BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan	)))))	Case No. 16-0395-EL-SSO
In the Matter of the Application of the Dayton Power and Light Company for Approval of Revised Tariffs	))))	Case No. 16-0396-EL-ATA
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	)))))	Case No. 16-0397-EL-AAM

JOINT INITIAL POST-HEARING BRIEF OF ENVIRONMENTAL DEFENSE FUND AND OHIO ENVIRONMENTAL COUNCIL

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I. Introduction

Pursuant to the procedural schedule established by the Attorney Examiners in this case, Environmental Defense Fund ("EDF") and Ohio Environmental Council ("OEC") respectfully submit the following initial post-hearing brief in the above-captioned proceeding.

In this docket, just over a year ago, Dayton Power & Light ("the Company" or "DP&L") applied for its third Electric Security Plan ("ESP"). The Application touted that it was designed to promote economic growth and stability in Ohio by allowing at-risk generation plants to remain operational, and would result in nearly half a billion dollars in credits to customers. Over that year, the true colors of the plan were revealed. The goal of the proposed ESP, as embodied in the Amended Stipulation filed March 14, 2017 ("Amended Stipulation") and presently before the Commission, is *not* to benefit customers or power plants, but to provide an influx of cash to the Company and its unregulated parents and affiliates to keep them above financial waters.

Cloaked in the moniker of grid modernization, the hallmark of this Amended Stipulation is the proposed Distribution Modernization Rider ("Rider DMR"). While the Amended Stipulation reduces the amount of revenues that DP&L can collect under Rider DMR, as compared to the earlier Stipulation filed in this case, the Amended Stipulation does not address the fundamental flaws of Rider DMR. Further, the Amended Stipulation allows DP&L to collect transition revenues and does not follow the Commission's policy for grid modernization riders. Moreover,

under DP&L's original proposal, a significant portion of the revenues would be used to pay for grid modernization. As outlined below, an ESP with Rider DMR is wholly unjust and unreasonable, and inconsistent with the policy of the state of Ohio and fails the Commission's standard of review for approving stipulations. Thereby, OEC and EDF urge the Commission to reject the Amended Stipulation.

II. Facts

On February 22, 2016, DP&L filed an application, pursuant to Ohio Rev. Code §§ 4928.141 and 4928.143, for approval of its electric security plan with a term of January 1, 2017 through December 31, 2026. The application, according to DP&L, was "designed to promote economic growth and stability in Ohio by allowing at-risk generation plants to remain operational."

On January 30, 2017, DP&L filed a Stipulation and Recommendation ("Stipulation"), signed by Dayton Power and Light Company, DPL Inc., the City of Dayton, Interstate Gas Supply, Inc./IGS Energy, Retail Energy Supply Association, Edgemont Neighborhood Coalition, People Working Cooperatively, Inc., Ohio Hospital Association, and Mid-Atlantic Renewable Energy Coalition, and not opposed by Ohio Environmental Council and Honda of America, Mfg., Inc. The Stipulation reduced the term of the ESP to only six years, and included financial stability measures in addition to grid modernization measures.

On March 14, 2017, an Amended Stipulation was filed, this time also including Staff of the PUCO, Ohio Energy Group, Kroger Company, and Ohio Partners for Affordable Energy as signatory parties, and Enernoc, Industrial

Users-Ohio, and Ohio Manufacturers' Association Energy Group on as non-opposing parties. Ohio Environmental Council now opposes the Amended Stipulation due to removal of the DIR-B, which would have provided $35 million per year for projects that enable and support grid modernization. (*See* Stipulation and Recommendation, Jan. 30, 2017, at 7.)

The hearing began on April 3rd and after five (inconsecutive) days of testimony, concluded on April 11th.

III. Standard of Review

The Commission is required to engage in the statutory standard for review of an ESP by "determin[ing] whether the ESP is more favorable in the aggregate than MRO, pursuant to Section 4928.143(C)(1), Revised Code." *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Dec. 14, 2011) at 27. Additionally, the burden is on the Company to show that the elements of the ESP are "just and reasonable and are consistent with the policy of the state as delineated in" R.C. 4928.02. Ohio Adm. Code 4901:1-35-06(A).

Because this ESP is being presented to the Commission as part of the Amended Stipulation, further review and scrutiny is warranted. In reviewing a proposed stipulation, "[t]he ultimate issue for the Commission's consideration is whether the agreement . . . is reasonable and should be adopted." *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order (Dec. 14, 2011) at 27. The Commission uses three criteria to determine the reasonableness of a stipulation:

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

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice? *Id.*

The Commission must also still ensure its decision is, "guided by the policies of the state as established by the General Assembly in" R.C. 4928.02. *In re Columbus S. Power Co.*, Opinion and Order at 17 (Dec. 14, 2011); see also *id*. at 27. Further, the Commission must apply the statutory standard for review of an ESP by "determin[ing] whether the ESP is more favorable in the aggregate than MRO, pursuant to Section 4928.143(C)(1), Revised Code." *Id.* at 27.

Finally, the signatory parties to a stipulation carry the burden of showing that it meets the stipulation standard. *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, *et al.*, Entry on Rehearing (Feb. 23, 2012) at 8.

IV. Argument

A. The Signatory Parties to the Amended Stipulation have not carried their burden to show that the Amended Stipulation meets the Standard of Review.

The Amended Stipulation is not a reasonable compromise, because it fails two of the three prongs required based upon the Commission's own test. As stated above, the Commission decides the reasonableness of a stipulation by considering the following criteria: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit

ratepayers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice? While OEC was unopposed to the original Stipulation, both OEC and EDF are opposed to the Amended Stipulation submitted in this case. The Amended Stipulation violates the Commission's reasonableness test for stipulations because (1) it does not benefit ratepayers and is not in the public interest to allocate costs to customers who are without blame for the financial problems of the Company or its parent, and (2) it violates several of Ohio's regulatory principles, as detailed below.

1. As a package, the Amended Stipulation does not benefit ratepayers and the public interest.

Despite DP&L's assertions, the Amended Stipulation does not benefit ratepayers and is not in the public interest. The Amended Stipulation fails to accomplish anything other than financially burdening ratepayers with the poor decisions made by DP&L. Though the amount of revenue DP&L can collect under Rider DMR is reduced in comparison with the first Stipulation, the Amended Stipulation continues to hold customers' accountable for the financial difficulties of the Company and its parent while removing any requirement that part of the cash infusion be spent to modernize and upgrade infrastructure, which would be a great benefit to the public.

While the first Stipulation had various components related to grid modernization and upgrades that may have benefitted DP&L customers, the Amended Stipulation is completely devoid of any benefit to customers, who are

simply being saddled with paying DP&L's debt. Though Witness Schroder admits that the Amended Stipulation provides funds to pay interest obligations on existing debt and make discretionary debt prepayments, she also claims it will facilitate investment to help the Company modernize the grid for its customers. Co. Ex. 3 at 9. However, testimony shows that DP&L will not have any funds leftover after paying down its debt to modernize and invest in the grid, and customers will be receiving no benefit, nor is there any requirement for a portion of the funds DP&L will receive to be spent on such upgrades. Company Ex. 1A at 16-17.

It is not beneficial to ratepayers or in the public interest to continue to pay for DP&L's failures, and the public should not be financing DP&L's bad business decisions. There is a clear difference between ensuring reliable electric service to a territory and financially propping up a company who has made bad investments--and the Amended Stipulation asks ratepayers to do the latter.

a. The proposed Rider DMR allocates costs to customers who are without blame for the financial problems of the Company or its parent.

It is clear that customers of DP&L rely on the Company to provide safe and reliable service. Company Ex. 3 at 3. However, Company Witness Schroder contends that "DP&L is currently facing a financial crisis, and will not be able to continue to provide such service without financial support." *Id.*

What is most troubling is the idea that it is not the executives or shareholders of the monopoly DP&L Company who should bear the responsibility, but the people of its service territory who have zero responsibility for the Company's financial

mismanagement or misfortune, but DP&L still believes should foot over $300 million of the bill. As Ohio Consumers' Counsel Witness Matthew Kahal states, this

> proposed Settlement elevates the interests of AES shareholders over those of DP&L's captive customers. This is particularly unfair because this credit quality problem was largely created by AES's management's merger financing decisions, not by customers. The DMR would perversely reward AES shareholders for AES's dubious excess leverage decisions by substantially increasing its corporate profits.

OCC Ex. 12 at 48. In fact, Witness Kahal determined that Rider DMR alone would cost a residential customer who uses 1,000 kWh per month approximately $9 per month (or about $108 per year). *Id.* at 11.

Furthermore, as Company Witness Schroder admits, the Rider DMR merely puts the Company "on a path toward achieving and maintaining investment grade," without ensuring that result. Company Ex. 3 at 10. Customers do not owe the Company in any way beyond payment of Commission-approved rates for the cost of electric service. The Company, in exchange for its monopoly power granted by the Commission, owes the customers the duty to stay healthy and provide reliable services. It is not the Commission's duty to bail out utilities that make bad business decisions and put it on the backs of blameless ratepayers.

Rather than burden its customers, Company executives and shareholders, like any company within America's free enterprise system, can and should take measures to reduce its own debt, including reducing executive pay and bonuses; cutting shareholder dividends, issuing more equity, etc. Ohio has moved slowly over the past decade and a half, in some stakeholder's eyes too slowly, toward electric

competition. This competition has encouraged, and if allowed to reach its potential will continue to encourage, innovation that lowers costs, lowers rates, and lowers environmental impact from the electricity sector. If the Commission acquiesces to this utility's pleas, customers' will lose confidence in the Commission's authority and goal of developing "innovative regulations and forward-thinking policies" to advance grid modernization and the integration of efficiency and distributed resources. Customers will see the PUCO as backward facing rather than one that is powering forward toward a more modern and efficient future that attracts innovation and investment.

2. The Amended Stipulation package violates important state regulatory principles and practices, and should not be approved.

The Amended Stipulation also violates several regulatory principles and practices, and should not be approved for those reasons as well. First, the Amended Stipulation fails to rectify the problem that it still allows DP&L to collect revenues to pay interest on its debt and to pre-pay debt, thereby collecting transition revenues as that debt finances the plants. Second, Rider DMR is inconsistent with past Commission rulings on grid modernization riders, failing to provide any plan showing how the utility would use the revenues to improve the grid and failing to base it on the utility's actual and prudently incurred costs for grid modernization. Finally, the Amended Stipulation will not support the state of Ohio's codified energy policies as there is zero requirement that Rider DMR encourage innovation and smart grid programs.

a. Approval of proposed Rider DMR would effectively allow unlawful recovery of transition costs.

Beginning in 1999, the State of Ohio, through Senate Bill 3, began the process of restructuring the state's electric utilities. In that process, the state's investor owned utilities were required to divest their generation. The amendments to the Revised Code provided an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. R.C. 4928.37. A utility is only permitted to receive those transition revenues, upon application, when the Commission finds that:

> (A) The costs were prudently incurred; (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (C) The costs are unrecoverable in a competitive market; and (D) The utility would otherwise be entitled an opportunity to recover the costs. ORC 4928.39.

Further, and importantly, Ohio law bars the Commission from authorizing the "receipt of transition revenues or any equivalent revenues" after December 31, 2010. Two recent Ohio Supreme Court cases concerning both AEP and DP&L's SSO cases further clarify this prohibition by showing that riders similar to Rider DMR will be considered transition charges. *See* *In re Application of Columbus S. Power Co.,* 2016-Ohio-1608, 147 Ohio St. 3d 439, 67 N.E.3d 734*; see also* *In re Application of Dayton Power & Light Co.,* Slip Opinion No. 2016-Ohio-3490.

The Company owns an interest in the following power plants: Stuart, Zimmer, Miami Fort, Killen and Conesville (the "Plants"), which were all built prior to 1999.

DP&L still owns these plants, according to the Company's most recent FERC Form 1 (attached to OEC/EDF Witness Finnegan's testimony as Exhibit JF-1), and the book value for DP&L's steam plants (mostly comprised by the Plants) is approximately $2.8 billion. EDF/OEC Ex. 2 at Exhibit JF-1. According to the balance sheet at pages 110-113 of Exhibit JF-1, the Company has a capital structure of approximately 40% equity and 60% debt, so the Plants are financed by approximately 60% debt. *Id.* Under Rider DMR, the Company would collect revenues to pay interest on its debt and to pre-pay debt. As some of this debt finances the Plants, this would allow DP&L to collect transition revenues, which is not permitted under Ohio law.

b. Rider DMR is inconsistent with past Commission Rulings on Grid Modernization Riders.

Rider DMR is also inconsistent with prior Commission opinions on grid modernization as no amount of funds are set aside for grid modernization under the Amended Stipulation, unlike in the first iteration. As part of the initial Stipulation, Rider DIR-B would have provided $35 million per year to "implement back-bone infrastructure projects designed to enable and support a longer term Smart Grid and Advanced Metering Infrastructure (AMI) roll out" and in "the remaining years of the ESP, the DIR-B amounts [would] be used for projects that enable and support a grid modernization plan." Stipulation at 7. DIR-B has been completely removed from the Amended Stipulation, which means removal of the vehicle to facilitate Smart Grid technologies, including AMI, Conservation Voltage Reduction (CVR), customer

programs like time-of-use and Green Button Connect My Data, data access for suppliers, Electric Vehicle Infrastructure, and other requirements to accommodate the growing use of renewables and distributed generation.

DP&L continues to reference grid modernization in relation to Rider DMR, yet it has no teeth. In past cases, the Commission has required that a grid modernization rider, (1) be accompanied by a grid modernization plan showing how the utility would use the revenues to improve the grid; and, (2) be based on the utility's actual and prudently incurred costs for grid modernization. EDF/OEC Ex. 2 at 3. Neither of these have been required in this case. In fact, there is no analysis in the record on DP&L's actual and prudently incurred costs for grid modernization, and there is no plan showing how money might be used to improve the grid--nor is there even a requirement that *any portion of the money be used for grid modernization*.

Additionally, in prior ESP cases where the Commission has approved a distribution tracker rider such as this, the Commission has required that the rider be based on an actual distribution improvement plan and the rider must also be cost-based. *In re FirstEnergy ESP*, Case No. 08-0935-EL-SSO (Opinion and Order at 40-41) (Dec. 19, 2008). In these situations, the Commission would traditionally and prudently require a rider to be subject to an annual audit, hearing and reconciliation process where any revenues not found to be actually and prudently spent are credited back to customers. Yet, no such requirement has been included with the funds allegedly being allocated for grid modernization here because the reference to grid modernization in Rider DMR is nothing more than a cover for

providing DP&L with a cash infusion that does not benefit its customers.

c. The Amended Stipulation will not support the state of Ohio's codified energy policies as there is zero guarantee that Rider DMR will encourage innovation and smart grid programs.

Staff Witness Donlon references R.C. 4928.02 (C) and (D), noting that the policy of the State is to encourage the modernization of the distribution grid, the offerings of innovative services, and the diversity of supply and suppliers. Witness Donlon goes on to state that the Amended Stipulation will further this policy through "the deployment of advanced technology and by enabling competitive providers to offer innovative products and services to customers in Ohio" with zero support for this statement. Staff Ex. 2 at 6.

Moreover, not only will the Rider DMR not support the Staff Witness's enumerated policies, it will violate an important section of Ohio law. If the Commission would approve a credit support rider to boost credit rating, this would be illegal under R.C. 4928.02 as it would involve a non-competitive service (i.e., the utility's duty to provide default service) to subsidize a competitive service. In this instance, it is the funding to payoff the debt from competitive generation through a distribution rider. This is a patent violation of Ohio's stated energy law.

The Amended Stipulation states that the Rider DMR revenues can be used for debt reduction *and* grid modernization, without indicating or requiring how much can be spent for either one. As a result, DP&L could choose to spend all of the revenues on debt reduction, and not use any of the revenues for grid modernization.

Based upon information in the record, it seems to be the most likely course of action for DP&L. Per DP&L Witness Craig Jackson's original testimony, the proposed Rider DMR revenues to be collected under the Amended Stipulation will be insufficient to protect DP&L's financial integrity, so DP&L has no incentive and no requirement to use any of the funds for grid modernization. Company Ex. 1A at 16-17. It does not appear that DP&L will use any of the Rider DMR revenues for grid modernization, but rather use Rider DMR in its entirety to prop up the Company's financial health.

B. Recommendations for Grid Modernization

An application for an ESP, under Ohio Revised Code 4928.143(B)(2)(h), is permitted to contain provisions regarding the utility's distribution service, including provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. R.C. § 4928.143(B)(2)(h). The statute presupposes that the ESP provisions will incent grid infrastructure modernization, different from the day to day operations the utility takes to keep up its system. However, the Amended Stipulation and its riders contain nothing that incents true grid modernization, but merely contemplates business as usual infrastructure investment. To earnestly comply with R.C. 4928.143(B)(2)(h), the Commission must require DP&L to move forward with grid modernization by implementing requirements that DP&L use a portion of the funds recovered from this case for grid modernization. The Commission has already recognized the importance of this topic through the three-part *PowerForward* initiative to modernize the grid. EDF and OEC applaud the

Commission for launching this discussion and note that there is now an even more compelling case for the Commission to require DP&L to file a business plan as well as a cost/benefit study for grid modernization steps in this docket.

As Witness John Finnigan noted in his testimony, the plan should include distribution automation, voltage optimization, AMI deployment, and customer and CRES provider access to customer energy usage data. EDF/OEC Ex. 1 at 2. The Commission has already approved grid modernization plans for Duke Energy and AEP, and FirstEnergy has filed a preliminary business plan as well, which is awaiting Commission approval. Now is the time for the Commission to require DP&L to begin the grid modernization process in earnest. The opportunity to require such an effort through this docket is essential, as the process might be delayed by a few years otherwise, disadvantaging DP&L customers in relation to Duke, AEP and FirstEnergy territories.

V. Conclusion

DP&L and the signatory parties to the Amended Stipulation have failed to present a package that meets the Commission's standard of review. The Amended Stipulation is nothing more than a financial boon for the Company, funded by its own customers, to help the Company out of a situation caused by its own mismanagement. Further, DP&L's nod to grid modernization is merely a lip service--there is no hook requiring a penny of the funds requested by DP&L to go toward anything to benefit the public. For these reasons, the Amended Stipulation clearly does not benefit ratepayers and is not in the public interest, and, as detailed

in this Brief, violates several Ohio regulatory principles and practices. Ohio Environmental Council and Environmental Defense Fund respectfully request that the Commission reject the proposed Amended Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Joint Initial Post-Hearing Brief by the Environmental Defense Fund and Ohio Environmental Council*, was served upon the persons listed below via electronic transmission this 5th day of May, 2017.

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