 707 (emphasis added).

DP&L witness Jackson explained that -- even with the DMR -- DP&L will have to make cuts, which may affect reliability, to achieve an appropriate FFO-to-debt metric:

> "Q. And as part of the proposed stipulation, the FFO to debt ratio plays no role in the $105 million, correct?
>
> A. Well, the way I think about it is obviously we want to achieve a certain FFO to debt range. <u>I don't believe that the 105 [million DMR] will get us there. The company is going to have to take some action, some cuts</u>, which could have an impact to reliability, in order for to us [sic] achieve a certain FFO to debt metric."

Trans. Vol. I, p. 45 (emphasis added). OCC witness Kahal agreed that the FFO-to-debt metric was a key metric considered by rating agencies when establishing credit ratings. Trans., Vol. IV, p. 707.

The Stipulation provides that DP&L can seek an extension of the DMR in three years, and places no limit on the amount of the DMR if it is extended. Stipulation, ¶ II.2.a. Therefore, if the DMR proves to be "too low," and DP&L's reliability is affected, the Commission can address that issue when DP&L applies to extend the DMR.

The DMR in this case is similar to the DMR that the Commission approved for FirstEnergy. Oct. 12, 2016, Fifth Entry on Rehearing, ¶¶ 185-210 (Case No. 14-1297-EL-SSO). The Commission cited similar factors relating to the importance of utilities' investment credit ratings in approving a DMR for FirstEnergy. <u>Id</u>. ¶¶ 279-80.

Importantly, DP&L has taken significant steps to improve its financial integrity without the DMR. DP&L witness Jackson described those steps:

> "Q. Has DPL or DP&L made efforts to cut costs and to maintain its financial integrity without having to receive a DMR?

A. Yes. Over the past several years, DPL and DP&L have taken strategic actions to improve its financial integrity: (1) Asset Sales: the sale of its ownership interests in East Bend generating station and the sale of its competitive retail businesses (MC Squared Energy Services, LLC and DPL Energy Resources, LLC); (2) Operational Actions: DP&L has implemented cost controls, travel restrictions and other measures to reduce its operating expenses; (3) Financing Actions: DP&L has refinanced with short-term variable-rate instruments which have a high risk profile but relatively low cost, which has lowered the Company's consolidated interest expenses; (4) Debt prepayment: the actions above, along with the use of existing operating cash flows, enabled DPL and DP&L to pay down approximately [redacted] (5) on November 30, 2015, DP&L filed a Distribution Rate Case requesting an increase to base distribution rates, of which the total requested amount is included in the financial projections reflected in Exhibits CLJ-1 through CLJ-6; and (6) finally, as noted earlier, AES has foregone (historically and prospectively) any divided and tax sharing payments from DPL since the end of 2012."

Jackson Test. (DP&L Ex. 1B) p. 18. Accord: Trans. Vol. I, pp. 33-35 (Jackson).

The undisputed evidence shows that DP&L could not maintain its financial integrity and provide safe and reliable service without the DMR, and DP&L needs at least the full amount of the DMR for five years. Providing safe and reliable service is one of the many public benefits achieved by the Stipulation.

B. The Stipulation Provides a Specific Path and Plan for Modernizing DP&L's Grid

The Stipulation provides that the purpose of the DMR is to allow DP&L and DPL Inc. to pay down debt, so that DP&L can modernize its distribution grid:

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

Stipulation, ¶ II.2.b (p. 5) (emphasis added).

Staff witness Donlon testified that the primary purpose of the DMR is to allow DP&L "to invest in the distribution grid":

> "Q. Okay. And it's correct, Mr. Donlon, that the primary purpose of the DMR is to pay off debt, correct?
>
> A. I think it is -- that's only a portion of it. It's -- it's not necessarily the primary. <u>I think the primary [purpose] is actually to allow the company to be able to invest in the distribution grid.</u> The -- to get to that point, they have to pay down debt, so they can actually incur -- be able to go out and get new debt, get debt at a reasonable rate without massive covenants, but <u>the primary goal is to invest in the grid</u>."

Trans. Vol. V, pp. 875-76 (emphasis added).

Mr. Malinak's testimony explains that grid modernization would provide significant customer benefits, including improved reliability:

> "According to the US DOE, modernized grids can have the following benefits: greater resilience to hazards of all type; improved reliability for everyday operations, enhanced security from an increasing and evolving number of threats, additional affordability to maintain our economic prosperity, superior flexibility to respond to the variability and uncertainty of conditions at one or more timescales, including a range of energy futures, and increased sustainability through additional clean energy and energy-efficient resources.
>
> As a result, after the grid is modernized, customers can directly benefit from greater reliability and security as well as numerous smart grid features. In particular, the ability to manage power requirements to and from the utility will reduce the need for power, especially during high-use periods. Further, consumers and utilities can receive accurate, timely, and detailed information about energy use. Armed with this information, customers would be able to identify ways to reduce energy consumption with no impact on safety, comfort, and security. Next, because of the

> improved operational efficiency, utility operators would be able to easily identify, diagnose, correct and even prevent problems from happening. Finally, depending on the technology installed, consumers could have an opportunity to seamlessly integrate all clean energy technologies: electric vehicles, rooftop solar systems, wind farms, and storage devices."

Malinak Test. (DP&L Ex. 2B), p. 65 (footnotes omitted).

Similarly, IGS/RESA witness White testified:

> "Q. Should DP&L invest in smart grid?
>
> A. Yes. Smart grid has the potential to lay the groundwork for CRES providers to offer customers innovative products and services that help reduce demand on the grid and incentivize customers to use energy more efficiently. Properly executed smart grid deployment will provide great benefit to all customers."

White Test. (RESA Ex. 1), p. 3.

A survey of DP&L's customers demonstrates the importance of improving DP&L's reliability. Specifically, in a survey of DP&L's residential customers, they were asked to rate on a scale of 1 (not at all important) to 10 (very important) how important it was to them that DP&L reduce by half the frequency of sustained outages, the duration of sustained outages, and the number of momentary outages. Williams Dir. Test. (OCC Ex. 13A), Ex. JDW 14, p. 6034. The survey shows that improving those metrics was important to residential customers -- the mean importance ratings were 7.2, 7.4 and 6.2, respectively. Id. Improving those reliability metrics was also important to business customers -- the mean importance ratings for the same three questions was 7.7, 7.8 and 7.0, respectively. Id. at 6046. The survey thus shows that customers want the improved reliability that would come from grid modernization.

The evidence at the hearing showed that DP&L could not implement grid modernization without the DMR. For example, DP&L witness Jackson testified:

> "Q. There was some questions posed to you about how DP&L would fund the SmartGrid rider and the DIR. Can you explain how those would be funded and whether they could be funded in the absence of the DMR?
>
> A. So we would -- <u>in order to fund the capital required for a SmartGrid program or investments that would roll through the DIR, we would need to access the capital markets to do so. We are not in a position to do that today</u>.
>
> <u>The DMR will enable us to pay down debt to put us in a position in the future to be able to access the debt and equity markets. But where we are today, we are not in a position to be able to access capital to fund SmartGrid and DIR</u>."

Trans. Vol. I, pp. 106-07 (emphasis added).

DP&L witness Malinak confirmed that if "DP&L would not have access to the funds from the financial integrity charges, DP&L would be experiencing severe financial distress and would not have the funds to implement robust grid modernization in a timely manner." Malinak Test. (DP&L Ex. 2B), p. 66.

A key piece of evidence demonstrating DP&L's need for the DMR to implement grid modernization relates to DP&L's most recent debt issuance. Specifically, on August 24, 2016, DP&L refinanced $445 million in debt. Jackson Test. (DP&L Ex. 1B), p. 9. Due to DP&L's poor financial condition, DP&L was forced to refinance that debt in a market reserved for companies with a "below investment grade credit ratings," and forced to agree to "a covenant package that, among other things, prevents the Company from raising debt to modernize the transmission and distribution system during the term of the loan." <u>Id</u>. at 10.

Mr. Jackson explained that that covenant would preclude DP&L from issuing debt to pursue grid modernization:

"EXAMINER PRICE: I only have a couple of questions, maybe only one.

Can you turn to page 10 of your testimony. Line 7. However we got here, transactions in the past aside, you currently have a covenant package which precludes you from raising debt to modernize your transmission and distribution infrastructure; is that correct?

THE WITNESS: That is correct.

EXAMINER PRICE: . . . [D]oes that include any advanced metering . . . ?

THE WITNESS: This covenant really prevents us from raising any debt at all, whether it's for advanced metering or SmartGrid, so on and so forth. We don't have the ability to raise debt at DP&L.

EXAMINER PRICE: Any grid modernization?

THE WITNESS: Correct."

Trans., Vol. I, pp. 109-10. (Approval of a $105 million DMR is expected to allow DP&L to refinance debt in the future to allow DP&L to implement grid modernization.)

At least the full DMR amount is thus needed for five years for DP&L to implement the Commission's PowerForward initiative.

C. **The Stipulation Contains Equity Investments by AES, not Otherwise Required or Jurisdictional**

The Stipulation contains three concessions by AES that constitute material equity investments by AES:

1. **No Dividends:** AES has not received a dividend from DPL Inc. since 2012,[7] and agreed in the Stipulation not to receive a dividend during the ESP term (Stipulation, ¶ II.1.a (p. 3)).

2. **Tax Liability Collection:** AES files a consolidated tax return on behalf of itself and its subsidiaries, and DPL Inc. has a contractual obligation to pay DPL Inc.'s share of the tax liabilities to AES. Schroder Test. (DP&L Ex. 3), p. 19; Jackson Test. (DP&L Ex. 1B), p. 12. AES has not collected the required tax-sharing payments from DPL Inc. since 2012,[8] and agreed in the Stipulation not to collect tax-sharing payments during the DMR term (Stipulation, ¶ II.1.b (pp. 3-4)).

3. **Conversion to Equity:** While AES has not been collecting DPL Inc.'s contractually-required tax-sharing payments, those payments have been listed as a liability on DPL Inc.'s balance sheet. Jackson Test. (DP&L Ex. 1B), p. 12. AES agreed in the Stipulation to convert DPL Inc.'s past and future (during the DMR term) tax liabilities into equity (Stipulation, ¶ II.1.b (pp. 3-4)).

DP&L witness Malinak explained the financial magnitude of those commitments:

> "[C]ommitments from AES regarding dividends and tax payments . . . are projected to provide approximately [redacted] million in additional cash flow available for debt service and improving the Company's overall financial health. As part of these commitments, AES has agreed to convert the outstanding tax liability on DPL's books as of the effective date of the ESP to equity and, thereafter, each month, convert newly accrued liabilities (incurred during the term of the DMR) to equity. [Stipulation, pp. 3-4.] I project that

[7] Jackson Test. (DP&L Ex.1B), p. 11.

[8] Trans. Vol. I, p. 49 (Jackson).

> this will result in a total incremental equity investment in DPL of [redacted] million by 2022."

Malinak Test. (DP&L Ex. 2B), p. 4 (footnote omitted). Accord: Trans. Vol. I, p. 154 (Malinak) (footnote omitted) (AES's contributions are equity investments).

Staff witness Donlon testified that those measures would constitute "ring fencing" and that "through this stipulation we were able to negotiate . . . something that is outside of the Commission's actual authority to be able to do in an order without the company in a stipulation." Trans. Vol. V, p. 883. Accord: id. at 884-87 (explaining that Staff was able to negotiate with AES Corporation to provide appropriate measures that can be implemented only through a stipulation).

In testimony that was filed before the Stipulation, OCC witness Kahal stated that AES should "mak[e] equity contributions to DPL Inc." Kahal Dir. Test (OCC Ex. 12A), p. 38. Mr. Kahal agreed at the hearing that those three measures in the Stipulation were benefits of the Stipulation (Trans. Vol. IV, pp. 710-11) and that they constituted "an equity infusion from AES into DPL Inc." Id. at 712 (emphasis added).

In approving a DMR for FirstEnergy, the Commission cited to the fact that "all of FirstEnergy Corp.'s stakeholders are sharing in the burden of improving its financial health," and cited to specific actions taken by FirstEnergy. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 283 (Case No. 14-1297-EL-SSO). The burden undertaken by DP&L's shareholders is even greater than the burden undertaken in that case, because DPL Inc. has not paid dividends or made tax sharing payments to AES since 2012, and has agreed not to do so during the remainder of the DMR/ESP term. Stipulation, ¶ II.1.a and b (pp. 3-4).

D. OTHER BENEFITS OF THE STIPULATION

The Stipulation includes many other significant customer benefits, including the following:

1. **Competitive Bidding:** The Stipulation provides that 100% of DP&L's SSO load will be provided through competitive bidding. Stipulation, ¶ III (pp. 8-9). There is no requirement in the ESP statute that SSO service be provided through competitive bidding. Ohio Rev. Code § 4928.143. OCC's witnesses conceded that that provision was a benefit. Trans. Vol. IV, p. 709 (Kahal); Trans. Vol. IV, p.768 (Williams). In fact, the SSO auction is the most significant factor contributing to the reduction in residential customer bills. Schroder Test. (DP&L Ex. 3), Ex. A.

2. **Transfer of Generation Assets:** The Stipulation also provides that DP&L will transfer its generation assets to an affiliate. Stipulation, ¶ II.1.c (p. 4). OCC witness Kahal conceded that that term was a benefit to customers. Trans. Vol. IV, p. 713.

3. **Sales Process for Certain Coal Assets:** The Stipulation provides that DP&L will engage in a sale process for certain of its coal-fired generation assets, and that any proceeds from the sale will be used to pay debt at DPL Inc. and DP&L. Stipulation, ¶ II.1.d, e (p. 4). OCC witness Kahal conceded that that was "a completely appropriate thing to do." Trans. Vol. IV, p. 714. This is yet another commitment by DP&L and AES that could otherwise be used to benefit shareholders instead of being used to pay down debt and reduce the amount to be collected from customers.

4. **Economic Development Incentives:** The Stipulation also provides that certain DP&L customers that are large employers in DP&L's service territory will receive economic development incentives. Stipulation, ¶ IV (pp. 9-10). DP&L witness Schroder

testified that the incentives are "designed to promote Ohio's ability to create and retain jobs. Not only will the incentives assist those businesses to retain existing employees and hire new ones, but there would also be a multiplier effect in that those employees will support local businesses." Schroder Test. (DP&L Ex. 3), p. 13. Accord: Trans. Vol. IV, p. 723 (Kahal) (businesses look at their costs when making decisions).

5. **Economic Development Grant Fund:** The Stipulation also includes an Economic Development Grant Fund. Stipulation, ¶ V (pp. 10-12). The testimony of DP&L witness Schroder explains that the costs of that fund will be borne by DP&L (not customers), and it will provide the following benefits: (1) $1 million annually for customers to use for energy programs and infrastructure; (2) payments totaling $2 million to benefit Adams County, and (3) DP&L will provide offset payments to certain large employers within DP&L's service territory. Schroder Test. (DP&L Ex. 3), p. 13.

6. **The Reconciliation Rider:** The Stipulation includes a Reconciliation Rider, which will allow DP&L to defer/recover or credit the net proceeds of selling Ohio Valley Electric Cooperative ("OVEC") energy and capacity into PJM. Stipulation, ¶ VI.1.a.ii (p. 13). DP&L will continue to attempt to discharge its OVEC obligations. Id. ¶ VI.1.a.iii (p. 13).

DP&L witness Schroder explains the benefits of the Reconciliation Rider, including that it will act as a hedge to protect against future spikes in power prices. Schroder Test. (DP&L Ex. 3), pp. 13-14. DP&L witness Malinak explains that the Reconciliation Rider is necessary to protect DP&L's financial integrity. Malinak Test. (DP&L Ex. 2B), pp. 52-58. The Commission has previously approved a substantially similar rider for AEP. Nov. 3, 2016 Second Entry on Rehearing, ¶¶ 51-58 (Case No. 14-1693-EL-RDR). Accord: id. concurring opinion of Chairman Haque, pp. 4-6.

7. **<u>Competitive Enhancements</u>:** The Stipulation contains three significant competitive enhancements: (1) a pilot program allowing DP&L's customers to opt out of DP&L's TCRR-N, and acquire transmission service directly from PJM or from a CRES Provider; (2) a supplier consolidated billing program; and (3) provisions regarding the inclusion of non-commodity items on a utility consolidated bill. Stipulation, ¶¶ VI.1.c (pp. 14-17); IX.1 (p. 21); IX.2 (pp. 21-25). The testimony of RESA/IGS witness White and DP&L witness Schroder demonstrates that those provisions will assist the competitive market within DP&L's service territory to develop. White Test. (RESA Ex. 1), pp. 8-11; Schroder Test. (DP&L Ex. 3), pp. 15-16.

8. **<u>City of Dayton</u>**: The Stipulation provides significant benefits for the largest municipality in the DP&L service territory – the City of Dayton and its residents – including:

a. A joint partnership with The University of Dayton's Hanley Sustainability Institute (Stipulation, ¶ X.2.a. (p. 27));

b. Payments of $50,000 annually for residential energy education and reduction programs (Stipulation, ¶ X.2.b (p. 27));

c. DP&L will participate in the Property Accessed Clean Energy Program, including payments to support that program (Stipulation, ¶ X.2.c (pp. 27-28));

d. DP&L will work to improve reliability at the Dayton International Airport (Stipulation, ¶ X.2.d (pp. 28-29));

e. City accounts will be exempt from paying redundant service charges (Stipulation, ¶ X.2.e (p. 29));

f. DP&L's operating headquarters will remain in the City of Dayton (Stipulation, ¶ X.2.f (p. 29));

g. DP&L will work with the City of Dayton to develop a job training program (Stipulation, ¶ X.2.g (p. 32));

h. DP&L agreed to provide special hiring outreach to City of Dayton residents (Stipulation, ¶ X.2.h (p. 32)); and

i. DP&L will contribute $200,000 annually to assist the City to provide economic development programs and essential city services to residences, including low-income residences (Stipulation, ¶ X.2.i (p. 32)).

The testimony of DP&L witness Schroder explained the benefits of those provisions. Schroder Test. (DP&L Ex. 3), pp. 16-17.

9. **Funds for Low-Income Customers:** The Stipulation also provides significant benefits for low-income customers -- DP&L will use shareholder funds (i.e., customers will not pay) totaling $965,000 annually (during the initial DMR term) to benefit low-income customers. Stipulation, ¶¶ X.2.i (p. 32), X.3 (p. 33), X.6 (p. 36); Schroder Test. (DP&L Ex. 3), p. 16. The testimony of OPAE/Edgemont witness Cronmiller explained the substantial benefits of the Stipulation to low-income customers. Cronmiller Test. (Edgemont/OPAE Ex. 1), pp. 2-4.

E. THE ESP RESULTS IN A RATE REDUCTION; DP&L HAS THE LOWEST RATES IN THE STATE

Not only does the Stipulation provide significant customer benefits, but also, the testimony of DP&L witness Schroder demonstrates that a typical residential customer will experience a rate decrease under the Stipulation (Schroder Test. (DP&L Ex. 3), p. 20 and Ex. A), and that DP&L's rates for typical residential customers are and will remain the lowest in the state after the Stipulation is approved (id. at 20-21 and Ex. B).

OCC witness Kahal described the rate impacts of the Stipulation as "surprisingly modest." Kahal Supp. Test. (OCC Ex. 12), p. 17. OCC witness Fortney conceded that customers would receive a rate decrease under the Stipulation. Trans. Vol. IV, p. 808.

V. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE

A. THE STIPULATION ESTABLISHES AN ESP THAT IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO

Pursuant to Ohio Rev. Code § 4928.143(C)(1), "the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security 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 section 4928.142 of the Revised Code." The Commission has considered three factors to determine whether an ESP is "more favorable in the aggregate" ("MFA") as compared to a market rate offer ("MRO"): (1) quantifiable differences in the prices to be charged to customers, (2) other quantifiable differences in customer charges, and (3) non-quantifiable differences.[9]

1. Quantifiable Differences in Price

It is undisputed that SSO customers would pay the same prices under either an ESP or an MRO. Donlon Test. (Staff Ex. 2), p. 5; Malinak Test. (DP&L Ex. 2B), p. 11. Kahal Dir. Test. (OCC Ex. 12A), p. 42. The SSO rates are thus a "wash" for purposes of the MFA test.[10]

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[9] August 8, 2012 Opinion and Order, Case No. 11-346-EL-SSO, p. 73; July 18, 2012 Opinion and Order, Case No. 12-1230-EL-SSO, pp. 56-57.

[10] The evidence at the hearing established that customers actually may pay lower prices for SSO service under an ESP than under an MRO. Specifically, it is undisputed that DP&L owned generation assets as of July 31, 2008. Trans. Vol. IV, p. 726 (Kahal). It is also undisputed that SSO rates in DP&L's to-be-conducted competitive auction are projected to be lower than DP&L's current SSO rates. Trans. Vol. IV, pp. 727-28 (Kahal); Schroder Test. (DP&L Ex. 3), p. 20 and Ex. A, pp. 1-36, Column G. Under the MRO statute, in year one, 90% of the rate that an SSO customer would pay would be based upon DP&L's existing rates and 10% would be based on competitive bidding. Ohio Rev. Code § 4928.142(D). OCC witness Kahal conceded that customers may thus pay higher prices under an MRO. Trans. Vol. IV, p. 728. DP&L nevertheless assumes for purposes of this brief that SSO rates would be the same under either an ESP or an MRO.

Further, Commission precedent and the evidence at the hearing established that a DMR or similar charge would be available under either an ESP or MRO. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 357 (Case No. 14-1297-EL-SSO); Donlon Test. (Staff Ex. 2), p. 5; Malinak Test. (DP&L Ex. 2B), p. 12. (OCC witness Kahal states that "[m]y assessment is that there is no provision under the MRO statute that would permit a distribution modernization rider to be approved." Kahal Dir. Test. (OCC Ex. 12A), p. 42. However, under the MRO statute, a charge is available "to address any emergency that threatens utility's financial integrity" (Ohio Rev. Code § 4928.142(D)(4)), and Mr. Kahal conceded at the hearing that he has "not done any analysis as to whether DP&L would be entitled to emergency relief under an MRO." Trans. Vol. IV, p. 729. He thus has no basis for his assertion that the DMR would not be available under an MRO.) The DMR is thus also a "wash" in the MFA test.

2. **Other Quantifiable Differences**

The Stipulation includes numerous benefits that are funded by shareholders, including economic development payments, energy education payments, and payments to assist low-income customers. Stipulation, ¶¶ IV (pp. 10-12), X.2.b. (p. 27), X.3.a. (p. 33), and X.6.a. (p. 36). There are no provisions in the MRO statute that require those benefits. Ohio Rev. Code § 4928.142. Depending upon whether one assumes that the DMR lasts for three years or five years, those benefits will provide between \$9 and \$11.5 million in direct customer benefits that are not required to be provided in an MRO. Donlon Test. (Staff Ex. 2), pp. 5-6 (\$9 million in benefits, assuming 3-year DMR); Malinak Test. (DP&L Ex. 2B), pp. 15-17 (\$11.5 million in benefits, assuming 5-year DMR).

As for other riders established in the Stipulation, the evidence at the hearing demonstrated that the riders also would be available if DP&L had filed for an MRO. Trans.

Vol. V, pp. 888-89 (Donlon); Malinak Test. (DP&L Ex. 2B), p. 14. No opposing witnesses disputed that point. Those other riders are thus a "wash" under the MFA test.

There are between $9 and $11.5 million in quantifiable benefits provided by the Stipulation that DP&L would not be required to provide under an MRO.

3. **Non-Quantifiable Benefits**

The Stipulation also includes significant non-quantifiable benefits that would not be required under an MRO. Those benefits are discussed at length on pages 64-70 in the testimony of DP&L witness Malinak (DP&L Ex. 2B). In summary, his testimony shows that the Stipulation would provide the following non-quantifiable benefits:

1. Accelerated implementation of grid modernization (pp. 64-66);
2. Commitments by AES to not collect dividends from DPL Inc. during the ESP term, and to forego collection of tax-sharing payments during the DMR term and convert those liabilities into equity (pp. 66-67);
3. DP&L remains subject to the significantly excessive earnings test (p. 67);
4. Future opportunity to file an ESP or an MRO (pp. 67-68);
5. Transfer of DP&L's generation assets to an affiliate (p. 68);
6. A sale process of certain DP&L generation assets with proceeds to be used to make discretionary debt repayments (pp. 68-69);
7. Numerous benefits to customers and Signatory Parties, including maintaining DP&L's headquarters in the City of Dayton (pp. 69-70); and
8. Competitive market enhancements including supplier consolidated billing and non-commodity services.

The Commission cited to similar nonquantifiable benefits in concluding that FirstEnergy's ESP passed the MFA test. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 358 (Case No. 14-1297-EL-SSO).

Mr. Malinak also addresses whether the Stipulation would pass the MFA test if the DMR was not available under an MRO. He explains that the MRO would then be approximately $ 401-477 million more favorable than an ESP on a price basis; however, DP&L would not be able to maintain its financial integrity and provide safe and stable service under an MRO without the DMR. Malinak Test. (DP&L Ex. 2B), pp. 13, 18. The inability of DP&L to provide safe and reliable service under an MRO would impose significant non-quantifiable costs upon customers in DP&L's service territory, and those costs greatly exceed any quantifiable benefits under an MRO without a DMR. Malinak Test. (DP&L Ex. 2B), pp. 18-19. OCC witness Kahal conceded that (1) the economy in DP&L's service territory could be adversely affected if DP&L could not provide safe and reliable service; and (2) if DP&L cannot provide safe and reliable service, that would impose costs on customers that would be difficult to quantify. Trans. Vol. IV, pp. 708, 731. Commission precedent establishes that an ESP passes the MFA test if the utility could not provide safe and reliable service under an MRO. Aug. 8, 2012 Opinion and Order, p. 76 (Case No. 11-346-EL-SSO). The Stipulation would thus pass the MFA test even if the DMR was not available under an MRO.

In summary, the Stipulation provides $9 to $11.5 million in quantifiable benefits and numerous non-quantifiable benefits to customers that would not be required under an MRO. The Stipulation thus easily passes the MFA test.

B. THE DMR IS AUTHORIZED BY STATUTE

1. The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(h)

The Commission has previously held that a DMR is authorized under Section 4928.143(B)(2)(h). Oct. 12, 2016, Fifth Entry on Rehearing, ¶¶ 189-191 (Case No. 14-1297-EL-SSO). That section provides that an electric security plan may include:

> "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. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."

Ohio Rev. Code § 4928.143(B)(2)(h) (emphasis added).

In FirstEnergy's recent ESP case, the Commission found that FirstEnergy's DMR was related to distribution, not generation, and it was "intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems." Oct. 12, 2016 Fifth Entry on Rehearing, ¶¶ 190-91 (Case No. 14-1297-EL-SSO).

Here, as demonstrated above, Staff witness Donlon testified that the primary purpose of the DMR was "to allow the company to be able to invest in the distribution grid." Trans. Vol. V, pp. 875-76. Similarly, DP&L witness Jackson explained that without the DMR, the financial integrity of DP&L and DPL Inc. will continue to be imperiled, and DP&L will not have "access to debt and/or equity to finance capital expenditures <u>necessary to maintain, modernize or grow existing transmission and distribution infrastructure</u>." Jackson Test. (DP&L Ex. 1B), pp. 17-18 (emphasis added). <u>Accord</u>: Malinak Test., (DP&L Ex. 2B), p. 66.

DP&L's DMR is thus a distribution charge that incentivizes and makes grid modernization possible. As with FirstEnergy's DMR, it would improve the performance of DP&L's distribution grid, and without the DMR, grid modernization, with its significant benefits, may be unattainable. In addition, the DMR constitutes single-issue or incentive ratemaking as it concerns a specific issue (<u>i.e.</u>, ensuring DP&L's financial integrity) and is intended to incentivize DP&L's ability to obtain capital for grid modernization. Thus, the charge is authorized pursuant to § 4928.143(B)(2)(h).

The evidence at the hearing also established that DP&L has been placing sufficient emphasis on the reliability of its distribution system and its expectations are aligned with the expectations of its customers. Ohio Rev. Code § 4928.143(B)(2)(h). Specifically, the testimony of Staff witness Nicodemus, DP&L witness Hall (sponsored by DP&L witness Schroder) and OCC witness Williams agree that DP&L has been achieving its reliability targets and DP&L's customer satisfaction scores are acceptable. Nicodemus Test. (Staff Ex. 1), pp. 5-7; Hall Test. (DP&L Ex. 4), p. 4; Trans. Vol. IV, pp. 781-82 (Williams). Further, as discussed above, a survey of DP&L's residential and business customers shows that it is important to them that DP&L continue to improve its reliability. Williams Dir. Test. (OCC Ex. 13A, Ex. JDW 14, pp. 6034, 6046) (showing that it was important to DP&L's residential and business customers that DP&L reduce by half the frequency of sustained outages, the duration of sustained outages, and the number of monthly outages). It is undisputed that grid modernization will improve reliability, so DP&L's and its customers' expectations are aligned. However, the evidence in the case also demonstrated that DP&L would not only fail to improve reliability or modernize its grid, but also would not be able to provide safe and reliable service absent the DMR. See supra, § IV.A.1 and 2.

2. The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(d)

The DMR is also authorized by Ohio Rev. Code § 4928.143(B)(2)(d), under which an electric security plan may include,

> "without limitation . . . [t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

"[A] proposed item in an ESP is authorized if it meets three criteria: (1) it is a term, condition, or charge, (2) it relates to one of the listed items (e.g., limitations on customer shopping, bypassability, carrying costs), and (3) it has the effect of stabilizing or providing certainty regarding retail electric service." In re Application of Columbus S. Power Co., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 43 (2016). Accord: Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 97, (Case No. 14-1297-EL-SSO).

1. A charge: The DMR satisfies the first condition of subsection (B)(2)(d) because it is a charge.

2. <u>Relating to</u>: The DMR satisfies the "relating to" prong because it relates to a financial limitation on shopping. Mar. 31, 2016 Opinion and Order, p. 109 (Case No. 14-1297-EL-SSO); Oct. 12, 2016 Fifth Entry on Rehearing, p. 45 (Case No. 14-1297-EL-SSO); Feb. 25, 2015 Opinion and Order, p. 22 (Case No. 13-2385-EL-SSO); Nov. 3, 2016 Second Entry on Rehearing, p. 83 (Case No. 14-1693-EL-RDR) ("The Commission's analysis of the scope of R.C. 4928.143(B)(2)(d) begins with the plain language of the statute. As the Commission interprets the statute, the General Assembly did not specify the scope or particular type of limitation on customer shopping under the statute, as opposing intervenors argue. Therefore, the Commission interprets the statute to permit various types of limitations on customer shopping, which gives the Commission the discretion to determine the types of limitations that meet the criteria set forth in the statute."); Apr. 2, 2015 Opinion and Order, p. 45 (Case No. 14-841-EL-SSO); Aug. 08, 2012 Opinion and Order, p. 31 (Case No. 11-346-EL-SSO).

The DMR also relates to "default service" since it ensures the financial integrity of DP&L, thus enabling DP&L to continue providing competitively bid SSO service. Sept. 4, 2013 Opinion and Order, p. 21 (Case No. 12-426-EL-SSO); Jan. 30, 2013 Entry on Rehearing, p. 15 (Case No. 11-346-EL-SSO). There is no requirement in § 4928.143 that SSO service be provided via competitive bidding.

The DMR also meets the second condition for the separate and independent reason that it relates to "bypassability" as a nonbypassable charge. DP&L is aware that the Commission has questioned whether it is sufficient for a charge to relate to "bypassability" to satisfy the "relating to" prong under Section 4928.143(B)(2)(d), because "nearly every charge may be bypassable or non-bypassable." <u>E.g.</u>, Oct. 12, 2016, Fifth Entry on Rehearing, ¶ 100 (Case No. 14-1297-EL-SSO). DP&L asks the Commission to reconsider that reasoning for two reasons. First, "[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute." Canton Storage & Transfer Co. v. Pub. Util. Comm., 72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995). Accord: In re Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 32 ("Fundamentally, [t]he PUCO, as a creature of statute, has no authority to act beyond its statutory powers.") (alteration in original) (internal quotation marks and citation omitted). The General Assembly determined that a charge would satisfy the "relating to" prong if the charge related to "bypassability," and the Commission cannot and should not disregard that provision.

Second, not all charges are bypassable or nonbypassable. Specifically, a charge is bypassable if a customer can avoid it by switching to an alternative generation supplier (e.g., a charge for SSO service). A charge is nonbypassable if all customers must pay it (e.g., the DMR or a charge for distribution service). However, utilities have various charges that do not fall into either category. For example, utilities charge customers to have distribution lines extended to their homes or businesses. Ohio Admin. Code § 4901:1-9-07. Utilities charge third parties (e.g., cable or telephone companies) to attach wires to utility poles. Ohio Rev. Code §§ 4905.51 and 4905.71. Utilities charge customers in certain instances things such as deposits, late payment charges, reconnection charges, and charges associated with damages relating to fraudulent or damaging practices by the customer.

Utility charges for pole attachments, line extensions or other items do not relate to "bypassability," since they are neither bypassable (they cannot be avoided by switching to an alternative generation supplier) nor nonbypassable (all customers do not have to pay them). Thus, not all charges are bypassable or nonbypassable. The Commission should thus hold that the DMR also satisfies the "relating to" prong of Section 4928.143(B)(2)(d) since it is nonbypassable.

3. "Stabilizing or providing certainty regarding electric service": As demonstrated at length above, DP&L could not provide safe or reliable service without the DMR. Malinak Test. (DP&L Ex. 2B), pp. 58-59; Jackson Test. (DP&L Ex. 1B), pp. 17-18. DP&L also could not implement grid modernization without the DMR. Malinak Test. (DP&L Ex. 2B), p. 66; Trans. Vol. I (Jackson Test.), pp. 106-07, 109-10. The DMR thus easily satisfies the third prong of the test.

The Commission should thus conclude that the DMR is authorized by § 4928.143(B)(2)(d).

3. **The DMR Is Lawful Pursuant to Ohio Rev. Code § 4928.143(B)(2)(i)**

The DMR is authorized pursuant to Ohio Rev. Code § 4928.143(B)(2)(i), which provides that electric security plans may include:

> "Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system."

Ohio Rev. Code § 4928.143(B)(2)(i) (emphasis added.)

Witness Malinak's testimony (p. 64) explains that "all residential, commercial, industrial, and governmental customers in West Central Ohio would benefit from the economic development, new jobs, and investment in human and physical capital that would be caused by the grid modernization projects." Malinak Test. (DP&L Ex. 2B), p. 64. OCC witness Kahal conceded that the economy would be adversely affected if DP&L could not provide safe and reliable service. Trans. Vol. IV, p. 708. Thus, the DMR also satisfies the requirements of § 4928.132(B)(2)(i).

4. **The DMR Is Not a Transition Charge**

OCC witnesses assert that the DMR is an unlawful transition charge. Kahal Dir. Test. (OCC Ex. 12A), p. 25. As demonstrated below, that assertion is not supported by the evidence. Moreover, even if the DMR was a transition charge, the DMR does not violate the statutes barring the collection of such charges.

a. **The DMR Does Not Constitute a Transition Charge**

Transition charges, by definition, are "directly assignable or allocable to retail electric generation service provided to electric consumers in this state." Ohio Rev. Code § 4928.39(B). The Commission should conclude that the DMR does not relate to retail electric generation service for three separate and independent reasons.

First, the Stipulation provides that DP&L will transfer all of its generation assets to an affiliate. Stipulation, ¶ II.1.c (p. 4). The Stipulation also provides that DP&L or its affiliate will initiate a sale process for certain of its coal-fired generation assets (Stipulation, ¶ II.1.d (p. 4)) and DP&L has announced plans to close its other coal-fired generation plants (Malinak Test. (DP&L Ex. 2B), p. 70.) The DMR thus is not "directly assignable or allocable to retail electric generation service provided to electric consumers in this state," since DP&L will not own generation assets.

Second, as demonstrated above, the purpose of the DMR is to allow DP&L to provide safe and reliable <u>distribution</u> service and to implement <u>distribution</u> grid modernization.

See supra § IV.1 and 2. The DMR funds will not be used to support generation. Stipulation ¶ II.2.b (p. 5) (DMR funds will be used to pay interest obligations, pay debt, and position DP&L to invest in distribution infrastructure); Schroder Test. (DP&L Ex. 3), pp. 22-23. The DMR thus is not a transition charge.

Third, the Stipulation establishes that DP&L will provide SSO service through 100% competitive bidding. Stipulation, ¶ III (p. 8). The Commission cited that factor in concluding that FirstEnergy's DMR was not a transition charge. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 287 (Case No. 14-1297-EL-SSO).

b. The DMR Is Lawful "Notwithstanding" Prohibitions Against Recovering Transition Costs and the Equivalent of Transition Costs

Even if the DMR was a transition cost, it would still be lawful. Specifically, as shown above, the DMR is authorized pursuant to Ohio Rev. Code § 4928.143(B)(2)(h), which contains not one, but two "notwithstanding" clauses. Each "notwithstanding" clause gives the DMR precedence over nearly every other provision of Title XLIX, including but not limited to the statute that prohibits the collection of transition costs.

The first "notwithstanding" clause appears in § 4928.143(B), which provides:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code . . . ."

Ohio Rev. Code § 4928.143(B) (emphasis added).

The second "notwithstanding" clause appears in § 4928.143(B)(2)(h), which provides:

> "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. "

Ohio Rev. Code § 4928.143(B)(2)(h) (emphasis added).

The Supreme Court interprets "notwithstanding" clauses broadly, holding that they "indicate[] the General Assembly's intention" that a given provision "take[s] precedence over any contrary statute purporting to limit" that provision. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35 (emphasis added). Accord: Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("[A] 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.") (emphasis added).

In AEP's recent case, the Supreme Court seemingly acknowledged that the "notwithstanding" clause in § 4928.143(B) would create an exception to the prohibition against recollection of transition charges, but declined to rule on that issue because the Commission did not rely on the language in the case below. In re Application of Columbus S. Power Co. and Ohio Power Co., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 38 n.3). The two "notwithstanding" clauses are plainly applicable here, and the Commission should rely upon them in its decision rejecting OCC's transition charge arguments so that the Supreme Court can and will rely on those arguments in the inevitable appeal in this case.

Indeed, the Commission has itself recently relied on the "notwithstanding" in § 4928.143(B)(2)(h). Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 290 (Case No. 14-1297-EL-SSO) (relying upon "notwithstanding" clause in § 4928.143(B)(2)(h) to reject argument that FirstEnergy's DMR violated § 4905.22).

In short, the "notwithstanding" clause of § 4928.143(B)(2)(h) contains no exceptions, and the "[n]otwithstanding" clause of § 4928.143(B) does not exclude the provisions concerning transition costs or their equivalent. Ohio Rev. Code §§ 4928.38 and 4928.141. Thus, those provisions are inapplicable to whether the DMR is lawful.

c. **The DMR Is Lawful Because Ohio Rev. Code § 4928.143 Is the Later-Enacted Statute**

There is a separate and independent reason that the DMR does not violate the prohibitions against the transition costs or Ohio Rev. Code § 4928.38, which was enacted in 1999 as part of S.B. 3. Specifically, the DMR is lawful pursuant to three separate subdivisions of § 4928.143, which were enacted nine years later, in 2008, as part of Am.Sub.S.B. 221.

Since § 4928.143 was enacted after § 4928.38, a charge approved under subdivisions (B)(2)(h), (B)(2)(i), and (B)(2)(d) is lawful even if it constitutes a transition charge. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

C. **THE DMR COMPLIES WITH STATE POLICY**

The policies of the state of Ohio are set forth in Ohio Rev. Code § 4928.02, and the testimony of DP&L witness Schroder demonstrates that the DMR satisfies those policies. Schroder Test. (DP&L Ex. 3), pp. 21-22. The Commission has previously held that a DMR satisfies state policies (Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 271 (Case No. 14-1297-EL-SSO)), and should do so here for the same reasons.

D. THE ECONOMIC DEVELOPMENT INCENTIVES AND GRANTS ARE LAWFUL

OCC witness Kahal (Kahal Supp. Test. (OCC Ex. 12), p. 32) asserts that the Economic Development Fund (Stipulation, ¶ IV (pp. 9-10)) and the Economic Development Grant Fund (Stipulation, ¶ V (pp. 10-11)) do not provide economic benefits. The assertions are not supported legally or factually.

The ESP statute expressly authorizes economic development provisions. Ohio Rev. Code § 4928.143(B)(2)(i). The testimony of DP&L witness Schroder establishes that those provisions will provide economic benefits to DP&L's customers:

> "Q. Can you describe the Economic Development Rider ('EDR') benefits in more detail?
>
> A. Yes. The Company's current Economic Development Rider is modified in Amended Stipulation, ¶IV., and 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. The rider is thus designed to promote Ohio's ability to create and retain jobs. Not only will the EDR assist those businesses to retain existing employees and hire new ones, but there would also be a multiplier effect in that those employees will support local businesses.
>
> Q. Can you describe the Economic Development Grant Fund benefits in more detail?
>
> A. Yes. The Economic Development Grant Fund is established in Amended Stipulation, ¶ V., and contains three components, all of which last for the DMR term. The costs of those components will be borne by DP&L, i.e., they will not be recovered from customers. First, DP&L will contribute $1,000,000 annually for use by customers within DP&L's service territory for energy programs and infrastructure. Second, DP&L will contribute a total of $2,000,000 to benefit Adams County, which funds will be used for economic development activities, workforce development, and job

> training. Third, DP&L will provide offset payments to certain large employers within DP&L's service territory."

Schroder Test. (DP&L Ex. 3), pp. 12-13. Accord: Trans. Vol. II, p. 254.

Indeed, the Commission has repeatedly approved stipulations that included provisions that provide economic development benefits to communities and stakeholders. Feb. 23, 2017 Order on Global Settlement Stipulation, pp. 31-32 (Case Nos. 09-872-EL-FAC, et al.) (approving stipulation in which AEP Ohio agreed to fund a one-time aggregate rate mitigation credit to signatory party Kroger in an amount equal to the projected impact of a rate change, which was to "be absorbed by [AEP-Ohio] as an economic development commitment . . . in recognition of the litigation cost incurred by Kroger to help provide the system-wide benefits" associated with the stipulation) (emphasis added); Dec. 14, 2011 Opinion and Order, p. 24 (Case Nos. 10-2376-EL-UNC, et al.) (approving stipulation in which AEP Ohio committed to provide $5 million annually "for the benefit of economic development" to the Ohio Growth Fund, which was to be advised by group of signatory parties and distribute $50,000 annually to signatory party AICUO) (emphasis added).

E. THE PAYMENT OF DPL INC. DEBT IS NECESSARY TO PROTECT DP&L

OCC witness Kahal criticizes the use of DMR funds to pay debt at DPL Inc. Kahal Supp. Test. (OCC Ex. 12), pp. 30-31. However, that testimony ignores the fact that DPL Inc.'s financial integrity is linked to DP&L's financial integrity.

Specifically, DP&L witness Malinak explained that DP&L's financial integrity is linked to DPL Inc.'s financial integrity:

"Q. Why do you analyze the financial condition and integrity of DPL in addition to DP&L?

A. The financial condition and integrity of DPL — which depends on its ability to service all of its consolidated debt — affects the financial condition and integrity of DP&L. For example, if DPL experiences financial stress, it would have a negative effect on DP&L including, but not limited to, unfavorable changes in DP&L's credit ratings, increased cost of debt/borrowing costs, reductions or other limits on capital expenditures or O&M that would negatively affect service quality, and redirecting management attention and effort to managing through financial distress. Also, just as importantly, in the event DP&L seeks incremental capital to finance grid modernization, it will require a healthy parent in order to receive equity capital, to complement debt capital, and to successfully finance these modernization investments."

Malinak Test. (DP&L Ex. 2B), p. 29 (emphasis added).

On cross examination, OCC's financial witnesses Kahal and Parcell conceded that DP&L's credit rating is "linked" to DPL Inc.'s credit rating, and that credit rating agencies may downgrade a utility based upon the financial weakness of the utility's parent. Trans. Vol. IV, pp. 704-05 (Kahal); Trans. Vol. V, p. 843 (Parcell). OCC witness Parcell also conceded that customers benefit from a financially healthy utility that is investment grade because it results in lower debt rates. Trans. Vol. V, pp. 843-44.

Mr. Kahal further testified that customers would be harmed if a utility has a financially distressed parent:

"Q. And as I understand it, MIK-1 [to Mr. Kahal's Direct testimony, OCC Ex. 12A] is a document that you've prepared that summarizes ring fencing testimony by a Mr. Charles Atkins in another proceeding?

A. It does.

* * *

Q. Okay. Turn, if you would, then to the second paragraph there, focus there. You say 'Mr. Adkins has identified three types of risks associated with a utility being owned by a financial distressed holding company parent that could be adverse to customers and utility regulators.' And then the first item you say is 'the distressed parent (which controls the utility) extracts cash flow or other assets from utility to address its needs thereby disrupting utility operations.' Did I read that accurately?

A. Yes.

Q. You would agree if that were to occur, that would have adverse effects on customers and regulators, correct?

A. Yes, it certainly could.

Q. Okay. Then the next item that you identify is that 'a parent in bankruptcy could require the utility subsidiary to participate voluntarily in that bankruptcy process.' Did I read that accurately?

A. Yes.

Q. And, again, if that were to occur, you believe that would have adverse effects for customers and regulators, right?

A. Yes.

Q. And then the last item you say 'a court could order the utility to be included in the parent's bankruptcy,' correct?

A. Yes.

Q. And, again, if that were to occur, that would have adverse effects on customers and regulators, right?

A. Yes."

Id. at 705-07.

DP&L witness Malinak explained that DPL Inc. would be under significant financial distress without the DMR:

"[redacted]

[redacted]."

Malinak Test. (DP&L Ex. 2B), p. 54 (footnotes omitted). Accord: id. at pp. 55-56 (showing that DPL Inc. [redacted] without the DMR and "could be forced into default").

In its recent decision approving a DMR for the FirstEnergy utilities, the Commission cited to and relied upon the fact that the credit ratings of utilities and their parent were linked. Oct. 12, 2016 Fifth Entry on Rehearing, ¶¶ 111, 194-95 (Case No. 14-1297-EL-SSO).

To assess DP&L's financial integrity (including its ability to provide safe and reliable service and implement grid modernization), the Commission thus needs to consider the financial integrity of DPL Inc.

F. <u>THE DMR DOES NOT COLLECT AN ACQUISITION PREMIUM</u>

OCC witness Kahal asserts that the DMR would collect on "acquisition premiums" in violation of Commission's November 22, 2011 Finding and Order in Case No. 11-3002-EL-MER in which the Commission's approved AES' acquisition of DPL Inc. Kahal Dir. Test. (OCC Ex. 12A), pp. 27-28.

However, Mr. Kahal essentially abandoned that opinion at the hearing:

> "Q. (By Mr. Sharkey) Now, let me ask you a couple of questions about the AES acquisition of DPL Inc. You are aware in that acquisition there was roughly $4 billion in debt, and about 1 billion of it was placed on DPL Inc. and 3 billion was placed on AES.
>
> A. Yeah. My recollection, I may not have these numbers exactly memorized, but I thought it was something like 4.3 billion and 1.3 billion of that went on DPL Inc.'s books. That's what my recollection was.
>
> Q. And it's true, isn't it, that <u>you don't sponsor any calculations showing which debt and how much debt at DPL Inc. is associated with an acquisition premium?</u>
>
> A. <u>I don't no</u>. I don't think that my testimony says anything about an acquisition premium one way or the other.

Trans. Vol. IV, pp. 712-13 (emphasis added). <u>Accord</u>: Trans. Vol. I (Jackson), p. 61 (some acquisition debt resides at AES and some resides at DPL Inc.); OCC Ex. 1.

Certainly, DPL Inc. and DP&L incurred debt related to the merger. Trans. Vol. I (Jackson), p. 91. But simply because DPL Inc. incurred debt, does not mean that it was necessarily a "premium." Webster's Dictionary defines a "premium" as "a high value or a value in excess of that normally or usually expected." Webster's Ninth New Collegiate Dictionary, at 928 (1989). But as DP&L witness Jackson testified, the price that AES paid for DPL Inc. and DP&L was a reasonable market price at the time. Trans. Vol. I, p. 98. OCC witness Kahal admits that out of a $4.3 billion purchase price, only $1.3 billion in debt ended up at DPL Inc. (Trans. Vol. IV, p. 713), eliminating any possible concern as to whether the debt at DPL Inc. was an "acquisition premium."

Moreover, no intervenor witness sponsored calculations establishing that any "acquisition premium" exists or that the DMR would collect any "acquisitions premium."

In the absence of any evidence that the DMR would collect an acquisitions premium, the Commission should conclude the AES acquisition of DPL Inc. (including associated debt at DPL Inc.) is irrelevant. For example, at the hearing in First Energy's recent ESP case, OCC attempted to introduce evidence of debt that First Energy took on in a past acquisition. The Attorney Examiner ruled that the evidence was not relevant because "we can't undo what happened in the past":

> "Q. If I gave -- put in front of you a FirstEnergy Allegheny press release, would that maybe help refresh your recollection?
>
> Mr. McNamee: Objection.
>
> Examiner Price: Grounds?
>
> Mr. McNamee: Same as before, we are not getting towards anything that's relevant in this case.
>
> Examiner Price: Mr. Sauer, what's the relevance of the Allegheny merger?
>
> Mr. Sauer: The relevance, they -- FirstEnergy assumed $3.8 billion in debt of Allegheny's in that transaction. And $3.8 billion in debt would have been reflected in this total debt number that appears from December 31, 2011, through 2015. It changes the calculations and impacts the numbers that are reflected here.
>
> * * *
>
> Examiner Price: <u>We can't undo what happened in the past</u>. As Mr. Kurtz pointed out, we can go back and there are a million things, The

Great Recession, the cratering of electric prices, you know MATS rule, we can't go back and revise history to avoid being in the situation we are in. I don't understand the relevance of this line of questioning.

Mr. McNamee's objection is sustained."

July 13, 2016 Transcript Vol. III, pp. 662-63, 666 (Case No. 14-1297-EL-SSO) (filed on July 27, 2016) (emphasis added).

Similarly here, the transaction occurred in 2011 and it cannot be undone. It is not relevant at this time and in this case.

G. A CHANGE IN THE CORPORATE TAX RATE SHOULD NOT CHANGE THE DMR AMOUNT

OCC witness Kahal testified that the DMR should be reduced if the federal corporate income tax rates are reduced. Kahal Dir. Test. (OCC Ex. 12), pp. 54-55. The Commission should reject that argument because DP&L needs all of the DMR funds to pay down debt so that DP&L can maintain its financial integrity.

Specifically, none of the DMR funds are being used to pay taxes. Stipulation ¶ II.2.b (p. 5). Instead, all of the DMR funds are being used to pay debt and/or for grid modernization. Id. As demonstrated at length above, DP&L needs all of the DMR funds to pay down debt so that DP&L can maintain its financial integrity and position itself to implement grid modernization. See supra § IV.A.1 and 2.

DP&L witness Malinak explained:

"Q. You were also asked a number of questions, Mr. Malinak, about the potential reduction in the corporate income tax rate. If the income tax rate were to be reduced, would it be reasonable or appropriate to reduce the DMR amount?

A. No.

Q. Why not?

A. Because as we know from the recent downgrade, this -- the level of the DMR and the stipulation right now is not even protection against the downgrade. So if you reduce it even further, you have an even larger downgrade that would produce even more deleterious effects in terms of financial distress on the entity.

Q. And are the DMR proceeds to be used to pay any AES corporate income taxes?

A. No.

Q. What are they used for?

A. They are used for debt reduction. They are going straight to debt reduction."

Trans. Vol. I, p. 226.

For example, under current tax laws (with a 35% federal corporate income tax rate), approximately $36 million of the $105 million DMR would be taxable income. Trans. Vol. I, pp. 78-79 (Jackson). Although DPL Inc. has a contractual obligation to pay that $36 million to AES (Jackson Test. (DP&L Ex. 1B), p.12), AES agreed in the Stipulation not to collect that tax sharing liability from DPL Inc. and to use the full $105 million DMR – including that $36 million – to pay down debt. Stipulation, ¶¶ II.1.b (pp. 3-4); II.2.b (p. 5). If the federal corporate income tax rate was reduced to 15%, then approximately $16 million of the $105 million DMR would be taxable income. Trans. Vol. I, pp. 78-79 (Jackson). That change in the corporate tax rate, however, would have no effect on the need to use the full DMR to pay down debt. Id. Specifically, DPL Inc. would still have a contractual obligation to pay that $16 million to AES, and the Stipulation would still establish that the full $105 million DMR – including that $16 million – would be used to pay down debt. Stipulation, ¶¶ II.1.b (pp. 3-4); II.2.b (p. 5).

DP&L thus needs and will use the full $105 million DMR to pay debt, regardless of whether the corporate tax rate is 35%, 15% or some other number. Trans. Vol. I, pp. 78-79 (Jackson); Trans. Vol I, p. 226 (Malinak).

H. THE EXCLUSION OF THE DMR FROM THE SIGNIFICANTLY EXCESSIVE EARNINGS TEST IS APPROPRIATE

The Stipulation provides that DMR funds will not be subject to the significant excessive earnings test ("SEET") in § 4928.143. Stipulation ¶ II.2.e (p. 6). The testimony of DP&L witness Jackson demonstrates that that provision is reasonable.

> "Q. Can you explain the method that DP&L proposes should be used for the significantly excessive earnings tests in Ohio Rev. Code 4928.143 (E) & (F)?
>
> A. Yes. If the DMR is in place as proposed, a pro forma adjustment should be made to exclude it from DP&L's SEET calculation. Thus, there will be no effect on the SEET for DP&L as a result of DMR, and the current SEET threshold of 12% should remain.
>
> Q. Can you explain why you believe that this method is reasonable?
>
> A. Yes. The financial stability of DP&L, and its ability to fund future investments in accordance with Ohio energy policy, is dependent on the financial strength of its parent DPL. If the SEET included these funds, there would be no assurance that these funds would be available to (a) refinance and/or retire debt principal obligations, (b) make interest payments due on its debt, and/or (c) recapitalize its balance sheet and ensure the long-term viability of DPL and DP&L."

Jackson Test. (DP&L Ex. 1B), p. 23.

The Commission held that FirstEnergy's DMR would not be subject to the SEET. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 212 (Case No. 14-1297-EL-SSO).

OCC witness Kahal testified that the DMR should be subject to the SEET. Kahal Dir. Test. (OCC Ex. 12A), pp. 35-36. However, at the hearing, he admitted that he did not perform any calculations showing that DP&L could achieve appropriate FFO-to-debt ratios if DMR funds were subject to the SEET. Trans. Vol. IV, p. 715.

Indeed, the SEET is a test that was instituted to ensure that shareholders were not receiving excessive earnings. The Stipulation limits any dividend payments to shareholders and instead requires that DMR funds be used to pay down debt. Stipulation, ¶¶ II.1.a, II.1.b., and II.2.b.

I. OTHER MISCELLANEOUS INTERVENOR ARGUMENTS

The Commission should reject the following miscellaneous arguments by intervenors:

1. DMR Cost Allocation: The Stipulation provides that the DMR will be allocated as follows:

> "c. The cost allocation of the DMR to tariff classes will balance the bill impact to customers, fairness, and cost-causation principles. This allocation shall be as follows: 34% allocated based on 5 Coincident Peaks, 33% allocated based on distribution revenue, and 33% based on historic allocation of the currently charged non-bypassable rider. DMR cost allocation and rate design are shown in Exhibit A. DMR will include an annual true-up mechanism, without carrying charges. Rate design within the classes is summarized as:
>
> i. Residential, secondary and lighting classes will be $/kWh rates by year three. DP&L will phase in the proposed rate design for the Residential Heating class and Secondary class over a two year period. DMR rates are provided in Exhibit A.
>
> ii. All other classes will include both energy and demand rates."

Stipulation ¶ II.2.c (pp. 5-6).

OCC witness Fortney criticizes that allocation, and opines that the DMR should be allocated 50% based upon energy and 50% based upon demand. Fortney Test. (OCC Ex. 14), pp. 3-13. However, at the hearing, he conceded that: (1) cost allocation includes elements of judgment, and is an art, not a science (Trans. Vol. IV, pp. 806-07); (2) that the NARUC manual is the most common resource for cost allocation, and it does not address allocation of charges like the DMR (id. at 808-09); and (3) the precedent upon which he relies from a FirstEnergy proceeding was not the product of a Stipulation (id. at 812-13).

Indeed, as demonstrated above, the Stipulation results in typical residential customers receiving a rate decrease and paying the lowest rates in the state. Schroder Test. (DP&L Ex. 3), pp. 20-21 and Exs. A and B. The Commission should approve the rate allocation established in the Stipulation because the allocation is a reasonable result of settlement negotiations.

Further, allocating DMR charges in part based on historic allocation of DP&L's current nonbypassable charge will promote gradualism, which the Commission has cited as a factor to be considered in allocating rates. Oct. 12, 2016, Fifth Entry on Rehearing, ¶ 245 (Case No. 14-1297-EL-SSO).

2. TCRR-N Pilot Programs: The Stipulation includes a TCRR-N pilot program, which will allow certain parties to opt out of the TCRR-N, and receive transmission service directly from PJM or a CRES provider. Stipulation ¶ VI.1.c (pp. 14-17).

OCC witness Haugh criticized that provision, since "the pilot is not short term, does not identify any objectives it wishes to achieve, nor does it require a demonstration of the benefits for the program." Haugh Dir. Test. (OCC Ex. 11), p. 5. However, at the hearing, Mr. Haugh conceded that: (1) he has no opinions on the merits of the pilot program itself (Trans. Vol. III, p. 613); (2) he has worked on much larger pilot programs (id. at 638); (3) the purpose of the pilot is specifically identified on pages 14-15 of the Stipulation (id. at 651); and (4) OCC had advocated in other proceedings that TCRR-N costs should be bypassable (id. at 658-61).

The Commission approved an analogous pilot program for FirstEnergy. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 310 (Case No. 14-1297-EL-SSO). The Commission should thus reject OCC's challenges to the TCRR-N pilot program.

3. Distribution Investment Rider: The Stipulation establishes a Distribution Investment Rider ("DIR") for DP&L that will allow DP&L to recover incremental distribution capital investments that are recorded in certain FERC plant accounts. Stipulation ¶ II.2.d (p. 6). The Stipulation establishes that the investments to be recovered will be incremental as compared to capital investments that are established in a DP&L distribution rate case. Id.

OCC witness Williams claims that the DIR is not necessary because DP&L has been achieving satisfactory reliability metrics and the Commission has rules regarding required reliability performance. Williams Supp. Test. (OCC Ex. 13), pp. 18-23. However, at the hearing, Mr. Williams conceded that he opposes the DIR irrespective of whether DP&L is meeting its reliability benchmarks. Trans. Vol. IV, pp. 799-800. Mr. Williams further conceded that he has not conducted any analysis to determine whether DP&L would have sufficient funds to implement the DIR programs without the DIR. Trans. Vol. IV, pp. 775-76. He also conceded that the Commission has approved DIRs for AEP and FirstEnergy, that the amounts sought by DP&L to be included in its DIR in DP&L's Application was proportionately less than what AEP and FirstEnergy recover through their DIRs, and that the DIR in the Stipulation is narrower than the DIR and DP&L's Application. Id. at 777-779.

The Commission has approved similar riders for other Ohio utilities.

> "Rider DCR ensures that the Companies can make necessary investment in the distribution infrastructure to maintain reliability by reducing the regulatory lag for recovery of those investments. The record is clear that the Companies have been meeting their reliability standards. Further, elimination of regulatory lag promotes cost causation by ensuring that customers using distribution service are paying the costs of such distribution service. Rider DCR is also audited annually, ensuring that the investments are reasonable. Finally, Rider DCR promotes gradualism. It is well established that, over the long run, recovery of the costs of distribution investments will be equivalent through Rider DCR or through base distribution rates. However, Rider DCR ensures that revenue increases are spread out over time, rather than risking rate shock when increased through a distribution rate case."

Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 250 (Case No. 14-1297-EL-SSO) (citations omitted).

The Commission should thus reject Mr. Williams' challenge to the DIR.

4. Sales Process for Stuart and Killen: Murray Energy witness Medine opines that "the Amended Stipulation should be revised to include an obligation by DP&L to commence a sale process [(Killen and Stuart)] as well." Medine Test. (Murray Energy Ex. 2), p. 7. However, at the hearing, Ms. Medine conceded the following points: (1) she does not dispute whether or not the Stipulation satisfies the Commission's three-part test (Trans. Vol. III, p. 564); (2) there is nothing in the Stipulation that would require DP&L to close Killen and Stuart (id. at 565); (3) there is nothing in the Stipulation that would preclude DP&L from selling Killen and Stuart to a third party (id.). The Commission should thus reject her argument.

5. Subject to Refund: OCC witness Kahal testifies that the DMR, if approved, should be subject to refund. Kahal Supp. Test. (OCC Ex. 12A), pp. 51-54. However, the Commission has already rejected a proposal that a DMR should be subject to refund. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 209 (Case No. 14-1297-EL-SSO) ("Making Rider DMR subject to refund would be counterproductive and impose additional risks on the Companies.")

VI. **CONCLUSION**

The Stipulation easily satisfies the Commission's three-part test. In particular, the DMR is necessary to allow DP&L to provide safe and reliable service, put DPL Inc. and DP&L on a path toward achieving and maintaining an investment grade credit rating, and position DP&L to invest in grid modernization. The Commission should thus approve the Stipulation without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Initial Post-Hearing Brief (Public Version) has been served via electronic mail upon the following counsel of record, this 5th day of May, 2017:

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