**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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# INITIAL POST-HEARING BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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# INITIAL POST-HEARING BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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To bail out its parent companies, DPL, Inc. ("DPL") and AES Corporation ("AES"), from imprudent management decisions, Dayton Power & Light Company ("DP&L") offers up a settlement that breaks a promise made to consumers and the Public Utilities Commission of Ohio ("PUCO"). It also contains an illegal transition charge. And as a testament to what is possible using other people's money, the broken promise and illegal transition charges to consumers are just a couple of the reasons why the settlement will cost hard-working Ohioans dearly. The settlement could add $432 (or much more) to 515,000 Ohioans' electric bills to bail out businesses that are not even subject to the PUCO's jurisdiction.

## I. INTRODUCTION

DP&L has already charged Ohioans $673.3 million in "stability" charges to bolster its financial integrity.[1] Since 2012, AES has not contributed any money to help stabilize or bolster DPL or DP&L's financial integrity. Notwithstanding the enormous transfer of wealth from Ohioans to DP&L, DP&L is in a "financial crisis."[2] By its own admission, it did not get there as a result of sound management.[3]

Once again, DP&L is back at the PUCO asking for authority to charge consumers to bail it out – to the tune of $315 million (and perhaps up to $525 million). This charge, though DP&L calls it a "Distribution Modernization Rider" ("DMR"), has nothing to do with modernization but everything to do with financial integrity.[4] But if DP&L's financial integrity is threatened, it is because of the nearly $1 billion in debt that AES saddled DP&L's parent, DPL, with as a result of AES's acquisition of DP&L ("the Merger").[5] DPL cannot pay that debt back due to the poor financial performance of the generation assets that were part of the AES/DP&L acquisition.[6] So DPL (and by

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[1] See *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (December 28, 2005) (setting RSS at $76,250,127); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order at 5 (June 24, 2009) (continuing RSS, but calling it RSC); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc at 2 (September 6, 2013) (setting SSR at $110 million).

[2] Direct Testimony of Sharon Schroder (DP&L Exs. 3 and 4) filed March 22, 2017 ("Schroder Testimony") at 3:17.

[3] Hearing Transcript, Vol. I at 32:1-3.

[4] See, e.g., Schroder Testimony at 22:9-10.

[5] Hearing Transcript, Vol. I at 30:1-13.

[6] DP&L Witness Jackson admitted that the DMR is about DPL's debt, *not* DP&L's: "I believe without the DMR, Dayton Power and Light could service its existing debt." Id. at 60:10-12; see also id. at 58:2-7.

extension, AES) needs more money out of DP&L.[7] Hence the Amended Stipulation and Recommendation ("Settlement") with a DMR.

The Settlement should be rejected because the so-called DMR violates the Merger Finding and Order and it is an illegal transition charge. AES, DPL, and DP&L[8] committed to the PUCO that they would not charge customers costs related to the negotiation, approval, and closing, nor any acquisition premium, associated with AES's acquisition of DP&L.[9] But that is exactly what they are trying to do here with the DMR.[10] The Ohio Supreme Court has told the PUCO and multiple electric utilities, including DP&L specifically, that transition charges and equivalent revenue are illegal no matter how hard they try to dress up the charges as something else.[11] But the DMR is a transition charge or equivalent revenue. Money from the DMR will "be used to pay down debt[]"[12] at DP&L and DPL.[13] Approximately $1 billion of that debt is associated with the merger.[14] The merger included the purchase of generation assets,[15] the merger

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[7] DP&L represents about 96% of DPL's revenues. See id. at 43:21-23.

[8] DP&L is a wholly-owned subsidiary of DPL, which in turn is a wholly-owned subsidiary of AES. See id., Vol. II at 277:14-17. It is therefore clear that AES is DP&L.

[9] See *In the Matter of the Application of the AES Corporation*, Case No. 11-3002-EL-MER, Finding and Order at 9 (November 22, 2011). Although not germane, the details of how the acquisition was effected are summarized on page 1, paragraph 2 of the Finding and Order.

[10] See, e.g., Supplemental Direct Testimony of Mathew I. Kahal (OCC Ex. 12) filed March 29, 2017 ("Kahal Supp. Dir.") at 30:16-31:2.

[11] See *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439 (2016); *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

[12] Schroder Testimony at 10:12.

[13] Id. at 10:12-14.

[14] Hearing Transcript, Vol. I at 30:1-13.

[15] Id., see also id., Vol. II at 293:22-294:1.

debt cannot be paid due to reduced revenues from generation,[16] and but for the financial losses incurred in the competitive generation market, the DMR would not be needed.[17]

There are more reasons to reject the Settlement besides the illegal DMR. The record and the largely uncontroverted evidence offered by the Office of the Ohio Consumers' Counsel ("OCC") show that the Settlement fails the three-part test.[18] There was not serious bargaining among capable, knowledgeable parties with a diversity of interests in light of the multiple, signed stipulations filed. Approving the Settlement would create dangerous precedent fostering uncertainty, chilling settlements, and give a party an after-the-fact veto power in the settlement process – a prospect that the PUCO,[19] and Staff itself, [20] recognizes as inappropriate. The Settlement, as a package, does not benefit ratepayers and the public interest. DP&L's financial integrity could be better protected, without using customer-funded subsidies from DMR, by using a combination of ring fencing and equity contributions from AES. The Settlement's high charges to customers will hurt economic activity and development in DP&L's service territory. And the Settlement violates important regulatory principles and practices. It is too costly, contains expensive provisions (such as DMR) that are not necessary to provide safe and

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[16] See section IVA2, infra.

[17] Were DP&L suffering losses from its distribution business, it could file a traditional distribution rate case (and, of course, it has one pending). See Hearing Transcript, Vol. I at 36:6 – 37:14. Federal Energy Regulatory Commission ("FERC")-approved transmission costs are a pass through to DP&L's distribution customers, thus creating no financial hardship for DP&L from its transmission business. See id. at 37:18-21; 38:1-11. Further, DP&L could file a rate case at FERC if its transmission revenues were not enough. See id at 37:15-25.

[18] See *Consumers' Counsel v. PUC*, 64 Ohio St. 3d 123, 126 (1992).

[19] See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 43 (March 31, 2016).

[20] See Hearing Transcript, Vol. V at 865:19-866:5.

reliable service, would result in extraordinary earnings, and provides for handouts to signatory parties/non-opposing parties in return for their signatures/non-opposition.

And the Electric Security Plan ("ESP") in the Settlement does not pass the statutory test that requires DP&L to prove that the ESP is more favorable in the aggregate to customers than the expected results under a market rate offer ("MRO").[21] Rates under an MRO would be substantially lower, with no impairment to service quality, reliability, or interference with grid modernization investments.

## II. BACKGROUND

### A. The Ohio General Assembly chose competition to protect consumers.

In Senate Bill 3 ("S.B. 3"), the Ohio General Assembly adopted a comprehensive statutory plan to facilitate and encourage competition in the retail electric market as a means to protect consumers from increasing electric rates.[22] It also recognized that things could change as competition matured.

As competition evolved, the Ohio Supreme Court noted that things were not proceeding as expected.[23] The PUCO and utilities responded with rate plans not expressly contemplated by statute.[24] In reviewing those plans, the Ohio Supreme Court acknowledged the primary role the Ohio General Assembly had to play (and intended to

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[21] R.C. 4928.143(C)(1).

[22] See *AK Steel Corp. v. PUCO*, 95 Ohio St. 3d 81, 81 (2002); *OCC v. PUCO*, 114 Ohio St. 3d 340, 340 (2007).

[23] See *OCC*, 114 Ohio St. 3d at 343.

[24] See *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 513 (2011).

play) in connection with S.B. 3, and asserted that additional legislative action might be required.[25]

The General Assembly responded with Senate Bill 221 ("S.B. 221"). Broadly speaking, it required electric distribution utilities to provide consumers with a standard service offer ("SSO").[26] The Ohio General Assembly adhered to its belief in competition and provided that electric distribution utilities had to fulfill this requirement with a MRO[27] unless they could show that an ESP[28] is more favorable in the aggregate than a MRO.[29]

### B. The General Assembly protected consumers by allowing utilities to collect transition charges, but only for a limited time that has now passed.

Transition charges are costs incurred by a utility before retail competition began that would not be recoverable through market-based rates.[30] Generally, these were generation costs that a utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that were no longer recoverable from customers who switched to another generation provider.[31] The idea behind transition revenue was to allow the utility to avoid having to either absorb these costs or shift the burden of recovery onto remaining customers.[32]

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[25] See id. (citations omitted).

[26] See id.; see also R.C. secs. 4928.141-4928.144.

[27] See R.C. 4928.142. An "MRO" sets "rates using a competitive-bidding process to harness market forces." *See In re Columbus S. Power Co.*, 128 Ohio St. 3d at 514.

[28] See R.C. 4928.143.

[29] See R.C. 4928.143(C)(1). This test should be limited to considering quantitative factors.

[30] See *In re Columbus Southern Power Co.*, 147 Ohio St. at 443 (citations omitted); R.C. 4928.37 and 4928.39.

[31] See *In re Columbus Southern Power Co.*, 147 Ohio St. at 443 (citations omitted).

[32] Id. (citations omitted).

In 1999, the General Assembly enacted S.B. 3 "to facilitate and encourage development of competition in the retail electric market."[33] Enacted as part of S.B. 3, R.C. 4928.37 provided each electric utility with a limited opportunity "to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market." Utilities had until December 31, 2005[34] to receive generation transition revenue.[35] After the market development period, R.C. 4928.38 prohibits the PUCO from "authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility[.]"

R.C. 4928.141(A), enacted as part of S.B. 221, expressly prohibits the recovery of transition costs by providing that an SSO made through an ESP "shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." The Ohio Supreme Court, on two recent and separate occasions (one of which involved DP&L), found that charges to support utilities' financially floundering generation assets are illegal transition charges regardless of what a utility – or the PUCO – calls them.[36]

### C. DP&L charged consumers $673.3 million in "stability charges," the most recent of which was held to be an illegal transition charge by the Ohio Supreme Court, and now wants to take $315 million more of consumers' money.

In its first ESP, DP&L asked for and received a Rate Stabilization Charge ("RSC") to compensate it for providing stabilized rates and Provider of Last Resort

[33] *AK Steel Corp.*, 95 Ohio St. 3d at 81.

[34] The end of the market development period. See R.C. 4928.01(A)(26).

[35] R.C. 4928.38 and 4928.40(A).

[36] See note 11, supra.

service.[37] Under the RSC, DP&L charged consumers $76,250,127 a year.[38] In its second ESP, DP&L asked for and received a Service Stability Rider to stabilize electric service by maintaining its financial integrity.[39] Under the SSR, DP&L charged consumers $110 million a year. The Ohio Supreme Court recently held that the SSR was an illegal transition charge.[40] Despite this ruling, DP&L has kept all of its customers' money – money that it never should have collected.

The $673.3 million charged by DP&L to stabilize electric service by maintaining its financial integrity was apparently not enough. DP&L is back again. The DMR, now proposed by DP&L, is also alleged to be about stabilizing electric service by maintaining DP&L's financial integrity.[41] After allowing DP&L to take nearly $700 million of Ohioans' money (including hundreds of millions of dollars the Ohio Supreme Court found to be unlawful) for financial integrity, the PUCO should be wary of throwing more of consumer's good money after bad. This is particularly true given that the PUCO has already created a windfall for DP&L by allowing it to keep hundreds of millions of

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[37] See *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (December 28, 2005) (setting RSS at $76,250,127); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Application at 5 (October 10, 2008); Opinion and Order at 5 (June 24, 2009) (continuing RSS, but calling it RSC).

[38] See id.

[39] See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 17-22 (September 4, 2013); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc at 2 (September 6, 2013) (setting SSR at $110 million).

[40] *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016). And DP&L's current rates, placed in effect after it withdrew its ESP II, contain another rate stabilization surcharge that is being collected from customers at the rate of approximately $6 million per month.

[41] Schroder Testimony at 10:14-19; 22:7-10.

dollars of consumers' money under the SSR, even though the Supreme Court ruled the SSR was unlawful.

## III. STANDARD OF REVIEW

The Ohio Supreme Court stated in *Duff v. Pub. Util. Comm.*[42] that a stipulation is merely a recommendation that is not legally binding upon the PUCO. The PUCO "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."[43] The Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Com.*[44] considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements:

> (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating 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?

In evaluating settlements in ESP cases, the PUCO should recognize the parties' asymmetrical bargaining positions, where the utility possesses superior bargaining power. As Commissioner Roberto noted in FirstEnergy's initial ESP case filed in 2008:

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[42] 56 Ohio St. 2d 367 (1978); see also Ohio Adm. Code 4901-1-30(E).

[43] See id.

[44] 64 Ohio St. 3d at 125.

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.
>
> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[45]

Commissioners Centolella and Lemmie expressed similar concerns.[46]

As reflected in Commissioner Roberto's opinion, the bargaining position of an electric distribution utility relative to other parties in an ESP proceeding is strengthened by the ability of the electric distribution utility to reject the results from a fully litigated ESP proceeding. And the utility's advantage is further increased by the utility's ability to

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[45] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009) (citations omitted).

[46] See id., Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring at 2.

offer inducements, including inducements funded by other people's money, to gain signatures. These utility advantages should prompt a wary eye by regulators considering the terms of a settlement that the utility negotiated.

The ultimate question to be answered is whether, in light of the record, DP&L's proposals are reasonable, comply with Ohio law, and are in the public interest. As OCC shows below, DP&L does not meet this standard.

In addition, the PUCO must ensure that the Settlement meets the provisions of the Ohio Revised Code governing ESPs. The standard of review for ESP cases is found in R.C. 4928.143(C)(1), which states in pertinent part:

> [T]he 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. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

Further, R.C. 4905.22 requires that every public utility furnish necessary and adequate service and facilities, and that all charges for any service must be just and reasonable. Of course, DP&L as the applicant bears the burden of proof.[47]

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[47] *See, e.g.,* R.C. 4928.143(C)(1); *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations*, 1985 Ohio PUC Lexis 7, 91 (PUCO Case No. 84-1435-TP-AIR); *In the Matter of the Application of the Ottoville Mutual Telephone Company for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 Revised Code*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) ("Although the applicant must shoulder the burden of proof in every application proceeding before the Commission, this burden takes on an added dimension in the context of an emergency rate case.").

## IV. RECOMMENDATIONS

### A. The DMR and Reconciliation Riders are illegal transition charges or equivalent revenues that should be rejected to protect consumers.

#### 1. Approximately $1 billion in debt at DPL is linked to AES's acquisition of DP&L, including DP&L's generation assets, and DP&L is asking consumers to pay that debt.

DPL has approximately $1 billion in debt from AES's acquisition of DP&L.[48] That acquisition involved the purchase of DP&L's distribution, transmission, and generation assets.[49] DPL is in a financial crisis and, as a result, so is DP&L.[50] DPL cannot service its debt without taking more money out of DP&L, which represents 96% of DPL's revenues.[51]

"[I]f the debt at DPL Inc. cannot be serviced, which does rely on cash flow from DP&L, it may prevent us from meeting our debt obligations *at the parent* . . . ."[52] So DP&L is asking for the DMR to generate sufficient revenues so it can meet debt obligations, predominately if not exclusively DPL's,[53] and bolster their financial integrity.[54] Though DP&L says it will transfer its generation assets and commence a sale of those assets (though it was supposed to have divested its generating assets by January 1, 2017, per the PUCO's Order in Case No. 12-426-EL-SSO), the responsibility for

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[48] Hearing Transcript, Vol. I at 30:1-13. The consolidated debt of DPL and DP&L is approximately $1.8 billion. See id. at 29:13-18.

[49] See id., Vol. II at 293:22-294:1.

[50] See id., Vol. I at 28:15-23.

[51] See id. at 28:24-29:5; id. at 43:21-23.

[52] Id. at 58:3-6 (italics added).

[53] Id. at 60:10-12 (DP&L Witness Jackson explains: "I believe without the DMR, Dayton Power and Light could service its existing debt."); id. at 58:2-7 ("[I]f the debt at DPL Inc. cannot be serviced, which does rely on cash flow from DP&L, it may prevent us from meeting our debt obligations *at the parent* . . . .").

[54] See id. at 35:5-12.

paying the debt incurred to buy those assets will remain with DP&L, the regulated utility, and be paid by its customers.[55]

Only non-debt liabilities will be transferred if and when DP&L divests its generation assets.[56] The debt will remain on DPL's balance sheet irrespective of DP&L transferring or selling the generation assets.[57] Further, there would be no need for the DMR were the debt no longer DPL's. And the only real source of DPL's revenue is the regulated utility, DP&L.[58]

**2. The approximately $1 billion in debt cannot be repaid because revenue from unregulated generation assets is not enough – but consumers should not bail out the generation assets.**

DP&L and DPL assert that there are four reasons that they cannot repay their debt and, thus, explain the need for DMR. All are tied to generation. Accordingly, DMR is clearly aimed at charging consumers for transition revenues or any equivalent revenues.[59]

The first reason is slow load growth.[60] The second reason is the Ohio Supreme Court's ruling that DP&L's SSR illegally charged consumers for transition or equivalent revenues.[61] The third reason is depressed capacity prices.[62] And the fourth reason is low

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[55] See Settlement (Joint Ex. 1) at 5.

[56] Id. at 5.

[57] See Hearing Transcript, Vol. I at 202:3-13; see also id. at 30:1-13; 135-136; Direct Testimony of Jeffrey Malinak (DP&L Ex. 2b) filed March 22, 2017 ("Malinak Testimony") at RJM-19A ($200 Million from 2019 Bonds and $780 million from 2021 Bonds that are tied to acquisition debt); see also Hearing Transcript, Vol. I at 198:19-199:8; id. at 209:22-210:2 (no debt has been allocated to certain generation assets, so all debt will remain on the books).

[58] See Hearing Transcript, Vol. I at 28:24-29:5; id. at 43:21-23.

[59] R.C. 4928.38.

[60] See Direct Testimony of Craig L. Jackson (DP&L Exs. 1A and 1B) filed October 11, 2016 ("Jackson Direct") at 8:2-3.

[61] See id. at 8:4-6; see also *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

[62] See Jackson Direct at 8:3-11.

natural gas prices, which have depressed wholesale electricity prices.[63] All of these are "market-driven factors[.]"[64]

These reasons underlying the need for DMR are not tied to DP&L's distribution business. Distribution is non-competitive,[65] and DP&L Witness Jackson acknowledged that the reasons underlying the need for DMR are "market-driven factors."[66] To generate additional distribution revenue, DP&L can file a traditional base rate case – nothing in the Settlement prevents that.[67] DP&L currently has a pending base rate case in which it has asked for an increase in revenue.[68] Under that base rate case, DP&L has an opportunity to seek a fair and reasonable return on investment in its distribution assets.[69] Further, DP&L charges retail consumers for any lost distribution revenue due to energy efficiency.[70]

Likewise, the reasons underlying the need for DMR are not tied to DP&L's transmission business. DP&L does not claim that it is earning insufficient revenue from its transmission assets.[71] In any event, if it were earning insufficient revenue from its transmission assets, DP&L could go to FERC for a rate case to increase transmission rates.[72] Transmission costs are just a pass-through to DP&L's retail distribution

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[63] See id. at 8:12-14.

[64] Hearing Transcript, Vol. I at 33:7-11.

[65] Id. at 36:6-9.

[66] Id. at 33:7-11.

[67] Id. at 36:18-22.

[68] Id. at 36:10-17.

[69] Id. at 37:1-14.

[70] Id. at 38:12-18.

[71] Id. at 37:18-21.

[72] Id. at 37:22-25.

customers, and DP&L has no reason to believe that transmission revenues will be inadequate during the course of the proposed ESP.[73]

Depressed capacity and wholesale electricity prices are both linked to generation service.[74] Both the capacity and wholesale electricity markets are competitive.[75] Lower prices in those markets lead to less revenue for DP&L's generation.[76]

The second alleged reason underlying DP&L's request for DMR – the Ohio Supreme Court's ruling that DP&L's SSR illegally charged consumers for transition or equivalent revenues[77] – only serves to confirm that DMR is an illegal transition charge or equivalent revenue. DP&L Witness Jackson testified in Case No. 12-426-EL-SSO, the case that gave rise to the illegal SSR.[78] He testified in that case that SSR was needed due to increased customer shopping and declining capacity and wholesale power prices.[79] Increased customer shopping results from Ohio deregulating generation – and shopping has continued to increase.[80] DP&L makes no claims in this docket that increased customer shopping is hurting its bottom line. To the contrary, DP&L has actually agreed to provisions in the Settlement that are aimed at increasing customer shopping.[81]

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[73] Id. at 38:1-9.

[74] Id. at 41:13-22.

[75] Id. at 42:7-12.

[76] Id. at 42:13-23; see also id. at 126:18-127:7 (DP&L Witness Malinak conceding that generating assets producing less income than expected).

[77] *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

[78] Hearing Transcript, Vol. I at 38:23-39:3.

[79] Id. at 39:9-14.

[80] Id. at 39:15-41:10.

[81] See generally Direct Testimony of Matthew White (RESA Exhibit 1) filed March 22, 2017 ("White Testimony") (discussing smart grid, purportedly appropriate allocation of costs to the SSO, supplier consolidated billing, etc. and concluding that "Each of the above-referenced measures and programs follow those and other Ohio policies that are intended to promote the development of the competitive retail markets in Ohio[.]").

Decreasing capacity and wholesale energy prices – underlying the rationale for DMR here – were also reasons to which DP&L Witness Jackson testified regarding the need for SSR.[82] So the rationale underlying SSR – decreased generation revenue in the competitive generation market – is the very same rationale underlying DP&L's present request for the DMR. Instead of a credible reason for granting DMR, the Supreme Court's decision striking down SSR is all the more reason the PUCO needs for rejecting DMR.

#### 3. The DMR revenues needed to pay DP&L and DPL's bills are caused by their financially underperforming generation assets, so DMR clearly and illegally would charge consumers for transition or any equivalent revenues.

As noted above, the approximately $1 billion in debt that DPL cannot repay flows from AES's acquisition of DP&L, including DP&L's generation assets. There is no assurance that DMR dollars will be segregated from other dollars that DP&L brings in so as to ensure that DMR dollars will not support generation.[83] Despite the PUCO's directives that DP&L was to divest by January 1, 2017, DP&L is not structurally separated, so the revenues from DMR will go to support all three operations (distribution, transmission, and generation) – including generation.[84] Even were DP&L to structurally separate as a result of the Settlement, the debt that DP&L and DPL will pay off with DMR funds is fundamentally linked to the acquisition of generation assets.

DP&L's DMR proposal is an unlawful transition charge that would require consumers to improperly subsidize competitive generation. Ohio law bars the PUCO

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[82] Id. at 41:13-42:2.

[83] Id. at Vol. II, 293:2-6.

[84] Id. at 294:2-6.

from authorizing "the receipt of transition revenues or ***any equivalent revenues*** by an electric utility" after the market development period ended in 2005.[85] The Ohio Supreme Court has determined that even though something was not explicitly labeled as transition revenue, it can still be considered "transition revenue".[86] As part of that case, the Court determined that AEP's Retail Stability Rider ("RSR") included the recovery of unlawful transition revenue. The Court overturned the PUCO's approval of that rider.[87] When looking at AEP's transition revenues the Court noted that Rider RSR was approved to "provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital."[88] The Court's decision was subsequently reinforced when the Court recently and summarily rejected DP&L's service stability charge as an unlawful transition charge.[89]

Further, insufficient revenues from DP&L's distribution and transmission business cannot explain the need for DMR revenue. That leaves only the financial underperformance of DP&L's generation assets as explaining the need for DMR. Indeed, this was precisely the reason DP&L gave in initially filing this ESP.[90] DMR compensates DP&L for reduced revenues it is collecting due to generation competition. Because DMR compensates DP&L for revenues it is not collecting and cannot collect in the competitive generation markets, it is equivalent to customer funded transition charges

[85] R.C. 4928.38 (emphasis added).

[86] "But the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the Company is receiving the equivalent of transition revenue under the guise of the RSR." *In Re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d at 444.

[87] Id. at 449.

[88] Id. at 448.

[89] *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

[90] Hearing Transcript, Vol. I at 186:10 – 186:23.

or any equivalent revenues. Customer funded transition charges are, by definition, related to costs that are not recoverable in a competitive market.[91] Accordingly, DMR revenue is transition or any equivalent revenue.[92] The PUCO should reject DP&L's attempt to charge consumers for such revenue by rejecting the DMR.

#### 4. The DMR paid for by distribution customers allows DP&L to collect generation-related costs, violating R.C. 4928.08(H) to consumers' detriment.

R.C. 4928.02(H) prohibits public utilities from using revenues from distribution service to subsidize the cost of providing competitive generation service. "In short, each service component [is] required to stand on its own."[93]

DMR supports DP&L's competitive generation services – either directly (if no structural separation) or indirectly (because generation-related debt stays with DPL and DP&L even after structural separation and is paid by DP&L customers with DMR revenue). If DP&L is suffering losses from its distribution business, it can file a traditional base rate case for financial relief. The PUCO treats FERC-approved transmission costs as a pass through to DP&L's distribution customers, thus creating no financial hardship for DP&L from its transmission business. Therefore, but for the financial losses being incurred in the competitive generation market, DMR would not be needed. Calling the charge a "distribution modernization rider" does not undo the fact that the revenues collected will offset the insufficient revenues being produced for the uneconomic competitive generation service offered by DP&L.[94]

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[91] R.C. 4928.39(C).

[92] See section IIB, supra.

[93] *Migden-Ostrander v. PUC*, 102 Ohio St. 3d 451, 453 (2004).

[94] See section IVA2, supra.

Authorizing DMR would undermine the entire premise of S.B. 3 and the competitive service framework that has evolved under S.B. 221. S.B. 3 required the unbundling of the three components of service – generation, distribution, and transmission. Before S.B. 3, customers received and paid for the three major components on a bundled basis.[95] In that scenario, electric utilities used revenues from the bundled electric services to support their generation, distribution, and transmission expenses.

But with S.B. 3, the road to competition was forged. S.B. 3 provided for restructuring of Ohio's electric-utility industry with a goal of achieving retail competition for generation service.[96] The components of electric service were unbundled to ensure that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service.[97] Additionally, S.B. 3 established corporate separation requirements to ensure that utilities would not undermine generation competition by extending undue preference or advantage to affiliates engaged in generation service.[98]

Here, seventeen years after the General Assembly called for divestiture, DP&L is asking to charge distribution customers $315 million (and perhaps up to $525 million) for the financial integrity of its entire operations, including generation. But as explained above, the financial integrity of DP&L's distribution and transmission businesses can be addressed through traditional ratemaking at the PUCO and FERC.[99]

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[95] *Elyria Foundry Co. v. Pub. Util. Comm.,* 114 Ohio St. 3d 305, 315 (2007).

[96] *Ohio Consumers' Counsel v. Pub. Comm.,* 109 Ohio St.3d 328, 329 (2006).

[97] *Migden-Ostrander*, 102 Ohio St. 3d at 452-53.

[98] *See* R.C. 4928.17.

[99] See section IVA2, supra.

DMR is a subsidy that supports generation service, either directly (pre-structural separation) or indirectly (by paying off generation-related debt). That is exactly what Ohio law precludes. The PUCO should not allow DP&L to push it in the opposite direction – away from unbundling – under the guise of maintaining DP&L's financial integrity or "distribution modernization." It should reject the DMR.

**5. The Reconciliation Rider is also an illegal transition charge that should be rejected.**

Under the Reconciliation Rider, DP&L proposes to recover the difference between the net proceeds from selling Ohio Valley Electric Cooperative ("OVEC") energy and capacity into the PJM marketplace and OVEC's costs.[100] Though DP&L hypothesizes that the rider could be a credit, DP&L forecasts it to be a net cost.[101] That the Reconciliation Rider, like DMR, is meant to bolster DP&L's financial integrity by propping up its financially underperforming generation assets is acknowledged by DP&L Witness Schroder when she explains that without the rider, "DP&L's financial integrity issues would be further exacerbated."[102]

The Reconciliation Rider would charge customers for above-market costs that will not be used either for utility service or to provide power supply for DP&L customers.[103]

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[100] Settlement at 13aii.

[101] Hearing Transcript, Vol. II at 376:6-9.

[102] Schroder Testimony at 14:19-20.

[103] Kahal Supp. Dir. at 35:10-12; see also Hearing Transcript, Vol. II at 374:25-375:2 (OVEC entitlement bid into PJM markets).

It is a transition charge or equivalent revenue[104] that DP&L is seeking long after its market development period has ended.

### B. The Settlement does not meet the PUCO's three-prong test for analyzing the reasonableness of a stipulation and thus harms consumers.

The PUCO should deny the Settlement in its entirety because it does not meet the PUCO'S three-prong test for analyzing the reasonableness of a stipulation. Ohio Adm. Code 4901-1-30 permits parties to enter into stipulations for review by the PUCO. The PUCO uses the following criteria when evaluating whether a stipulation is reasonable and should be adopted:

> (1) Is the stipulation a product of serious bargaining among capable, knowledgeable parties?
>
> (2) Does the stipulation, as a package, benefit ratepayers and the public interest?
>
> (3) Does the settlement package violate any important regulatory principle or practice?

As explained below, the Settlement fails each prong of this test.

#### 1. The Settlement is not the product of serious bargaining among capable, knowledgeable parties.

##### a. The Settlement is not supported by a diversity of interests.

The first step of the settlement test requires there to be "serious bargaining among capable and knowledgeable parties."[105] When assessing this portion of the settlement test, the PUCO often considers whether there is "a diversity of interests" that are represented

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[104] See section IIB, supra; see also Kahal Supp. Dir. at 35:10-13.

[105] *Consumers' Counsel v. Pub. Util. Comm'n*. (1992), 64 Ohio St.3d 123, 126.

in the terms of the stipulation.[106] While the PUCO considers diversity to be important, it has also often determined that no one class of customers has the ability to "veto" a settlement.[107]

The Settlement is not supported by a diversity of interests. It is only supported by a fraction of the many parties that intervened in this case.[108] Excluding DP&L and DPL, "[t]here are only ten supporting parties from the approximately 30 parties listed by [DP&L] Witness Schroder. This means that the vast majority of parties are not supporting the proposed Stipulation."[109] The non-utility parties that support the Settlement appear to be more motivated by the handouts that they received rather than by support for the Settlement.[110]

For example, IGS, RESA, and the Ohio Manufacturing Association Energy Group do not explicitly support the DIR or the DMR, unquestionably the centerpiece of the settlement.[111] IGS and RESA submitted testimony but instead of supporting the Settlement, they only sought to "testify about certain measures and programs" included in the Settlement – the handouts that they received.[112] The PUCO should find this

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[106] The PUCO takes into account the "diversity of interests" as part of the first part of the stipulation assessment. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer*, Case No. 10-388-EL-SSO, Opinion and Order at 48 (August 25, 2010).

[107] See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer*, Case No. 14-1297-EL-SSO, Opinion and Order at 43 (March 31, 2016).

[108] See Kahal Supp. Dir. at 13:4-20.

[109] See id. at 14:6-8.

[110] See id. 13:4-20; 14:8-12.

[111] Settlement at 5, footnote 1.

[112] White Testimony at 2:14.

testimony to be unpersuasive because it does not attempt to explain why the Settlement, *taken as a whole*, is in the public interest and should be approved.

The narrow support for the Settlement does not include the bulk of DP&L's customers. 456,000 of DP&L's 515,000 customers are residential customers.[113] The costs of the Settlement will disproportionately be borne by those residential customers. In contrast to the burden placed on residential customers, the Settlement includes specific benefits to *offset* rate increases for a select group of industrial and commercial customers.[114] Low-income advocates – who help low-income customers, only a portion of residential consumers – receive only a pittance that does not begin to offset the harm caused by the illegal transition charge (DMR) that DP&L seeks. This is not a single class of customers seeking to veto a settlement, but rather a complete lack of diversity of interests because the Settlement overwhelmingly burdens roughly 89% of DP&L's customers that the OCC represents.[115]

The Settlement does not have support, as a package, from a diverse set of interests. As such, the proposed Settlement fails the first prong of the PUCO's standard for evaluating settlements. The PUCO should reject it.

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[113] Supplemental Direct Testimony of James D Williams (OCC Ex. 13) filed March 29, 2017 ("Williams Supp. Dir.") at 7:9-10; see also Kahal Supp. Dir. at 13:10-12 ("notably the OCC, which represents the interests of DP&L residential customers [nearly half the load and most of the customers] opposes [the Settlement].")

[114] Settlement at p11-12 (describing specific payouts to individual parties to "offset the costs of this stipulation").

[115] Williams Supp. Dir. at 7:9-10.

**b. The Settlement was not the product of serious bargaining, but instead handouts from DP&L to parties in return for their support or non-opposition, thereby harming consumers.**

Provisions in the Settlement are "clearly intended to purchase the signatures of individual parties in exchange for DP&L securing its own investor benefits."[116] Section IV of the Settlement provides rate discounts that are available only to a few signatory parties.[117] Section X of the Settlement extends for nine pages and describes the cash or cash-equivalents that DP&L provides in exchange for signatures.[118] Such handouts are no reason for PUCO approval of the Settlement.[119] They are, in fact, reason to reject the Settlement.[120]

**2. The Settlement, as a package, does not benefit customers or the public interest.**

**a. Customers will be worse off if the Settlement is approved.**

The bill impacts supported by Company Witness Schroder do not carry DP&L's burden to show that consumers will be better off as a result of the Settlement. In her Exhibit A, DP&L Witness Schroder calculates customer bill impacts from the proposed settlement, ultimately finding that any increases will be minimal, or in the case of a residential consumer using 1,000 kWh per month, a slight decrease. These calculations are misleading for several reasons. The rate decrease is a result of (1) the Rate Stability

[116] Kahal Supp. Dir. at 16:1-2.

[117] See id. at 16:3-4.

[118] See id. at 16:4-7.

[119] See id. at 10-14.

[120] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (Feb. 11, 2015).

Charge from DP&L's ESP I expiring and (2) reduced market-based costs from a fully competitive SSO auction.[121] Both of these benefits are independent of the Settlement and would likewise occur under an MRO.[122]

OCC Witness Kahal presented customer bill impacts for the DMR that are more reliable. He calculated that the DMR alone "would add about $9 per month for the 1,000 kWh per month customer, or $108 per year."[123] When added to the $3 per month that DP&L Witness Schroder calculates for the Reconciliation Rider, Regulatory Compliance Rider, and Economic Development Rider,[124] this results in "a total monthly bill impact of about $12 (or $144 per year) from the proposed Settlement."[125] This bill impact does not include the cost of other riders – because DP&L does not know what their cost will be – nor does it include the pending base rate increase of approximately $65 million.[126]

Ohio has a state policy to provide reasonably priced retail electric service.[127] The charges to customers discussed above violate this policy. They are not needed for DP&L to provide safe and reliable service. [128] Further, Staff Witness Nicodemus has not identified any reliability deficiencies.[129] The predicament that DPL finds itself in was

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[121] See Kahal Supp. Dir. at 17:9-12.

[122] See id. at 17:12-16.

[123] See id. at 18:1-2.

[124] Schroder Testimony at Ex. A.

[125] See Kahal Supp. Dir. at 18:2-6.

[126] See id. at 18:12-15.

[127] R.C. 4928.02(A).

[128] See, e.g., Hearing Transcript, Vol. II, at 275:11-14; 291:3-9; Williams Supp. Dir. at 18:11-19:15.

[129] See Testimony of Jacob J. Nicodemus (Staff Ex. 1) filed March 22, 2017 ("Nicodemus Testimony") at 5.

entirely of AES' making. As discussed below, it can be resolved through other means that will not result in consumers paying for unreasonably priced retail electric service.

The PUCO must deny excessive (and unlawful) charges. It must reject the Settlement.

**b. The proposed Settlement shoulders consumers with a burden that should be borne by AES, and is therefore not in the public interest.**

**i. DPL has taken on nearly $1 billion in debt from the merger, and consumers should not be forced to pay for that debt.**

Through DP&L Witness Malinak's testimony and the proposed Settlement, DP&L has created a narrative that it is in dire financial straits and desperately needs the proposed DMR so that it can provide safe and reliable service to its customers.[130] This narrative, however, is missing a number of key facts. DP&L is not suffering because of low distribution rates or insufficient revenues from its transmission business. In fact, DP&L, as a stand-alone entity, is not in any financial hardship at all. Its financial position is being weighed down by an anchor of debt that AES captained. AES overloaded DPL (DP&L's immediate parent company) with the excessive debt when it acquired DP&L (including its generation assets) in 2011.[131] It is against the public interest for DP&L to place the burden of paying that debt onto consumers. The PUCO should not allow it.

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[130] See Malinak Testimony at 8:3-5.

[131] Supplemental Testimony of David C. Parcell (OCC Ex. 15) filed March 29, 2017 ("Parcell Supp. Dir.") at 16:20-22; Kahal Supp. Dir. at 10.

As OCC Witness Parcell explains, DP&L has an investment grade credit rating while DPL does not.[132] DPL has approximately $1 billion in debt that resulted from AES's acquisition of DP&L.[133] As OCC Witness Parcell conducted his financial analysis he noted that Moody's credit opinions have stated:

> The ratings of DP&L and DPL remain constrained by the group's significant financial leverage including the material amount of DPL holding company debt. This is largely related to the indebtedness used to help fund DP&L's acquisition by AES in November 2011 that was assumed by DPL at the closing of the transaction.[134]

Before the acquisition, both DP&L and DPL had single A ratings.[135] AES has burdened DPL with debt and is now demanding that Ohio consumers, through DP&L, bail it out by paying that debt. The PUCO should not permit that. It is not in the public interest.

#### c. AES, DPL, and DP&L promised the PUCO that they would not charge consumers for the merger debt.

The responsibility for servicing and paying off debt from the merger rests solely with AES – not DP&L's customers. AES chose to buy DP&L and fund that purchase through debt. Although some of the merger debt has been paid off, it still accounts for the lion's share of debt on DPL's books.[136]

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[132] Parcell Supp. Dir. at 13:5-8; id. at 13:20-21.

[133] Malinak Testimony at RJM-19A ($200 Million from 2019 Bonds and $780 million from 2021 Bonds that are tied to acquisition debt); see also IGS Interrogatory 4-1 (OCC Ex. 1) (details the bonds involved in the Merger); Hearing Transcript, Vol I at 135-136 (Mr. Malinak admits that the notes identified in RJM-19A are those identified in IGS Interrogatory 4-1).

[134] Parcell Supp. Dir. at 15:8-14 (quoting Moody's October 13, 2015 credit rating).

[135] Parcell Supp. Dir. at 14:4-5.

[136] Kahal Supp. Dir. at 13.

A condition precedent to AES obtaining approval for the merger was its commitment to the PUCO – and to Ohio consumers – not to charge DP&L's customers for costs associated with closing the transaction or for any acquisition premium.[137] "It seeks to do exactly that in this proposed Settlement through the inclusion of the DMR. AES is simply attempting to transfer the business risk and its imprudent financial decisions associated with [the] DP&L acquisition to its captive monopoly utility customers. This transfer of risk does not benefit customers, is unfair, and is not in the public interest."[138]

AES, DPL, and DP&L now seek to renege on the promises they made in the merger case. The acquisition premium and debt financing costs associated with closing the merger were business risks taken on by AES. The consequences of those decisions should lie with AES, not with DP&L customers.

#### d. AES is not making any commitments in the Settlement that benefit the public interest.

Without signing onto the Settlement,[139] AES has "agreed" to suspend dividend payments from DPL to AES[140] and forgive any tax-sharing payments to AES for the duration of the DMR.[141] Such "commitments" do not benefit consumers or diminish any

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[137] See *In the Matter of the Application of the AES Corporation*, Case No. 11-3002-EL-MER, Finding and Order at 9 (November 22, 2011).

[138] Kahal Supp. Dir. at 32:19-33:2.

[139] See Settlement.

[140] Id. at 3-4.

[141] Id. at 3-4.

payments they have to make to DP&L for taxes.[142] They merely ensure that the dividends that DP&L pays to DPL will fund the service of DPL's acquisition debt.[143]

And these "commitments" are not "sacrifices." AES's consolidated corporate earnings and corporate income tax obligations will not decrease by even one dollar. They are merely accounting actions. They are steps that AES has a responsibility and obligation to undertake as part of prudent corporate financial management.[144] Indeed, DPL has not paid dividends to AES or made tax sharing payments since 2012.[145] This is current, ongoing practice.[146] These practices would likely continue with or without the Settlement (or under an MRO).[147]

Consumer benefits from these accounting exercises are virtually nonexistent. The "equity infusions" into DPL through the foregone tax sharing payments are not of the magnitude necessary to provide meaningful relief to DPL.[148] AES's promises do not result in any customer benefits and are nothing more than a weak attempt to show some contribution from AES.

#### e. DPL's financial integrity can be bolstered in other ways that do not, like DMR, harm consumers.

There are more appropriate alternatives to the DMR that can address DPL's financial integrity issues. These alternatives involve changing management techniques

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[142] Kahal Supp. Dir. at 15.

[143] Parcell Supp. Dir. at 12:7-10.

[144] Kahal Supp. Dir. at 14.

[145] Hearing Transcript, Vol V at 16-21; Kahal Supp. Dir. at 31:12-16.

[146] Kahal Supp. Dir. at 31:12-16.

[147] Id. at 14.

[148] Parcell Supp. Dir. at 23:7-15.

and AES shareholders bearing more of the responsibility for the problems that management has caused. These alternatives are not only reasonable steps for AES and DPL to take, but they also protect DP&L's customers from unfairly shouldering cost responsibility for problems they had no part in creating. Not only is such a result more fair, it is a better solution.

For example, OCC Witness Kahal explains that DPL's financial problems can (and should) be fixed with a combination of ring fencing measures and equity infusions from AES.[149] Ring fencing would entail creating structures or measures that provide greater credit rating separation between DPL and DP&L.[150] "This would enable DP&L to be rated on more of a stand-alone basis as it would be perceived as being legally protected from DPL, Inc. debt default or bankruptcy."[151] OCC Witness Kahal provided an outline of steps that could be taken to achieve effective ring fencing of DP&L from DPL.[152]

Equity infusions from AES could take many forms. One form could be using proceeds from asset divestitures/sales to pay down debt.[153] Another could be for AES to slow the forecasted, rapid increases in the dividends it pays to its shareholders.[154] AES has raised its common stock dividend each year since 2012.[155] By 2020, AES is projected

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[149] Kahal Supp. Dir. at 12.

[150] Direct Testimony of Mathew I. Kahal (OCC Ex. 12a) filed November 21, 2016 ("Kahal Direct") at 38:18-20.

[151] Id. at 38:20-22.

[152] See id. at 39:1-9; MIK-1.

[153] Kahal Supp. Dir. at 29:4-16.

[154] Id.

[155] Parcell Supp. Dir. at 18:17-18.

to pay about $600 million in dividends per year.[156] AES has the ability to pay for the DMR (approximately $67 million per year after taxes) merely by slowing its rate of increase of dividends.[157] The dividends do not need to be frozen or cut from current levels – just the rate at which they grow could be slowed.[158]

Or AES could use cash on hand. AES's own investor presentations show that it has close to a billion dollars in free cash flow.[159] As OCC Witness Parcell notes:

> The above review of AES's financial circumstances indicates that AES currently has the ability to provide more support to finance its acquisition of DPL than it has in the past. AES, not the captive customers of DP&L, should be on the hook for funding actions to reduce the debt level and improve the credit rating of DPL.[160]

It would be against the public interest for the PUCO to approve the Settlement, which unnecessarily places a substantial burden on customers for a problem caused by AES. Instead of solving these financial problems by allowing DP&L to charge its customers, the PUCO should use a scalpel at the AES and DPL levels.[161]

**f. The DMR is a costly charge that would hurt consumers and is not necessary for providing safe and reliable service.**

DP&L claims that the DMR allows DP&L to continue to provide safe and reliable service.[162] But DP&L is already providing safe and reliable service to customers. There

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[156] OCC Exhibit 2.

[157] Kahal Supp. Dir. at 29:4-16.

[158] Id.

[159] Id. at 20:1-2.

[160] Id. at 22:11-15.

[161] Importantly, Staff Witness Donlon conceded that Staff is able to negotiate concessions from AES. See Hearing Transcript at 886:16-887:18. Thus, not only should AES do more before the PUCO allows DP&L to charge consumers hundreds of millions of dollars to pay off a debt they played no role in creating, Staff is capable of negotiating more out of AES.

[162] Schroeder Testimony at 3:14-16.

are procedures and PUCO rules that ensure DP&L will continue to provide safe and reliable service to customers.[163]

In fact, DP&L has met or exceeded the CAIDI and SAIFI reliability standards that have been set by the PUCO for the past five years.[164] As part of the standards, DP&L is required to file annual reports regarding its reliability performance.[165] Any declines in reliability performance would be apparent and remedied under PUCO rules. DP&L would be required to submit an action plan including why the standards were missed and how performance could be improved.[166] DP&L would have nearly two years to work with the PUCO Staff and address any specific issues that were contributing to decreased reliability performance.[167]

The PUCO created such safeguards to prevent any drop in reliability. As OCC Witness Williams explained:

> DP&L has recognized these important safeguards in the past and has argued that there is no direct relationship between the downgrade of a utility or an affiliate and how a downgrade would affect the service reliability. It is disingenuous for DP&L and the Parties to the Settlement to now claim that without the Settlement, the Utility is unable to continue to provide safe and reliable service or to make investments to address local distribution reliability issues.[168]

DP&L's attempt to disguise the DMR as necessary for safe and reliable service is a red herring that does not take into account the various other legitimate regulatory

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[163] *See* Ohio Admin. Code §4901:1-20 et seq.

[164] Williams Supp. Dir. at 18-19:17-7.

[165] Id. at 19:12-13.

[166] Id. at 20:15-19.

[167] Id. at 21:1-4.

[168] Id. at 20:5-11.

mechanisms that ensure safety and reliability. Nor does it account for the fact that DP&L could address and appropriately remedy any projected distribution investment losses in its ongoing distribution rate case.[169]

The PUCO should not fall for such scare tactics. It should reject the Settlement.

**g. The Settlement, as a package, is not in the public interest because it harms low-income customers.**

DP&L Witness Malinak attempts to rationalize the burdens of an illegal DMR and inappropriate Settlement by stating that DP&L customers have an ability to pay the rates that DP&L is foisting on customers.[170] But he does not take into account the serious economic hardships that are plaguing DP&L's service territory. Only around 75% of DP&L customers can afford to reconnect their service after being disconnected for non-payment.[171] There are approximately 35.5% of Dayton's residents at the poverty level, 30,000 DP&L customers who are on Percentage of Income Payment Plans, and another 187,000 customers who were unable to pay their electric bill and were required to be on a PUCO-ordered payment plan to prevent loss of service.[172]

While DP&L touts its commitments to low-income customers,[173] the value of the commitments pale in comparison to the hundreds of millions of dollars[174] that it seeks to charge customers – including the very low-income customers it purports to want to help – through various riders and charges.

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[169] Id. at 18:5-8.

[170] Malinak Testimony at 38:5-10.

[171] Williams Supp. Dir. at 12:14-16.

[172] Id. at 12:13-13:18.

[173] Id. at 13:7-13.

[174] Settlement at 4.

#### h. The proposed return on equity that DP&L seeks on investment is not in the public interest and would harm consumers.

The Settlement provides that the costs of many of DP&L's riders will be determined in future cases.[175] It is inappropriate to approve those riders without knowing their costs. On other occasions, DP&L Witness Malinak uses the stale and inappropriate return on equity that was proposed by DP&L in the ongoing distribution rate case.[176] There is no support for using that return on equity here other than the fact that it is the same number proposed (but not adopted or yet subject to cross-examination) in DP&L's distribution rate case.[177]

Only OCC has provided testimony that another more proper return on equity is appropriate. Only the testimony of OCC Witness Parcell conducts a financial analysis of DP&L's return on equity using a Discounted Cash Flow analysis, Capital Asset Pricing Model, and Comparable Earnings Model to show that DP&L's proposed 10.5% Return on equity is both stale and inappropriate.[178] If any riders are created and set at zero (including the DIR) in this ESP, or portions of the ESP require a return on equity, OCC's proposed 9.25% should be adopted.[179]

#### i. The Smart Grid Rider does not benefit customers and is not in the public interest.

Approving the Settlement would establish a new Smart Grid Rider ("SGR") to collect the cost associated with developing a Distribution Grid Modernization Plan and

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[175] Settlement at 6.

[176] Malinak Testimony at 26:10-11.

[177] Id.

[178] Parcell Supp. Dir. at 6:13-18, 7:1-15.

[179] Id. at 8:1-2.

grid modernization investments.[180] These investments will occur, if at all, in the future and are based on the PUCO's PowerForward grid modernization initiative.[181] Because this initiative is in its early stages, DP&L itself has admitted that it has no understanding about it.[182] It is inappropriate and premature for DP&L to try and create a rider through the Settlement to support the PUCO's grid modernization initiative when that initiative is in its early stages and DP&L does not even understand it.

And as OCC Witness Williams explained, there are other reasons to reject DP&L's Smart Grid Rider:

> The PUCO should not permit customers to be converted into investors by being asked to shoulder the risks for investments that DP&L makes that are not supported through sound financial analysis (including quantifiable cost/benefit analysis). DP&L should consider future enhancements to its distribution system in the normal course of business without the need for a rider to collect the costs for preparing the distribution modernization plan. Furthermore, DP&L has the opportunity to seek cost recovery for investments that it makes in its distribution system through traditional base rate cases. Approval of the smart grid rider circumvents consideration of alternatives like future base rate cases for collecting smart grid costs. Furthermore, to the extent that grid modernization initiatives are being used by the Stipulating parties as support for the DMR, there has been no demonstration that the grid modernization initiative or the Settlement benefits customers or is in the public interest.[183]

The PUCO should not approve the Smart Grid Rider.

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[180] Schroder Testimony at 11:8-12.

[181] Williams Supp. Dir. at 9:2-4.

[182] Id. at 9:4-6.

[183] Id. at 10: 4-16.

### j. The TCRR-N pilot program does not have enough safeguards to protect consumers and the public interest.

The Settlement includes a Transmission Cost Recovery Rider – Non-Bypassable ("TCRR-N") "pilot" program.[184] The program allows certain customers[185] to receive transmission and ancillary services provided through PJM's Open Access Transmission Tariff ("OATT") from a marketer rather than solely relying on DP&L to provide these services.[186] But the program does not have any parameters around which to judge its costs or efficacy,[187] and will run the entire term of the ESP (6 years).[188] As OCC Witness Haugh suggests, the TCRR-N Pilot Program should at a minimum:

> [R]equire DP&L to outline the goals it wishes to achieve, determine the costs required to implement this program, define the anticipated benefits to participants, and calculate any possible cost shifts from participants to non-participants. Additionally, the pilot program should be evaluated after a two-year period to determine if it is benefitting all customers, not just "certain" customers.[189]

If the PUCO chooses to allow the TCRR-N program, it should adopt OCC Witness Haugh's recommendations and place reasonable limitations around, and requirements on, this program.

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[184] Settlement at 14-16.

[185] Customers receiving service at primary voltage are the only customers eligible for this program. Id. at 15.

[186] Id. at 14.

[187] Direct Testimony of Michael P. Haugh (OCC Ex. 11) filed March 29, 2017 ("Haugh Testimony") at 6:4-8.

[188] Settlement at 15.

[189] Haugh Testimony at 6:1-6.

#### k. The proposed supplier consolidated billing program does not provide any customer benefits and is therefore not in the public interest.

The proposed Settlement also includes a pilot program for supplier consolidated billing.[190] Supplier consolidated billing allows for customers who received generation service from a marketer to receive a single consolidated bill for both the regulated distribution charges and the deregulated generation charges.[191] The marketer collects and remits the customer's charges to the utility.[192]

Under the Settlement, 50% of the costs of implementing this program are going to be paid by DP&L customers.[193] There is no evidence that customers would benefit from this proposal, so they should not have to pay for it.[194] As OCC Witness Haugh testified, the vast majority of the benefits of supplier consolidated billing benefit marketers: "Supplier consolidated billing allows a marketer to include its own branding and marketing on the bill and also include line items that may not be allowable on a traditional utility bill."[195] It is inappropriate for customers to bear *any* of the costs associated with a program that provides benefits only to marketers and may not even be wanted by residential customers. [196] The PUCO should reject this pilot program, or modify the proposed settlement so that 100% of the costs of this program are borne by marketers.

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[190] Settlement at 21-23.

[191] Haugh Testimony at 6:11-14.

[192] Haugh Testimony at 6:11-14.

[193] Settlement at 23.

[194] Haugh Testimony at 6:20.

[195] Id. at 6:21-23.

[196] Id. at 7:4-6.

### l. The purported benefits identified by DP&L Witnesses Schroder do not actually benefit consumers.

DP&L Witness Schroder asserts that the Settlement will provide the following four benefits: (1) a competitively bid SSO; (2) the promotion of economic development; (3) retail competition enhancement; and (4) low-income funding.[197] Each of these four purported benefits is discussed, in turn, below.

#### i. Including the Competitive Bidding Process for the SSO is not a benefit of the Settlement.

Though DP&L Witness Schroder asserts that the competitively bid SSO is a benefit of the Settlement, DP&L Witness Malinak concedes that the competitive bidding process for the SSO would be in place even if DP&L provided SSO service to its customers under an MRO.[198] Staff Witness Donlon makes the same concession.[199] This competitive bidding process would be in place whether or not the PUCO approves the Settlement and therefore it is not a benefit of it.

#### ii. The Settlement does not promote economic development; it hurts consumers by stifling it.

The Settlement places massive burdens on consumers. These come through direct impacts such as increased rates, but also indirectly through impacts on the cost of living. Electric charges are an input price for the production of virtually each and every good or service. For example, any increase in electric charges seen by schools or governments

[197] Schroder Testimony at 9.

[198] Malinak Testimony at 11.

[199] Direct Testimony of Patrick J. Donlon (Staff Ex. 2) filed March 22, 2017 (“Donlon Testimony”) at 5.

will likely be passed on to residential consumers through higher taxes.[200] Similarly, increased charges to non-residential customers will likely be passed on to residential consumers through higher priced goods and services.[201] Consumer purchasing power lessens as the cost of living and the cost of doing business increases.[202] Less money will be spent on locally-supplied goods and services causing reductions in economic activity, incomes, and employment.[203] Businesses with increased costs will become less competitive in regional, national, and global markets leading to further declines.[204] These effects will ripple through the region.[205]

Additionally, there is no guarantee that the "economic development incentives" section of the Settlement will actually result in economic development. In fact, the employers eligible for the economic development incentives do not have to create any new jobs to receive the incentive. They will continue to receive the incentives even if they do not create any new jobs. And they will receive the incentive even if they do not maintain current employment levels.[206] In the unlikely event that the Settlement results in economic development, such a result is extremely limited. The incentives are only available to "a small group of privileged customers, likely in exchange for their support for or non-opposition to the proposed Settlement."[207]

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[200] Kahal Direct at 21.

[201] Id. at 21.

[202] See id. at 22.

[203] See id. at 22.

[204] See id. at 22-23.

[205] See id.

[206] Hearing Transcript, Vol. II at 330:24 – 335:23.

[207] Kahal Supp. Dir. at 32:19-21.

### iii. The Settlement does not guarantee any enhancements to retail competition.

IGS/RESA Witness White does not guarantee that consumers will receive any competitive benefits from the Settlement.[208] He testified only that the "competitive retail market enhancements" will provide the "potential" for such benefits and, in the case of Smart Grid, would only occur if the Smart Grid was "deployed correctly."[209] Even assuming a "correct deployment" of Smart Grid, it is unclear if marketers like IGS would provide any new products or services to customers.[210]

Regarding another purported "competitive retail market enhancement," supplier consolidated and non-commodity billing, it is unclear if customers even want these products.[211] And it is extremely likely that during the life of these programs there will be customers who never use them. But they will be forced to pay for them. As discussed above and recommended by OCC Witness Haugh, marketers should pay for 100% of these programs.[212]

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[208] Hearing Testimony, Vol. II at 424:13-19.

[209] See, e.g., Direct Testimony of Mathew White (RESA Ex. 1) filed March 22, 2017 at 3:2-6; Hearing Transcript, Vol. II at 424:20-25.

[210] See, e.g., Hearing Transcript, Vol. II at 428:9-14 (IGS does not offer time-of-use products in Texas even though Texas has allegedly gotten Smart Grid right).

[211] Haugh Testimony at 7:4-6. Further, no electric utility in Ohio allows marketers to bill for non-commodity products or services. Hearing Transcript, Vol. II at 446:1-4.

[212] See Haugh Testimony at 6:20; 7:4-6.

**iv. Despite some funding for low-income programs, low-income customers will be worse off under the Settlement.**

While the Settlement provides some assistance to low-income customers, it also burdens them with paying for the DMR and the other costly riders and handouts in the Settlement. Low-income consumers will likely be worse off under the Settlement.[213]

**m. The Settlement's proposed allocation of DMR costs is not in the public interest.**

In the unfortunate (and unlawful) event that DMR is approved (despite OCC's objections otherwise), the proposed methodology for allocating its costs harms consumers and is therefore not in the public interest. OCC Witness Fortney proposes a rate allocation that "appears to best embody the concept of cost causation . . . allocating the revenue based in equal share on energy and demand."[214] This is because the principle service provided by DP&L – an electric distribution utility – is the provision of energy, instantaneously and over time.[215] An allocation based on 50% energy and 50% demand best represents this service.[216] Under such an allocation, residential consumers will shoulder 38.435% of the DMR's costs.[217] Under the Settlement's allocation, residential consumers would pay 48.65% of the DMR's costs – an additional (and unfair) $1.97 per month for a typical residential customer using 1,000 kWh per month, or an additional $23.64 per year.[218]

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[213] Kahal Supp. Dir. at 39:1-13.

[214] Direct Testimony of Robert B. Fortney (OCC Ex. 14) filed March 29, 2017 ("Fortney Testimony") at 7:16-19.

[215] Id. at 8:22-23.

[216] Id. at 8:25-9:2.

[217] Id. at 9:2-4.

[218] Id. at 9:9-12.

As discussed below, OCC Witness Fortney's proposed allocation is consistent with PUCO precedent. It is also more in-line with DP&L's initial proposal for allocation of the DMR's costs. Originally, DP&L Witness Hale proposed the same revenue allocation to the tariff classes of service that was utilized for the SSR in order to "prevent[] rate design changes from causing any inter-class shifts in revenue."[219] Such a rate design would result in residential customers paying 43.92% of the DMR's costs, or approximately $0.91per month less (or $10.92 per year) than a typical residential customer using 1,000 kWh per month would pay under the rate design in the Settlement.[220]

If a DMR is adopted – which should not happen – the costs associated with the charge should be allocated on a 50% energy and 50% 5 CP demand basis to reflect a more balanced and fair cost allocation to customers. This result will also be consistent with and not violate PUCO precedent.

**n. Burdening SSO customers (largely residential and small commercial) with the Reconciliation Rider's costs is not in the public interest.**

The Reconciliation Rider is bypassable, so it will be paid by SSO customers.[221] Said differently, "[i]t discriminates against SSO customers."[222] Residential and small commercial customers will bear the brunt of paying the rider, as they are the customers more likely to take SSO service.[223] The competitively bid SSO rate generally is the rate

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[219] See id. at 6:10-7:2.

[220] Id. at 7:4-14.

[221] Settlement at 13aii.

[222] Kahal Supp. Dir. at 38:18-19.

[223] See id. at 36:21-23.

used by consumers to compare with rates available from competitive suppliers.[224] Adding the Reconciliation Rider's cost to SSO service will artificially inflate SSO costs to consumers.[225] This will allow competitive suppliers additional margins to compete with the SSO.[226] So allocating the Reconciliation Rider's costs to SSO customers – again, predominately residential and small commercial – will result not only in unwarranted SSO price increases, but higher chargers from competitors.[227] "This policy is not in the public interest."[228]

These problems with the Reconciliation Rider will get worse with time. As shopping increases,[229] individual consumers' remaining on SSO will see their share of the Reconciliation Rider's costs increase.[230] "Such an outcome is unfair and unacceptable."[231] And it is certainly not in the public interest.

**3. The Settlement violates several important regulatory principles and practices.**

As discussed above, DMR is an illegal transition charge or unlawful equivalent revenue. It is also an illegal subsidy.[232] But that is just the beginning. The Settlement is riddled with violations of important regulatory principles and practices.

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[224] See id. at 38:6-7.

[225] See id. at 38:7-8.

[226] See id. at 38:9-10.

[227] See id. at 38:10-12.

[228] Id. at 38:12.

[229] DP&L Witness Jackson has indicated that shopping has increased. See Hearing Transcript, Vol. I at 40:21-41:9.

[230] See id. at 36:13-37:6.

[231] Id. at 37:5-6.

[232] See section IVA2, supra.

**a. The Settlement allows DP&L to earn significantly excessive earnings, harming consumers.**

Under the Settlement, DP&L and DPL Inc. will collect significantly excessive earnings. The earnings will be substantially more than the 10.5% return on equity requested in DP&L's distribution rate case and the 9.25% return on equity recommended by OCC Witness Parcell in this case.[233] OCC Witness Kahal calculated that with the increased revenues from the DMR, DP&L would receive a rate of return on equity that averages approximately 20% during the three years of the DMR.[234] When the revenues from DP&L's pending distribution rate case are considered this return jumps to an incredible 30%.[235]

These egregious rates of return violate the core tenant of utility regulation – to prevent a monopoly provider from exploiting customers in providing an essential product.[236] Company Witness Malinak's "capital attraction" standard[237] completely ignores the fundamental role of regulation: "restrain the utility from charging customers' rates that would systematically provide unwarranted monopoly profits."[238] If the DMR is approved as filed, then the significantly excessive earnings test ("SEET") is the only real protection consumers will have against paying significantly excessive rates.[239] Earnings from DMR must be subject to SEET. The PUCO must impose at least some limit on the

[233] See Parcell Supp. Dir. at 11.

[234] Kahal Supp. Dir. at 20:7-21:8.

[235] Id. at 21:10-15.

[236] Id. at 21:17-23:2.

[237] Malinak Testimony at 26.

[238] Kahal Supp. Dir. at 22:14-16.

[239] Kahal Direct at 36:2-4.

amount of profits that DP&L can earn. Protecting consumers should be the guiding principle when it comes to earnings because protecting consumers from monopoly abuses is the primary reason for having a regulatory scheme.[240]

When setting rates, the PUCO must ensure that customers are not overcharged. Adherence to such a principle in this case supports one conclusion: reject the Settlement and the DMR.

**b. The Settlement includes financial inducements that are not supported by regulatory practice or principle and should be striken to protect consumers.**

The PUCO has warned against the practice of paying signatory parties, stating that "parties to future stipulations should be forewarned that such provisions are strongly disfavored by this Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval."[241] Yet here, DP&L has presented the PUCO with a stipulation that does exactly that. In Sections IV and X of the Amended Stipulation, "DP&L agrees to provide financial inducements, payments, discounts, and subsidies to the signatory parties in exchange for their support of (or non-opposition to) the proposed Settlement."[242]

The Settlement includes an inducement of a $0.004/kWh discount for specific parties that sign or do not oppose it.[243] This discount is specifically tailored and only

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[240] Id. at 36: 4-13.

[241] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 12 (Feb. 11, 2015).

[242] Kahal Supp. Dir. at 24:6-9.

[243] Settlement at 9; Haugh Testimony at 9:12-14.

made available to members of Industrial Energy Users-Ohio ("IEU"), Ohio Energy Group ("OEG"), Ohio Manufacturer's Association Energy Group ("OMAEG"), and specific entities like Kroger, Honda, and the Miami Valley Hospital.[244] These discounts are subsidies that are paid for by other DP&L customers but do not otherwise meet the requirements of traditional economic development arrangements.[245] These discounts are in addition to the direct cash payments to IEU, OMAEG, Kroger, and MAREC.[246]

As OCC Witness Haugh states, none of these cash payments or discounts abide by the well-established traditional standards under which economic development programs are considered:

> There has been no showing of need for the discounted rates, nor how the discounted rates further state policy. There are no commitments by any of the qualifying parties to retain or expand jobs in Ohio in exchange for the discounted rates. There is no identification of other incentives these customers are receiving. Nor have the delta revenues created by the rider been identified. None of the criteria that the PUCO considers for economic development have been met.[247]

At a policy level it is inappropriate for the PUCO to approve any of these inducements as providing any "economic development." These cash or cash equivalent payments do not meet the standards that are traditionally used for other economic development programs. Requiring them to meet those standards is especially important because the costs of the

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[244] Settlement at 9-10.

[245] Haugh Testimony at 10:10-12.

[246] Settlement at 9-10; Haugh Testimony at 11:11-16.

[247] Haugh Testimony at 10:16-21.

Economic Development Rider will be borne by all of DP&L's other customers – including residential customers.[248]

Additionally, these economic development programs violate Ohio law by providing inappropriate rebates to individual customers. Ohio law explicitly prohibits special rates and rebates for specific "firms or corporations."[249] The Settlement specifically states that certain rebates are "[t]o partially offset the costs of this Stipulation and rate design modifications[.]"[250] These cash payments and discount are special rates and rebates that are being provided directly to specific firms and groups. These cash payments clearly "provide[] discriminatory rate or subsidy treatment in favor of individual named customers merely due to their support of the Utility's objective, in this case the proposed Settlement."[251] Purchasing support of a few on the backs of the numerous non-supporting customers is a "very troubling violation of regulatory principle."[252] That is why the PUCO has strongly disfavored direct payments to signatory and non-opposing parties.[253] The PUCO should strike the financial inducements from the Settlement.

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[248] Id. at 10:10-12.

[249] R.C. 4905.33 states "No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions."

[250] Settlement at 11.

[251] Kahal Supp. Dir. at 24:21-25:3.

[252] Id. at 24:19-20.

[253] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order On Remand at pages 11-12 (Feb. 11, 2015).

DP&L's argument that the financial inducements in Section X of the Settlement are "shareholder contributions" falls flat.[254] Shareholders are essentially paying $11.5 million (or $9 million according to Staff Witness Donlon[255]) to secure $315 million (or more) under the DMR.[256] The Settlement merely fixes the "DMR at a level to recover the supposed $9 million of shareholder benefits."[257] As it forewarned parties, the PUCO should strike these financial inducements from the Settlement. They are handouts to a select few parties that are paid for by the bulk of DP&L's other customers, particularly residential consumers.

### c. DP&L has failed to comply with the standard-filing requirements for its Distribution Investment Rider, so the PUCO should reject the rider to protect consumers.

The Ohio Administrative Code sets out the standard filing requirements for infrastructure and modernization incentives.[258] DP&L has failed to comply with any of

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[254] Malinak Testimony at 71 and Exhibit RJM 20; see also Donlon Testimony at page 5.

[255] See, e.g., Donlon Testimony at 5:103-113.

[256] See Kahal Supp. Dir. at 26:2-3.

[257] Id. at 26:4-5.

[258] Ohio Admin. Code §4901:1-35-03(C)(9)(g) states that any application for an infrastructure modernization plan shall include the following specific requirements:

(i) A description of the infrastructure modernization plan, including but not limited to, the electric utility's existing infrastructure, its existing asset management system and related capabilities, the type of technology and reason chosen, the portion of service territory affected, the percentage of customers directly impacted (non-rate impact), and the implementation schedule by geographic location and/or type of activity. A description of any communication infrastructure included in the infrastructure modernization plan and any metering, distribution automation, or other applications that may be supported by this communication infrastructure also shall be included.

(ii) A description of the benefits of the infrastructure modernization plan (in total and by activity or type), including but not limited to the following as they may apply to the plan: the impacts on current reliability, the number of circuits impacted, the number of customers impacted, the timing of impacts, whether the impact is on the frequency or duration of outages, whether the infrastructure modernization plan addresses primary outage causes, what problems are addressed by the infrastructure modernization plan, the resulting dollar savings and additional costs, the activities affected and related accounts, the timing of savings, other customer benefits, and societal benefits. Through metrics and milestones, the

these filing requirements and therefore their request for the approval of the Distribution Investment Rider ("DIR") should be denied.

DP&L's application contains none of the required information,[259] the Settlement contains none of the required information,[260] and the testimony of DP&L Witness Schroeder contains none of the required information.[261] Any argument that these details could be satisfied by a future rate case fails to recognize that these rules are enumerated in the standard filing requirements *for an ESP case*.[262] Because DP&L has failed to satisfy those requirements (and did not seek a waiver), the DIR as included in the Settlement should be rejected.

#### d. DP&L's DIR should not be approved because it does not conform to Ohio law and past PUCO practice.

DP&L claims that the DIR is appropriate because customer expectations are aligned with utility expectations as required by Ohio law.[263] This argument is highly

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infrastructure modernization plan shall include a description of how the performance and outcomes of the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of un-depreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolescent by the plan and reason for early plant retirement. The infrastructure modernization plan shall also include a description of efforts made to mitigate such stranded investment.

(iv) A detailed description of any proposed cost recovery mechanism, including the components of any regulatory asset created by the infrastructure modernization plan, the reporting structure and schedule, and the proposed process for approval of cost recovery and increase in rates.

(v) A detailed explanation of how the infrastructure modernization plan aligns customer and electric utility reliability and power quality expectations by customer class.

[259] DP&L's Application at 8.

[260] Settlement at 4-6.

[261] Ohio Admin. Code. §4901-35-03(A).

[262] Ohio Admin. Code §4901:1-35-03(C)(9)(g).

[263] R.C. 4928.143(B)(2)(h).

flawed. The customer perception surveys that were conducted by DP&L do not include any information on whether customers are willing to pay more money for the same or increased reliability.[264] In fact DP&L's reliability is in line with the PUCO's standards. It has met or exceeded the reliability goals since the goals have existed.[265] Further, DP&L has been able to achieve and meet these goals without the existence of the DIR. DP&L is the only remaining regulated electric utility that lacks an infrastructure modernization rider.[266] Without an infrastructure modernization rider, DP&L has maintained some of the highest customer satisfaction scores when compared to other utilities in the Midwest.[267] Because DP&L has consistently met its reliability goals and customer expectations, there is no alignment between customer expectations and the need for accelerated recovery of distribution investments through the DIR. Since there is no alignment as required by Ohio law, the DIR should be rejected.

The law also requires that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.[268] However, in this case, DP&L is not required to spend a single dollar collected from customers through the DMR on grid modernization. DP&L's proposal cannot show that sufficient resources are dedicated to grid modernization and thus does not meet the requirements of R.C. 4928.143 (B)(2)(h). DP&L's proposal should be rejected.

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[264] Hearing Transcript, Vol II at 457:7-11.

[265] Nicodemus Testimony at4:4-5.

[266] Hearing Transcript, Vol II at 459-461:11-1.

[267] Direct Testimony of James D. Williams (OCC Ex. 13a) filed November 21, 2016 at 22:2-4.

[268] R.C. 4928.143(B)(2)(h).

Oddly, DP&L seeks approval of the DIR in this case and seeks to set the specific charges to customers in a separate rate case.[269] This is inappropriate because there are serious questions about the viability of DP&L's plant records. These issues are epitomized by the fact that there has been no Staff Report issued for a rate case that was filed over a year and a half ago.[270] Staff is now seeking an independent forensic audit of DP&L's plant records to glean the sort of information that would be necessary to approve a DIR.[271] There is no demonstrated need for a DIR until those records can be examined. To comply with proper regulatory practice and procedure, the PUCO should, at the very least, delay the creation of any DIR until the proper plant records can be produced. That means rejecting portions of the Settlement allowing DP&L to obtain a DIR.

#### e. The Settlement includes a series of unsupported and unnecessary riders.

The Settlement includes the creation of a Regulatory Compliance Rider,[272] Storm Cost Recovery Rider,[273] and an Uncollectible Rider.[274] It is inappropriate to create these riders without examining cost components in the context of a base rate case.

Regarding the Regulatory Compliance Rider, DP&L seeks to recover cost deferrals approved by the PUCO.[275] But DP&L has not provided any information regarding deferral authorities.[276] Without a Staff review to determine that those deferral

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[269] Settlement at 6.

[270] Williams Supp. Dir. at 24:15-17.

[271] Id. at 24:19-20.

[272] Settlement at 17.

[273] Id. at 18-19.

[274] Id. at 19-20.

[275] Id. at 17.

[276] Williams Supp. Dir. at 26:1-3.

authorities were properly incurred, there is no basis to understand whether any of the costs are just and reasonable.[277] There is no basis for approving the Regulatory Compliance Rider until those costs are known.[278]

Regarding the Storm Cost Recovery Rider, a baseline level of storm recovery costs has not been established.[279] This baseline is necessary to ensure that storm costs are not being double collected.[280] These costs should be established in a base rate case, and a rider could be proposed in that case. Yet the Settlement allows DP&L to bypass this standard regulatory practice and use a three-year average of major storm expenses as a surrogate for what customers are already paying in base rates.[281] This is entirely inappropriate and this entire issue, including the creation of this rider, should be dealt with in a base rate case proceeding.

The Uncollectible Rider has similar problems to the Storm Cost Recovery Rider. DP&L has not provided any information about any costs that have been deferred or the previous amounts that have been allocated for this purpose.[282] Nor has it provided any analysis to show how much of these costs are already being collected in base rates. Without the analysis contained in a Staff Report, there is no certainty that this rider will not result in customers being double charged.[283] As OCC Witness Williams specifies,

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[277] Williams Supp. Dir. at 26:5-15.

[278] The PUCO has noted that it generally opposes creating deferrals except in extraordinary circumstances. See, e.g., *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, Opinion and Order at 36 (August 8, 2012).

[279] Williams Supp. Dir. at 26-27:13-3.

[280] Id. at 26-27:13-3.

[281] Id. at 27:5-12.

[282] Id. at 27:15-22.

[283] Id. at 28:1-5.

"there is no justification for creating an uncollectible rider when DP&L has failed to demonstrate the need for the rider. The Uncollectible Rider is just another ill-disguised attempt to circumvent the rate case process."[284]

#### f. In accordance with regulatory practice, a rules review regarding non-commodity billing should be conducted during the comprehensive review of all the CRES rules.

The Settlement requires Staff to request that the PUCO conduct a rules review to establish parameters regarding non-commodity billing and for DP&L to submit an application to establish non-commodity billing within 18 months of approval of the Settlement.[285] A special and specific rules review is inappropriate at this time. The PUCO is required to conduct a rules review every five years, and the rules regarding marketers will be reviewed by July 24, 2019.[286] This rules review can thus comprehensively examine all the issues associated with marketers and the issue of non-commodity billing can and should be appropriately examined in that context. The PUCO should reject this request for a special rules review and reject the requirement for DP&L to file an application to establish non-commodity billing.

#### g. The proposed allocation of the DMR's costs harms consumers by violating numerous important regulatory principles and practices.

The cornerstone of cost allocation is that rates should be designed to "best reflect the 'causers' of the costs (i.e., cost causation)."[287] DP&L Witness Jackson admits,

[284] Id. at 28:7-10.

[285] Settlement at 21.

[286] Ohio Admin. Code §§ 4901:1-21; Haugh at 13:6-11.

[287] Fortney Testimony at page 10.

however, that DMR is not linked in any way to cost causation principles.[288] By DP&L's own admission, DMR is not properly assigning costs to cost causers. The cost causer is AES, as explained above.

Ignoring the bedrock principle of cost causation, the Settlement utilizes a "combination allocation methodology" that rests on a foundation made of sand. Residential consumers are assigned a significant portion of the costs of the DMR. The practical reason is that representatives of residential customers did not sign onto the Settlement. If the PUCO approves this combination methodology, then residential consumers will be trapped under the weight of a disproportionate amount of DMR costs. This threatens to make service to residential customers unaffordable. The Settlement should not be adopted with the combination cost allocation methodology for DMR as a provision of the Settlement.

Additionally, the combination methodology proposed in the Settlement violates the third prong by disregarding prior PUCO precedent. In October 2016, the PUCO approved a DMR for FirstEnergy. That case was the first and only other time that the PUCO has approved a DMR.

The PUCO's entry in the FirstEnergy case found that FirstEnergy's DMR was "primarily a distribution-related rider" and that the PUCO should take a "hybrid approach" to allocating Rider DMR costs.[289] Finding that an allocation of 44% of the DMR's costs to residential consumers would "excessively impact residential consumers," the PUCO concluded that, based upon the testimony of PUCO Staff Witness Turkenton,

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[288] Hearing Transcript, Vol. I at 100:17-19.

[289] Fifth Entry on Rehearing issued on October 12, 2016, in Case No. 14-1297-EL-SSO, page 8, paragraph 211 (internal citations omitted).

an allocation based on "50% energy and 50% demand" was more appropriate.[290] Such an allocation "best embod[ied] the concept of gradualism " and "mitigate[d] the impact of [FirstEnergy's] Rider DMR on residential customers."[291]

Therefore, if the DMR is approved (which OCC is not recommending) the PUCO's decision regarding the allocation of the DMR's costs in the FirstEnergy proceeding should be followed here. This precedent – only six months old – is the only standard for allocation of costs under a DMR. Neither DP&L nor any of the signatory parties to the Settlement have provided any support as to why the PUCO should diverge from this prior precedent in favor of the combination methodology.

#### h. The Reconciliation Rider violates fundamental regulatory principles.

One hundred percent of OVEC's net costs are allocated to SSO customers.[292] "This allocation clearly is improper because the OVEC costs have nothing to do with the provision of SSO."[293] This allocation violates the principle of cost causation and any other generally accepted regulatory principle of cost allocation.[294] Further, it discriminates against SSO customers.[295] SSO customers will pay all of the OVEC costs even though such costs have nothing to do with SSO service.[296] It therefore violates Ohio law.[297]

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[290] Id.

[291] Id.

[292] See Kahal Supp. Dir. at 36:2-3; see also Settlement at 13aii (Reconciliation Rider bypassable).

[293] Id. at 4-6.

[294] See id. at 6-7.

[295] See id. at 38:18-19.

[296] See id. at 36:4-6.

[297] See R.C. 4905.35.

### C. The ESP embodied in the Settlement fails the ESP versus MRO test.

#### 1. The governing standard.

Ohio Revised Code Section 4928.143(C) requires that the PUCO only approve an ESP if it finds that the plan, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results of a market rate offer under R.C. 4928.142. This statutory test – referred to as the ESP versus MRO test – involves three elements:

(1) Quantifiable customer rate impacts of the ESP versus MRO ("Aggregate Price Test");

(2) other quantifiable impacts; and

(3) qualitative attributes of the ESP, which can include impacts on service quality or reliability.[298]

DP&L has the burden of demonstrating that its proposed ESP is, in fact, more favorable than an MRO.[299]

#### 2. DP&L asserts that the MRO v. ESP test is passed.

DP&L Witness Malinak lays out three possible scenarios under which he believes the Settlement would pass the ESP versus MRO test. DP&L Witness Malinak's first scenario assumes that a DMR and Reconciliation Rider would be recoverable under an MRO (or in a distribution rate case or other docket).[300] Based on Witness Malinak's purportedly "reasonable" assumption that the PUCO would approve these same charges

[298] Ohio Revised Code Section 4928.143(C)(1). See also Public Utilities Commission of Ohio, Opinion and Order, Case No. 11-346-EL-SSO, August 8, 2012, p. 77; Public Utilities Commission of Ohio, Opinion and Order, Case No. 12-1230-EL-SSO, July 18, 2012, pp. 56-57.

[299] Ohio Revised Code Section 4928.143(C)(1) ("The burden of proof in the proceeding shall be on the electric distribution utility.")

[300] Malinak Testimony at 9-10.

in an MRO, he concluded that the DMR and Reconciliation Rider are a "wash" and therefore would not have any impact on the MRO versus ESP test.[301] The outcome of the application of the MRO versus ESP test in this scenario depends on whether other quantifiable and non-quantifiable costs and benefits make the Settlement more favorable in the aggregate than an MRO.

DP&L Witness Malinak also presents second and third scenarios. They both assume that the DMR (and the Reconciliation Rider in the third scenario) *would not be allowable* under an MRO.[302] Under these scenarios, the ESP would be at least $525 million more expensive than an MRO (assuming a two-year extension of the DMR at $105 million per year).[303] DP&L Witness Malinak purports to rely on other quantifiable benefits (totaling $11.5 million[304]) and non-quantifiable benefits that, he asserts, would not be available under an MRO (or distribution rate case or other docket). In his opinion, these other benefits would total more than $525 million under scenario two and more than $525 million plus the cost of the Reconciliation Rider under scenario three. Thus, the Settlement would be more favorable in the aggregate than a hypothetical MRO. DP&L Witness Malinak is wrong.

**3. The ESP embodied in the Settlement does not pass the ESP versus MRO test and, therefore, the ESP embodied in the Settlement would harm consumers.**

The Settlement improperly foists substantial and improper costs on consumers through the DMR, Reconciliation Rider, and numerous other charges and riders whose

[301] Id. at 9-10; 12.

[302] Id. at 9-10.

[303] Id. at 12-13.

[304] Id. at 17.

costs are currently unknown. These massive charges are not justified and are not part of an MRO. Consequently, the ESP embodied in the Settlement clearly fails to pass the ESP versus MRO test on a quantitative basis. The proposed ESP also fails to provide "qualitative benefits" that plausibly would offset its massive quantitative costs.

Further, because the Settlement includes numerous riders with unknown costs, the scales are tipped even further against the ESP embodied in the Settlement passing the MRO versus ESP test. The numerous riders are created but initially set at zero.[305] But the riders will be populated in other dockets during the course of the ESP.[306] Once the costs are known, they have to be considered. Such consideration will, by necessity, increase the cost of the ESP in comparison to an MRO. Additionally, because the costs of the riders are unknown, any application of the ESP versus MRO test will be inaccurate and incomplete.

#### a. The purported quantifiable benefits in the ESP embodied in the Settlement should be disregarded because they are equally available under an MRO.

All of the quantifiable benefits identified by DP&L Witness Malinak are payments made by DP&L that "shall not be recoverable from customers"[307] or "shall be funded by shareholders."[308] Shareholder contributions or other benefits not recovered from customers are always available benefits regardless of whether the electric distribution utility is providing service under an ESP or MRO.

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[305] Some examples include the DIR, Regulatory Compliance Rider, Uncollectible Rider, Storm Cost Recovery Rider, Economic Development Rider, etc. See Malinak Testimony at 14:9-20.

[306] Settlement at 6.

[307] See, e.g., id. page 10-12, 27-36.

[308] See, e.g., id. at page 10-12, 27-36.

The ESP statute only governs "provisions relating to the supply and pricing of electric generation service"[309] by providing for recovery of various costs.[310] The statute only covers costs that are sought to be *recovered from customers*. Nothing in the ESP statute grants or restricts a utility's shareholders from bestowing benefits upon the utility's customers. This is a decision left solely to the shareholder's discretion. The $11.5 million of other quantifiable benefits are not being recovered from customers and are therefore not affected by or in any way dependent on the ESP statute. Thus, DP&L Witness Malinak's reliance on these benefits as supporting the ESP over an MRO is misplaced.

Similarly, the MRO statute pertains to "a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer,"[311] that will be "determined through a competitive bidding process."[312] Shareholder contributions, especially the ones at issue here, will not affect a market-rate offer or the competitive bidding process. Therefore, nothing in the MRO statute grants or restricts a utility's shareholders from bestowing benefits upon the utility's customers. As such, the $11.5 million in other quantifiable benefits would be equally available under an MRO as they are under an ESP. Once again, DP&L Witness Malinak's reliance on these benefits as supporting the ESP over an MRO is misplaced.

That the quantifiable benefits relied on by DP&L Witness Malinak are equally available under an MRO and ESP (and thus his reliance on them to assert that DP&L's

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[309] R.C. 4928.143(B)(1).

[310] See, e.g., R.C. 4928.143(B)(2)(a); R.C. 4928.143(B)(2)(b) (reasonable allowances); R.C. 4928.143(B)(2)(c) (non-bypassable surcharges).

[311] R.C. 4928.142(A).

[312] R.C. 4928.142(A)(1).

proposed ESP passes the MRO v. ESP test is misplaced) is particularly true in the context of a stipulation. PUCO Staff Witness Donlon testified that Staff felt it was negotiating with AES (DPL's – and by extension DP&L'S – sole shareholder) and was able to extract concessions from AES that are otherwise beyond the scope of the PUCO's jurisdiction.[313] To the extent these shareholder-contributed benefits are outside the scope of the PUCO's jurisdiction, this is further support that they are not affected in any way by the ESP or MRO statutes and would be available under both statutes. Due to DP&L's belief in the importance of having PUCO Staff sign onto a stipulation,[314] there is no reason to believe – and neither DP&L nor any other proponent of the Settlement has offered one – that Staff would not have been able to extract the same concessions on a stipulation resolving an MRO (or distribution rate case or other docket).

DP&L Witness Malinak's conclusion that shareholder contributions in an ESP settlement would not be available under an MRO is wrong. Because these benefits are equally available under an ESP or MRO, the $11.5 million of purported quantified benefits are "a wash" for purposes of the more favorable in the aggregate test. The PUCO should not consider DP&L Witness Malinak's purported $11.5 million of quantifiable benefits because they have no impact on the outcome of the ESP versus MRO test under any of DP&L Witness Malinak's three scenarios.

[313] See Hearing Transcript, Vol. V, at 886:16-887:18.

[314] See Schroder Testimony at 4:9-17.

**b. DP&L Witness Malinak does not appropriately account for the purportedly non-quantitative benefits in his second and third scenarios.**

DP&L Witness Malinak notes four categories of non-quantitative benefits that will "particularly" make the Settlement more favorable in the aggregate than an MRO. These include: (1) more rapid and robust grid modernization; (2) the agreement by AES and DPL to forego dividends and tax payments, and to convert both existing and future foregone tax payments to permanent equity; (3) the avoidance of "significant and real, adverse effects that DP&L and its customers would suffer" where "DP&L would have insufficient funds to provide safe and stable service to its customers;" and (4) locating DP&L's operating headquarters in Dayton.[315] DP&L Witness Malinak also concedes that there will be an "incremental impact of potentially higher electricity rates on the local economy."[316]

DP&L Witness Malinak concludes, based solely on his opinion, that these four categories of non-quantitative "benefits" will more than outweigh the increased costs of the ESP (due to inclusion of the DMR and Reconciliation Rider in his second and third scenarios).[317] DP&L Witness Malinak's judgment is incorrect.

**i. More rapid and robust investment in Smart Grid do not favor an ESP.**

While it may be impossible for DP&L Witness Malinak to quantify the exact benefits that a DMR and Reconciliation Rider would have on DP&L's ability to

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[315] Malinak Testimony at 17:15-18:20.

[316] Id. at 19:103.

[317] See, e.g., id. at 18:1-5. These non-quantifiable benefits are not relevant for Witness Malinak's first scenario because he assumes that the DMR and Reconciliation Rider would be available under an MRO (or distribution rate case or some other docket). As such, the outcome of the ESP versus MRO test in the first scenario comes down to the $11.5 million of other quantifiable benefits.

modernize its grid, there is enough information to help qualify the magnitude of these purported benefits, if any. First, the Settlement only requires that DP&L make a grid modernization plan filing "within three months of completion of the Commission's Power Forward initiative or February 1, 2018, whichever is earlier unless an extension is recommended by Staff or granted by the Commission."[318] Once this plan is filed, it will be subject to future proceedings to address all matters related to Smart Grid investment.[319] Any intervenors in that proceeding will be able to oppose the plan and there is no guarantee that it will be approved.

Thus, the term "rapid" is misleading as any actual investment in smart grid infrastructure is likely years away. Just as DP&L Witness Malinak uses a "present value calculation" that discounts the costs of the DMR and Reconciliation Rider due to timing and uncertainty issues, so too should any potential benefits of the Smart Grid investments (if any at all occur during the proposed ESP period) be discounted.[320] Further, any costs required to make grid modernization investments must be netted from any potential benefits that customers may receive. Any grid modernization investments made by DP&L will be paid for by consumers via the Smart Grid Rider (if approved).

Under an MRO, DP&L could proceed with PUCO-approved and cost-beneficial grid modernization because DP&L could recover such costs through a standard base rate case.[321] Because the same smart grid investments could be made under an MRO or an ESP, grid modernization via the SGR is no benefit.

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[318] Settlement at 7.

[319] Id. at 7-8.

[320] Further, any Smart Grid benefits to the competitiveness of the retail market should also be severely discounted. See section IVC2kii, supra.

[321] Kahal Supp. Dir. at 44:6-8.

### ii. AES's commitments do not favor an ESP.

DP&L Witness Malinak's assertion that AES and DPL's agreement to forego dividend and tax payments and to convert them to equity would not be available in an MRO is inexplicable. AES and DPL are not regulated by the PUCO. Any agreement that they enter into with each other does not need approval from the PUCO. This is true regardless of whether DP&L provides service under an ESP or an MRO. Indeed, AES and DPL have had such an agreement since 2012.[322] The PUCO had no say in that agreement. Nor was the agreement entered into in connection with DP&L's ESP II. The agreement is a separate and independent event that could also occur under an MRO (or distribution rate case). Accordingly, AES's commitments do not favor an ESP.

OCC Witness Kahal testified that foregoing tax payments "almost certainly would continue under an MRO" because continuing this past and current practice "is in AES's interest."[323] Additionally, "while the tax payment suspension is a benefit to DPL, Inc., it does not in any way reduce the utility revenue requirements or charges that DP&L customers must pay. Similarly, the dividend suspension also would be likely to continue, as required, due to DPL, Inc.'s inability to pay dividends."[324]

OCC Witness Kahal does agree that converting these tax liabilities to equity will have a positive effect on DPL, but such an effect will be small. These equity infusions "amount to only a small fraction of the $1.3 billion of debt that AES imposed on DPL, Inc. in connection with the merger."[325] DP&L Witness Jackson concedes that converting

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[322] See id. at 45:14-21.

[323] See id. at 45:14-16.

[324] See id. at 45:17-21.

[325] Id. at 9-10.

non-current tax liabilities (i.e., 2012-2016) to equity would have no effect on DPL Inc.'s FFO-to-debt metrics (which he considers to be the "key metric") and would only make DPL Inc.'s capitalization a "little bit better."[326] Conversions of future tax liabilities to equity will also have a minimal impact, especially if the federal statutory income tax rate is reduced as has been proposed.[327] And lastly any future equity contributions (from eliminating DPL's tax burden) is just an accounting measure – it will not increase DPL Inc.'s cash flow and have minimal impact on its credit rating.[328] The benefits from foregoing tax liabilities and converting them to equity provide no benefits to DP&L's customers (they still must pay the taxes to DPL Inc.) and will have little, if any, impact on DPL Inc.'s credit ratings or DP&L's ability to borrow on more competitive terms. Importantly, these likely small benefits would be available under an MRO (or a stipulation resolving such a case as is proposed here). They are available regardless of whether DP&L provides service under an ESP or MRO.

#### iii. The DMR is not needed for distribution system reliability.

Potential reliability impacts must be considered in the appropriate context. There is no doubt that, currently, and for quite some time, DP&L has been providing safe and reliable service.[329] A significant portion of this time has occurred while DP&L was claiming a financial crisis, as it is now. In fact, DP&L has some of the highest service quality and reliability ratings of electric utilities in the state of Ohio.[330]

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[326] Hearing Transcript, Vol. I at 49:24 – 52:7.

[327] See Kahal Supp. Dir. at 46:10-12.

[328] See id. at 46:13-20.

[329] Williams Supp. Dir. at 18-19:17-7; see also Nicodemus Testimony; Schroder Testimony.

[330] See Williams Supp. Dir.; Nicodemus Testimony.

If there are any declines in service quality or reliability, DP&L will likely still be well above the PUCO's reliability standards.[331] Additionally, DP&L Witness Malinak does not include any analysis on when these purported declines in service quality and reliability would happen or what form they would take (i.e., flickering lights, outages lasting, on average, a few seconds longer than they do now, blackouts, etc.). Without this information, it is impossible to give DP&L Witness Malinak's blanket statement that "in [his] opinion" the non-quantifiable benefits will "more than outweigh" the non-quantifiable costs of the Settlement the correct weight, if any at all.[332]

Also, OCC Witness Kahal shows that "there is no reason why service quality should be impaired under an MRO" because "DP&L's credit ratings and financial integrity can be fully protected by the [other] measure[s] [including] ring fencing, AES equity and cash contributions, asset sales, and so forth."[333] OCC Witness Kahal concludes that the Settlement "will not provide improved service quality or reliability for electric distribution service, nor is it required for pursuing an effective and cost/beneficial grid modernization."[334]

**iv. DP&L headquarters remaining in Dayton does not favor ESP.**

DP&L Witness Malinak also includes benefits "related to the location of DP&L's operating headquarters in Dayton."[335] Neither he nor DP&L Witness Schroder provided any evidence on whether there is even the slightest chance that DP&L would move its

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[331] Williams Supp. Dir. at 18-19:17-7; see also Nicodemus Testimony.

[332] Malinak Testimony at 19:4-9.

[333] Kahal Supp. Dir. at 44:13-17.

[334] Id. at 44:21-23.

[335] Malinak Testimony at 18:18-19.

headquarters out of Dayton if there was an MRO rather than an ESP. Nor did they provide any rationale for why DP&L could not make a commitment to keep its headquarters in Dayton under an MRO (or distribution rate case or other docket).

Additionally, this commitment is hollow. DP&L Witness Schroder testified that DP&L is not committing to keep the same number of employees as are currently employed at DP&L's Dayton headquarters.[336] Because such a commitment was not made any benefits associated with DP&L's headquarters must be appropriately discounted.

**v. Incremental impacts on economy from higher rates.**

DP&L Witness Malinak does recognize that weighing against any purported non-quantifiable benefits of the Settlement are the impacts of "potentially higher electricity rates on the local economy."[337] OCC Witness Kahal agrees. He has demonstrated that "overall, the proposed Settlement ESP would produce an economic headwind for the Dayton area by reducing disposable income, increasing customer rates, and increasing the cost of doing business in DP&L's service area."[338]

DP&L Witness Malinak's reliance on his purported non-quantitative benefits is misplaced. These benefits (if they are benefits at all) would be equally available under an MRO. The value of these benefits must also be discounted for likely realities. Even if one could identify some qualitative benefits from the proposed Settlement that would not

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[336] Hearing Transcript, Vol. II at 383:2 – 21.

[337] Malinak Testimony at 19:1-3.

[338] Kahal Supp. Dir. at 3-6.

be available under an MRO, those benefits would not be worth more than the costs of the DMR, Reconciliation Rider, and any adverse economic impacts from increased rates.

#### 4. The ESP embodied in the Settlement fails the MRO v. ESP test under DP&L Witness Malinak's scenarios and, therefore, it should be rejected to protect consumers.

Under DP&L Witness Malinak's first scenario, the outcome of the ESP versus MRO test comes down to the "other quantifiable and non-quantifiable costs and benefits of the stipulated ESP relative to an MRO."[339] They allegedly are what make the ESP more favorable in the aggregate than an MRO. But as discussed above, the $11.5 million of purported other quantifiable benefits (shareholder contributions) identified by DP&L Witness Malinak are equally available under an MRO as they are an ESP (or at any time in any case, for that matter). Therefore, those purported benefits are a wash and have no impact on the outcome of the ESP versus MRO test.

Under DP&L Witness Malinak's first scenario, the ESP versus MRO test is failed on the scenario's own terms. The ESP embodied in the Settlement is not *more favorable* in the aggregate than an MRO. And when the costs of riders that are created by not populated are considered, it is clearly *less* favorable.[340] This first scenario does not pass the ESP versus MRO test.

Under DP&L Witness Malinak's second scenario, the ESP versus MRO test comes down to "whether the value of [the Settlement's] other, non-quantifiable benefits

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[339] Malinak Testimony at 12:16-17.

[340] For example, the signatory parties who receive the benefits under the Economic Development Rider in the Settlement do not have to retain or create any jobs to receive the benefits. Hearing Transcript, Vol. II at 330:16-331:16. But they would have to if such incentives were offered outside of an ESP and they wanted to receive them. Because the signatory parties have not pledged to create or retain any jobs, but still get the benefits under the Rider, the costs of the Rider in the ESP embodied by the Settlement is higher than what it would be in an MRO.

as compared to an MRO exceeds the present value of its increased cost ($401 million to $477 million), as well as any non-quantifiable costs of the Amended Stipulation as compared to an MRO."[341] The analysis for DP&L Witness Malinak's third scenario is similar. The ESP in the third scenario is costlier than the ESP in the second scenario and does not provide any additional non-quantitative benefits. Therefore, if the second scenario fails the MRO versus ESP test, so does the third scenario.

As discussed above, the $11.5 million of purported other quantifiable benefits identified by DP&L Witness Malinak are equally available under an MRO as they are an ESP (or at any time in any case, for that matter). Therefore, those purported benefits are a wash and have no impact on the ESP versus MRO test.

The purported non-quantitative benefits discussed by DP&L Witness Malinak are pure conjecture and would also be available under an MRO (if they are even benefits at all). Additionally, the purported benefits must be discounted to take into account what is likely to happen. After incorporating all of these considerations (including harm to the local economy from approving the Settlement) into the ESP versus MRO analysis, it is clear that the non-quantitative benefits will not exceed the costs of the DMR (and Reconciliation Rider under the third scenario). Therefore, DP&L Witness Malinak's second and third scenarios also fail the ESP versus MRO test.

Because all three of DP&L Witness Malinak's scenarios fail the MRO versus ESP test, the PUCO must reject the ESP embodied by the Settlement.

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[341] Malinak Testimony at 13:10-14.

## V. CONCLUSION

After taking nearly $700 million of consumers' money to bolster DP&L's financial integrity, enough is enough. The PUCO should reject DP&L's request for a DMR. It has not shown the PUCO that an additional $315 million will do the trick. Instead, that DP&L is still in a financial crisis after receiving nearly $700 million shows that an additional $315 million will *not* do the trick. Shut off the spigot. No more good consumer money after bad.

The PUCO should also reject the DMR because it violates the Merger Finding and Order. There, AES, DPL, and DP&L promised that they would not charge consumers for the Merger. That is exactly what they are trying to do now. Further, the DMR should be rejected because it is an illegal transition charge or equivalent revenue, regardless as to how DP&L chooses to characterize it. The Ohio Supreme Court could not have been more consistent or clear – such charges are illegal.

The Settlement should also be rejected because it fails all three prongs of the PUCO's three-prong test for evaluating settlements. The ESP embodied in the Settlement also fails the MRO versus ESP test.

In the interest of using electric markets, as intended by the Ohio General Assembly, and the benefits for Ohioans from those markets, the PUCO should deny DP&L's proposals.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Post-Hearing Brief was served on the persons stated below via electronic service, this 5th day of May 2017.

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Summary: Brief Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.