

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

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

William J. Michael, (0070921)
Counsel of Record
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Andrew Garver (PHV-10193-2017)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: [Michael] (614) 466-1291
Telephone: [Moore] (614) 387-2965
Telephone: [Kumar] (614) 466-1292
Telephone: [Garver] (614) 466-9569
william.michael@occ.ohio.gov
kevin.moore@occ.ohio.gov
ajay.kumar@occ.ohio.gov
andrew.garver@occ.ohio.gov
(Will accept service via email)

May 15, 2017

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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the Dayton Power and Light Company for)	Case No. 16-0395-EL-SSO
Approval of its Electric Security Plan.)	
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Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13.)	

**REPLY BRIEF
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This Settlement could add \$432 (or much more) to Ohioans' electric bills. In large part that cost-increase is attributable to the Distribution Modernization Rider ("DMR"). "DP&L needs *all* of the DMR funds *to pay down debt* so that DP&L can maintain its financial integrity."¹ Though clarity is not always the law's virtue, one thing

¹ The Dayton Power and Light Company's ("DP&L") Initial Post-Hearing Brief Public Version ("DP&L Brief") at 44 (*italics added*). This is not an isolated admission. DP&L's Brief (consistent with hearing testimony) is replete with confirmations that *all* DMR funds are needed to pay-off generation debt and will *not* go to distribution modernization. See, e.g., *id.* ("As demonstrated at length above, DP&L needs all of the DMR funds to pay down debt so that DP&L can maintain its financial integrity . . .") (*underline in original*); *id.* at 45 (DMR funds are used for "debt reduction. They are going straight to debt reduction.") (quoting from DP&L Witness Malinak's hearing testimony, Hearing Transcript, Vol. I at 226); *id.* at 45 ("the full \$105 million DMR – including that \$36 million [saved from AES foregoing collecting the tax sharing liability from DPL, Inc.] – [will be used] to pay down debt."); *Id.* (the "change in the corporate tax rate, however, would have no effect on the need to use the *full* DMR to pay down debt.") (citing to DP&L Witness Jackson's hearing testimony, Hearing Transcript, Vol. I at 78-79) (*italics added*); *id.* at 45 ("the Stipulation would still establish that *the full \$105 million DMR* – including that \$16 million [saved if the corporate tax rate were lowered] – *would be used to pay down debt.*") (citing Stipulation) (*italics added*); *id.* at 46 ("DP&L thus needs and *will use the full \$105 million DMR to pay debt*, regardless of whether the corporate tax rate is 35%, 15%, or some other number.") (citing Malinak and Jackson hearing testimony, Hearing Transcript, Vol. I at 78-79; 226) (*italics added*).

is crystal clear: The Public Utilities Commission of Ohio (“PUCO”) must look past form to substance when considering if a charge is an illegal transition charge or equivalent revenue.² DP&L’s admissions confirm that the DMR is nothing but an illegal transition charge or equivalent revenue needed to pay-off generation debt. In another instance of crystal-clarity, the Ohio Supreme Court (“Court”) has twice directed that the PUCO cannot authorize a transition charge or equivalent revenue after the market development period has ended.³ To protect consumers – and to follow the law – the PUCO should reject the DMR.

In addition to the DMR, there is so much bad news for Ohioans in DP&L’s proposed Amended Stipulation and Recommendation (“Settlement”) that the problems vie with each other for attention. But as laid out in the Initial Post-Hearing Brief of the Office of the Ohio Consumers’ Counsel (“OCC”), and described below, the settlement is bad for consumers, bad public policy, and bad for Ohio. It should be rejected.

I. INTRODUCTION

With but few exceptions, the parties that signed (or do not oppose) the Settlement ignore the hearing record, to the detriment of all consumers who must pay the unwarranted subsidy for uneconomic generation and other provisions included in the Settlement. Judging by their initial briefs, the signatory parties and non-opposing parties act as if the evidentiary hearing never occurred.

OCC pointed out in its Initial Post-Hearing Brief – based on uncontroverted record evidence from DP&L’s own witnesses – that the debt that DP&L is looking to

² *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).

³ *Id.*

pay-off with DMR funds is linked to its generation assets.⁴ And notwithstanding DP&L's protestation that it will transfer its generation assets, the responsibility for paying the debt associated with those assets will remain with DP&L, the regulated utility, and be paid by its customers.⁵ The Court has been very clear that DP&L, the other parties, and the PUCO cannot ignore this record evidence.⁶ The DMR is an illegal transition charge or equivalent revenue that should be rejected.

To make matters worse, the DMR would break the promise that AES Corporation ("AES"), DPL, Inc. ("DPL"), and DP&L made to Ohioans – they would not charge customers costs related to the negotiation, approval, and closing associated with AES's acquisition of DP&L ("the Merger").⁷ The PUCO should not let this promise be broken.

When the record is addressed, parties mischaracterize, misunderstand, selectively and inaccurately interpret, and set up straw men in critiquing OCC's evidence. Properly considered, the record evidence shows that the Settlement fails the three-part test.⁸ Properly considered, the record evidence shows that the electric security plan ("ESP") embodied in the Settlement fails the market rate offer ("MRO") versus ESP test--it is not more favorable in the aggregate to consumers than a market rate offer.⁹ Properly considered, evidence points in the same direction: Reject the Settlement.

⁴ OCC's Initial Post-Hearing Brief at 12-16.

⁵ Id. at 13.

⁶ See, e.g., *Tongren v. PUC*, 85 Ohio St. 3d 87 (1999); see also R.C. §4903.09.

⁷ 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) ("Merger Order"); see also OCC's Initial Post-Hearing Brief at 27-28.

⁸ See *Consumers' Counsel v. PUC*, 64 Ohio St. 3d 123 (1992).

⁹ R.C. 4928.143(C)(1).

II. RECOMMENDATIONS

- A. To protect consumers, the PUCO should follow the Ohio Supreme Court’s directive and find the DMR is an unlawful transition charge or equivalent revenue that DP&L seeks to collect from customers.**
- 1. The DMR is first, last, and always about paying off generation debt – it is an unlawful transition charge or equivalent revenue that should be rejected to protect consumers.**

DP&L defends the DMR as predominantly being about grid modernization.¹⁰

Revealingly, DP&L highlights the PUCO Staff’s testimony, not its own, to this effect.¹¹

This is because DP&L’s own testimony (that is, testimony from the party seeking the DMR and, thus, presumably the most informed about its purpose and intended use) confirms that 100% of DMR funds are going to be used to pay-off debt.¹² “DP&L needs *all* of the DMR funds *to pay down debt* so that DP&L can maintain its financial integrity.”¹³ That debt is linked to its generation assets.¹⁴ And the responsibility for paying that debt will remain with DP&L, the regulated utility, and be paid by its

¹⁰ See, e.g., DP&L’s Initial Brief at 12-16.

¹¹ See, e.g., *id.* at 13 (quoting Staff Witness Donlon’s testimony).

¹² See note 1, *supra*. In addition to confirming that the DMR is an illegal transition charge or equivalent revenue, DP&L’s assertion that any reduction in taxes should not be passed on to consumers is unreasonable and should be rejected. See DP&L’s Initial Brief at 44-46. If consumers bear the burden of paying the current tax rate, they should also get the benefit if the tax rate is reduced. This is the PUCO’s past practice. See *In the Matter of the Commission’s Investigation of the Financial Impact of the Tax Reform Act of 1986 on Regulated Ohio Utility Companies*, Case No. 87-831-AU-COI, Entry (June 9, 1987) (ordering utilities to file “an application to reduce rates or a statement to show cause why their rates should not be reduced as a result of the TRA ’86 tax rate changes” and that companies who reduced their rates should “file application reduce their rates” reflecting the lower tax rates).

¹³ DP&L’s Initial Post-Hearing Brief Public Version at 44 (*italics added*).

¹⁴ OCC’s Initial Post-Hearing Brief at 12-16.

customers.¹⁵ The DMR is an illegal transition charge or equivalent revenue that should be rejected.¹⁶

Read most charitably, the defense of the DMR boils down to this: DP&L needs the DMR funds to pay-off generation debt so that it can borrow more money to spend on grid modernization. Staff Witness Donlon, put it succinctly: “to get to that point, [DP&L has] to pay down debt, so they can . . . go out and get new debt”¹⁷ But the first step in the process – paying down existing generation debt with DMR funds – cannot be passed over to get to the second step – borrowing yet more money to (allegedly) spend on grid modernization. That is because the first step is an unlawful transition charge or equivalent revenue that would require consumers to improperly subsidize unregulated, competitive generation.

Ohio law bars the PUCO from authorizing “the receipt of transition revenues or *any equivalent revenues* by an electric utility” after the market development period ended in 2005.¹⁸ The Court has determined that even though something was not explicitly labeled as transition revenue, it can still be considered “transition revenue.”¹⁹ As part of that case, the Court determined that AEP’s Retail Stability Rider (“RSR”) included the

¹⁵ Id. at 13.

¹⁶ *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).

¹⁷ Hearing Transcript, Vol. V at 875-76; see also DP&L’s Initial Brief at 13; Hearing Transcript, Vol. I at 106-107 (DP&L Witness Jackson explained that “[t]he DMR will enable us to pay down debt to put us in a position in the future to be able to access the debt and equity markets.”). The irony of allowing DP&L to charge consumers so that it can pay debt that it cannot now pay so that it can go out and borrow yet more money has apparently been lost thus far. As a matter of public policy and consumer protection, it should be found. The DMR should be rejected.

¹⁸ R.C. 4928.38 (italics added).

¹⁹ “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 RSR.” *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d at 444.

recovery of unlawful transition revenue. The Court overturned the PUCO's approval of that rider.²⁰ 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."²¹ The Court's decision was subsequently reinforced when it recently and summarily rejected DP&L's service stability charge as an unlawful transition charge.²²

The Environmental Defense Fund and Ohio Environmental Council put it well:

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.²³

2. DP&L's technical defenses of the DMR are inadequate and should be rejected to protect consumers.

The best defenses of the DMR that DP&L could come up with is that it will no longer own generation assets, it allegedly allows DP&L to invest in distribution service and modernization, and it is permissible under the "notwithstanding" clause in R.C. 4928.143(B)(2)(h).²⁴ Although DP&L may not own any generation assets at some point in the Settlement's wake, the debt linked to those assets that is the debt giving rise to the

²⁰ Id. at 449.

²¹ Id. at 448.

²² *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

²³ Joint Initial Post-Hearing Brief of Environmental Defense Fund and Ohio Environmental Council at 10.

²⁴ See DP&L's Initial Brief at 33-36. DP&L throws in that it will provide 100% of SSO service through competitive bidding, and that that was cited as a "factor" by the PUCO when it concluded that FirstEnergy's DMR was not a transition charge. That "factor", by itself, is insufficient to support DMR here. And because all of DP&L's other defenses of DMR fail, as explained herein, that "factor" should be disregarded. Further, the factor did not save a previous, similar charge from the Supreme Court declaring it illegal. See *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439 (2016). It should not here, either.

need for the DMR, will remain.²⁵ That debt will be paid with DMR funds taken from DP&L’s customers.²⁶ According to DP&L’s own testimony and the financial reality, 100% of the DMR funds will be used to pay debt.²⁷ So, none of the funds will be used to invest in distribution service or grid modernization. As explained by Wal-Mart, DP&L’s “customers receive no improvements in the utility service that they are already receiving or any universal benefit”²⁸ DP&L raised its argument based on R.C. 4928.143(B)’s “notwithstanding” clause in the appeal to the Court on the Service Stability Rider. It was rejected there, and should be here.²⁹

3. The DMR proposed by DP&L is not authorized under R.C. 4928.143(B)(2)(h), (d), or (i) and should be rejected to protect consumers.

Not only should the DMR be rejected because it is an illegal transition charge or equivalent revenue, it (as proposed by DP&L) is not authorized under R.C. 4928.143(B). DP&L cannot show that sufficient resources are dedicated to grid modernization through the DMR and thus does not meet the requirements of R.C. 4928.143 (B)(2)(h). In fact, no resources from the DMR are dedicated to grid modernization. “DP&L needs *all* of the

²⁵ See OCC’s Initial Post-Hearing Brief at 12-16; see also ED and OEC Joint Post-Hearing Brief at 13.

²⁶ See *id.*

²⁷ See note 1, *supra*.

²⁸ Wal-Mart Stores East, LP and Sam’s East, Inc.’s Post-Hearing Brief at 3.

²⁹ *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016). The issue was briefed before the Supreme Court in *In re Dayton Power & Light Co.*, including in supplemental briefs. Further, the majority in *In re Dayton Power & Light Co.* held the Service Stability Rider illegal notwithstanding the opinions concurring in part and dissenting in part in *In re Application of Columbus Southern Power*, which discussed the “notwithstanding” clause. Because the issue was squarely before the Court, and the Court nonetheless held the Service Stability Rider illegal, it is apparent that the “notwithstanding” clause cannot save the DMR. The same goes for DP&L’s “later-enacted statute” argument. See DP&L Initial Brief at 36. It was raised in the Service Stability Rider case. Because the issue was squarely before the Court, and the Court nonetheless held the Service Stability rider illegal, it is apparent that the “later-enacted statute” clause cannot save the DMR. Also, as shown *infra*, the DMR proposed by DP&L is not authorized under R.C. 4928.143(B)(2)(h), (d), or (i).

DMR funds *to pay down debt* so that DP&L can maintain its financial integrity.”³⁰ The DMR is *not* necessary for DP&L to provide safe and reliable service, so it does not stabilize or provide certainty regarding electric service as required by R.C. 4928.143(B)(2)(d).³¹ There are rules and procedures in place that ensure that DP&L will provide safe and reliable service irrespective of the DMR.³²

And the economic development provisions in R.C. 4928.143(B)(2)(i) do not save the DMR. The purported economic development benefits described by DP&L relate to grid modernization. But 100% of the DMR is going to pay-off debt, not grid modernization.³³

B. DP&L mischaracterizes OCC witness testimony regarding DP&L’s ability to provide safe and reliable service to its customers.

DP&L claims that OCC witnesses conceded that they did not evaluate whether DP&L could maintain its financial integrity or provide safe and reliable service without the DMR.³⁴ This is a gross mischaracterization. OCC Witness Williams explained that DP&L has a regulatory obligation to provide its customers with safe and reliable service

³⁰ DP&L’s Initial Post-Hearing Brief Public Version at 44 (*italics added*); see also note 1, *supra*.

³¹ See, e.g., Hearing Transcript, Vol. II at 275:11-14; 291:3-9; Williams Supp. Dir. At 18:11-19:15; OCC’s Initial Post-Hearing Brief at 31-33.

³² See Ohio Admin. Code 4901:1-20 et seq.

³³ See note 1, *supra*. Further, the PUCO should recognize that DP&L itself recognizes that the DMR is inadequate for its stated purposes. It says that it needs DMR for five years. See, e.g., DP&L Initial Brief at 8. But the proposal before the PUCO is for a three-year DMR. See Settlement. Also, DP&L Witness Jackson conceded that DP&L may have reliability issues even with the DMR. See DP&L’s Initial Brief at 11 (quoting DP&L Witness Jackson). As noted by Wal-Mart: “Nor does the Company contend that the DMR, which is outside the normal regulatory compact, will actually correct the Company’s alleged financial crisis; at best, it hopes to be placed *on a path* towards maintaining an investment grade rating.” Wal-Mart’s Post-Hearing Brief at 7 (citations omitted, *italics in original*). There is no justification for approving \$315 million-dollar charge on Ohioans that, by DP&L’s own admission, will not solve anything.

³⁴ DP&L’s Initial Brief at 7-8.

regardless of whether the DMR is established.³⁵ As stated in OCC's initial brief, DP&L is required to provide safe and reliable service under a set of standards and requirements that are completely unrelated to the DMR.³⁶ OCC witnesses further explained that if DP&L truly has concerns about its ability to maintain safe and reliable service to its customers, then it should raise those concerns in a distribution rate case, possibly even the one that is currently before the PUCO.³⁷

Further, DP&L's characterization that its assertion that the DMR is necessary to maintain financial integrity and that it cannot provide safe and reliable service without the DMR is "uncontested" is grossly inaccurate. OCC Witness Kahal explicitly states, "I do not believe that the excessive charges [DMR] to customers are required to provide safe and reliable service. Nor are the excessive charges to customers required for grid modernization."³⁸ OCC Witness Kahal goes on to provide an explicit analysis of how DP&L can prevent its parent's financial condition from affecting its ability to provide safe and reliable service:

³⁵ Williams Supp. Dir. at 4:17-19.

³⁶ OCC Initial Brief at 31-32.

³⁷ Williams Supp. Dir. at 18:5-8.

³⁸ Kahal Supp. Dir. at 19:1-5.

As explained in my Direct Testimony, DMR should not be viewed as providing a public interest benefit because the DP&L financial integrity could be better protected, without the use of customer-funded subsidies, by using a combination of ring fencing and equity contributions from AES. This could take the form of asset divestiture/sales, dividend payment reductions by AES (including AES simply slowing its anticipated rapid increases in dividend payout), and AES applying its substantial surplus cash flow to DPL, Inc. debt reduction. AES certainly has the financial capability to replace the approximately \$67.2 million per year of (after-tax) DMR customer payments with cash equity transfers to DPL, Inc. Moreover, it is AES's corporate responsibility to do so, not that of its captive customers....If AES would take these reasonable and responsible actions, then DP&L's financial integrity and access to capital on favorable terms would be preserved without the need for the burdensome DMR. This could be further ensured by implementing ring fencing for DP&L to further assure investors of bankruptcy protection.³⁹

This analysis shows the flaws in DP&L's argument that it must pay DPL's debt to protect DP&L.⁴⁰ And, as DP&L Witness Malinak acknowledged, it is possible for a company with a junk issuer rating to have an investment grade debt issuance if it is sufficiently collateralized.⁴¹ Even without resorting to these measures, with ring-fencing and additional equity infusions from AES, DP&L would not need to illegally charge consumers for DPL's debt.

OCC Witness Williams provides testimony that DP&L must provide safe and reliable service regardless of its financial condition. OCC Witness Kahal specifically lays out how DP&L can continue to do so without resorting to a charge that directly harms consumers. It is disingenuous for DP&L to now say that OCC witnesses provided no testimony on the subjects, and to characterize its assertions as "uncontested."

³⁹ Kahal Supp. Dir. at 29-30:4-2.

⁴⁰ DP&L's Initial Brief at 38-41.

⁴¹ Hearing Transcript, Vol. I at 140: 8-14; 20-25.

C. DP&L's reliance on the Standard and Poor's report is misguided – it supports rejecting the DMR thereby protecting consumers.

DP&L also relies heavily on a report that was issued by Standard and Poor's ("S&P") that lowered DPL's credit rating, but kept DP&L's credit rating as investment grade.⁴² DP&L seems to claim that this credit rating adds further urgency to its DMR request.⁴³ But, as OCC Witness Parcell testified, this is not true. DPL was not investment grade before the report, and DP&L *is* still investment grade:

They [DPL] went from BB to B. Neither of those are investment grade. BB is not investment grade. BBB is investment grade. So DPL was not investment grade before, but the following bullet point showed DP&L's rating was affirmed, not downgraded, and it's BBB which is investment grade.⁴⁴

Further, DP&L claims that OCC Witness Kahal concedes that S&P is critical of the Settlement and that the DMR is too low.⁴⁵ Far from any meaningful concession that supports DP&L's proposals here, OCC Witness Kahal's cross-examination is extremely sensible in light of his filed testimony. He repeatedly states in his testimony that the DMR is an excessive charge on customers and the best methods to address financial integrity matters are ring fencing and equity infusions from AES.⁴⁶

DP&L's blatant attempts to twist the words of OCC witnesses are misguided and flawed. The PUCO should listen to S&P and OCC Witness Kahal. It should not continue to throw good money after bad. It should reject the Settlement. It should certainly reject

⁴² DP&L's Initial Brief at 9.

⁴³ DP&L's Initial Brief at 9.

⁴⁴ Hearing Transcript, Vol. V at 847:6-12.

⁴⁵ DP&L's Initial Brief at 9-10.

⁴⁶ Kahal Supp. Dir. at 29-30:4-2.

the DMR and, if necessary, adopt the recommendations of OCC's witnesses by engaging in appropriate ring fencing to preserve DP&L's finances and customers' money.

D. The Settlement's equity "investments" are misleading and do not protect consumers.

DP&L contends that the settlement contains a number of provisions that constitute equity infusions from AES, DP&L's ultimate parent.⁴⁷ But the infusions were already in place *before* the Settlement. AES was not receiving dividends since 2012 and had suspended the tax liability payments for some time as well.⁴⁸ For DP&L to now tout these provisions as new and beneficial is simply wrong.

Further, the provisions do not (as Staff Witness Donlon believes) constitute ring-fencing.⁴⁹ OCC Witness Kahal lays out a series of concrete proposals for ring fencing in his original direct testimony. These concrete proposals include 12 separate provisions.⁵⁰ For Staff Witness Donlon to now say that this "equity infusion" constitutes ring-fencing disregards the facts.

The equity contributions cited by DP&L are both inadequate and have already been in place for years. They do not constitute ring-fencing. The PUCO should not buy-into misleading assertions to the contrary. It should reject the Settlement.

⁴⁷ DP&L's Initial Brief at 6-7.

⁴⁸ Hearing Transcript, Vol. V at 849:16-21 (DPL not paying dividends since 2012); *id.* at 850:5-8 (DPL not paying taxes to AES).

⁴⁹ Hearing Transcript, Vol. V at 883:11-884:5.

⁵⁰ Direct Testimony of OCC Witness Kahal at Schedule MIK-1 (Nov. 21, 2016).

E. DP&L's claimed rate decrease does not flow from the ESP embodied in the Settlement.

The purported rate reduction is not related to the Settlement. DP&L cites OCC Witness Kahal as stating that the rate reduction is “surprisingly modest.”⁵¹ But DP&L simply cherry-picks this phrase without providing any context. OCC Witness Kahal actually describes how the rate decrease results not from the ESP, but from the expiration of the Rate Stability Charge and reductions in the market-based SSO.⁵² His conclusion is that the same rate decrease (and not the costs associated with the DMR) would be available under an MRO.⁵³

Further, OCC Witness Williams provided a cogent explanation of how this “rate decrease” is not really a decrease at all:

DP&L bills are lower today because DP&L is finally providing customers with some of the benefits of lower priced energy from competitive auctions even though these benefits are 16 years after Ohio restructured the electric industry. Also, the rate impact is understated considering that DP&L is collecting \$73 million in unlawful stability charges from customers. Customers should be able to finally enjoy the benefits of lower energy prices that were contemplated by lawmakers sixteen years ago before DP&L again unnecessarily raises the costs of electric bills through unwarranted and unnecessary charges.⁵⁴

DP&L's argument that the Settlement results in a rate reduction is actually an attempt to capitalize on low wholesale energy prices and pile excessive charges on customers. It should be rejected, along with the Settlement.

⁵¹ DP&L's Initial Brief at 22.

⁵² Kahal Supp. Dir. at 17:5-12.

⁵³ Kahal Supp. Dir. at 17:12-16.

⁵⁴ Williams Supp. Dir. at 11-12:19-5.

F. DP&L's contention that the DMR would not violate the Merger Order is wrong and adopting it would harm consumers.

DP&L's assertion that it is not collecting an acquisition premium is not only wrong, but misleading.⁵⁵ It claims that OCC Witness Kahal "abandoned" his opinion that the DMR would charge consumers for costs associated with the Merger.⁵⁶ But OCC Witness Kahal was simply responding to DP&L counsel's question regarding calculations of a specific acquisition premium.⁵⁷ In both his direct and supplemental testimony, OCC Witness Kahal remarks at length on the excessive debt that was caused by the Merger being pushed down to consumers.⁵⁸ In fact, Kahal lays out exactly how this occurred:

An important contributing factor causing the excess debt is unquestionably from the AES Corporation acquisition of DPL, Inc. in 2011. AES choose to finance the acquisition as an all cash transaction instead of an exchange of stock or even a combination of stock and cash. The cash nature of the transaction necessitated the issuance of massive amounts of new debt because AES lacked the cash on hand. As part of the merger financing arrangements, DPL, Inc. issued \$1.25 billion of new debt. This merger financing decision, imposed on DPL, Inc. by AES Corporation, is clearly a major reason why DPL, Inc. has excess debt leverage and weak credit ratings, and therefore an important reason supporting the asserted need for the \$1.015 billion DMR being proposed. In other words, customers are being asked today to pay for merger financing from five years ago.⁵⁹

⁵⁵ See DP&L's Initial Brief at 42-44.

⁵⁶ DP&L Initial Brief at 42.

⁵⁷ Hearing Transcript, Vol. IV at 713:8-14.

⁵⁸ Kahal Dir. at 26-27:12-2; Kahal Supp. Dir. at 30-31:16-2.

⁵⁹ Kahal Dir. at 26-27:12-2.

DP&L itself acknowledges that it and DPL incurred debt related to the Merger.⁶⁰ And through the DMR, DP&L plans to break its commitments to the PUCO and pay off that debt with consumers' money.

DP&L then asserts that the debt associated with the Merger is not an “acquisition premium” by narrowly defining “premium” based on a dictionary definition.⁶¹ The Merger Order is not so narrow. In it, the PUCO states that DP&L represented that “they are not seeking to recover *any* costs of the merger through customers[.]”⁶² Further, the PUCO ordered that “neither the costs incurred directly related to the negotiation, approval[,] and closing of the merger nor any acquisition premium shall be eligible for inclusion in rates and charges applicable to retail electric service provided by DP&L.”⁶³ Such an order goes far beyond simply specifying an “acquisition premium.” It prevents DP&L from charging consumers for any of the costs associated with the Merger.

The debt that DP&L is looking to pay-off with DMR funds is from “costs incurred directly related to the negotiation, approval and closing of the merger” and an “acquisition premium.” Under the Merger Order, which enshrines DP&L's prior commitment to the PUCO, it is inappropriate to allow DP&L to pay the debt by charging customers. The PUCO should reject the Settlement.

⁶⁰ DP&L's Initial Brief at 42.

⁶¹ See *id.*

⁶² Merger Order at ¶15 (*italics added*).

⁶³ Merger Order at ¶19(d).

G. The Settlement fails the MRO versus ESP test and should be rejected to protect consumers.

1. “Benefits” that are “not required” are a “wash” under the MRO versus ESP test.

Both DP&L and Staff find that the Settlement passes the MRO versus ESP test primarily because of the purported “direct benefits” that are paid by DP&L’s shareholders.⁶⁴ For example, DP&L says that the “numerous benefits that are funded by shareholders” would not be provided under an MRO because there is “no provision[] in the MRO statute that require[s] those benefits.”⁶⁵ But the mere fact that shareholder payments are not required under an MRO does not make them required under an ESP – they are not.⁶⁶ Neither DP&L nor Staff can point to any provision of the ESP statute requiring these benefits. Under DP&L’s and Staff’s logic, these purported “direct benefits” from shareholders would be a “wash” under the MRO versus ESP test.⁶⁷ Accordingly, they do not make the ESP embodied in the Settlement more favorable in the aggregate than the expected results under an MRO.⁶⁸

Although DP&L and the PUCO Staff exclude purported qualitative benefits under an MRO because they are “not required,” they ironically include qualitative benefits

⁶⁴ DP&L’s Initial Brief at 24-26; Staff Brief at 12-13 (citing to Staff Ex. 2 at 5). Staff does not provide any support as to why such “direct benefits” would be available under an ESP but not under an MRO. See Staff Ex. 2 at 5-6 (merely listing \$9 million of “direct benefits” as “quantitative measures” that Staff Witness Donlon considered “in regard to the ESP versus MRO test” but not taking any position on whether these measures are available under an ESP, MRO, both, or neither).

⁶⁵ DP&L’s Initial Brief at 24-25 (internal citations omitted). DP&L makes the same argument for certain, purported qualitative benefits. DP&L at 25 (citing to DP&L Ex.2B at 64-70) (“The Stipulation also includes significant non-quantifiable benefits that would not be required under an MRO.”). Likewise, DP&L does not point to – and cannot point to – any portion of the ESP statute that “requires” such purported benefits.

⁶⁶ R.C. §4928.143; see also OCC’s Initial Post-Hearing Brief at 58-60.

⁶⁷ See OCC’s Initial Post-Hearing Brief at 58-60.

⁶⁸ See R.C. 4928.143(C)(1).

under the ESP even though they are “not required.”⁶⁹ For example, DP&L includes “[c]ommitments by AES” as non-quantifiable benefits under the ESP,⁷⁰ but admits earlier in its brief that such benefits are “[o]therwise not [r]equired” under an ESP or even “[j]urisdictional” to the PUCO.⁷¹ Staff Witness Donlon admitted the same.⁷²

DP&L and the PUCO Staff cannot have it both ways. They have not provided a single justification as to why “not required” quantitative benefits should be handled differently than “not required” qualitative benefits. There is absolutely no basis for the argument that these benefits should be excluded from the MRO because the PUCO Staff would have been able to negotiate such benefits into an ESP settlement but not under an MRO settlement.⁷³ As such, these purported benefits should also be a “wash” under the MRO versus ESP test. They therefore do not support approving the ESP embodied in the Settlement.

⁶⁹ See DP&L’s Initial Brief at 25 (listing “commitments by AES” under non-quantifiable benefits).

⁷⁰ See DP&L’s Initial Brief at 25 (listing “commitments by AES” under non-quantifiable benefits).

⁷¹ DP&L’s Initial Brief at 16-17.

⁷² See e.g., Hearing Transcript, Vol. V at 883 (“through this stipulation [Staff was] able to negotiate . . . something that is outside of the Commission’s actual authority to be able to do in an order without the company in a stipulation); id. at 884-87 (explaining that Staff was able to negotiate with AES Corporation to provide appropriate measures that can be implemented only through a stipulation).

⁷³ In fact, it is likely that Staff or other intervenors may be able to negotiate more favorable terms under an MRO because the utility does not have the unilateral ability to withdraw its application. See R.C. §4928.143(C)(2)(a). The PUCO has recognized that a utility’s unilateral ability to withdraw means that “the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.” *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 (Mar. 25, 2009). See also id. at Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring at 2.

2. The “other riders” in the Settlement matter and favor the MRO to protect consumers.

DP&L and Staff argue that none of the riders in the Settlement matter for purposes of the MRO versus ESP test.⁷⁴ Particularly, Staff argues that there are “two particularly salient things that must be understood in implementing this test, context matters and not all benefits can be quantified.”⁷⁵ , Staff disregards the most important thing that must be understood and rigorously applied in implementing the MRO versus ESP test: the law.

For example, Staff argues that irrespective of whether SSO service is provided under an MRO or an ESP, “storm damage [] would need to be repaired.” That is true. But if done (appropriately) in a rate case, the law requires a thorough review of all of DP&L’s costs to make sure that all were incurred prudently for used and useful investments.⁷⁶ This in-depth analysis that protects and benefits customers will not be done under this Settlement.⁷⁷

As another example, Staff argues that irrespective of whether SSO service is provided under an MRO or an ESP, “[e]conomic development would still be needed.”⁷⁸ This is also true. But if done (appropriately) under the reasonable arrangement law, companies that receive economic development incentives would actually have to retain or create jobs⁷⁹ – something that is not required in this Settlement.⁸⁰ Recovering storm costs

⁷⁴ DP&L’s Initial Brief at 24-25; Staff Brief at 11.

⁷⁵ Staff Brief at 11.

⁷⁶ Williams Supp. Dir. at 23-27.

⁷⁷ Id.

⁷⁸ Staff Brief at 11.

⁷⁹ See R.C. §4905.31; Haugh Testimony at 8-9 and 10:16-21.

⁸⁰ Hearing Transcript, Vol. II at 330:16-331:16; OCC’s Initial Post-Hearing Brief at 67, footnote 340.

after a rigorous analysis in a rate case, or allowing for economic development incentives via more stringent requirements (to take but two examples) could result in cost-savings for customers. It would certainly provide more consumer protection. Allowing DP&L to charge consumers for such things as a result of the Settlement in an electric security plan case has neither benefit.

Additionally, Staff argues that “[t]o obtain the benefits of smart grid, the financial problem would need to be addressed whether that were through a determination of an emergency under R.C. 4928.142(D)(4) or through a rate case doesn’t matter. Relief would be provisioned, it has to be. Since the need and the means to address that need remain the same under either scenario, the presence of the DMR is irrelevant to the ESP v. MRO test.”⁸¹ This argument also disregards the law. The MRO and ESP statutes delineate exactly which utility needs can be addressed, in what manner, and according to which standards.⁸² The “means to address [these] needs” are specifically laid out in the relevant statutes. They are not the “same” as Staff argues. They cannot be ignored. All riders in the Settlement must be taken into account within the specific context of the governing statute, whether MRO or ESP. They tip the analysis in favor of an MRO. The Settlement fails the MRO versus ESP test and must be rejected.⁸³

In addition to ignoring the law, DP&L and Staff’s arguments would make the MRO versus ESP test meaningless. Following DP&L’s and Staff’s logic, a utility could file an ESP with limitless riders that cost consumers billions of dollars. But all of these riders would be a “wash” under the MRO versus ESP test because they could be gotten

⁸¹ Staff Brief at 12 (internal citations omitted).

⁸² See R.C. 4928.142 and 143.

⁸³ See OCC’s Initial Post-Hearing Brief at 56-69.

through some other means. Thus, any proposed ESP would pass the MRO versus ESP test as long as the utility's shareholders made some sort of "direct benefit" payment, no matter how small. This is a slippery slope that the PUCO should refuse to go down. These riders do matter and make the ESP less favorable in the aggregate than the expected outcome under an MRO. Therefore, the Settlement fails the MRO versus ESP test and should be rejected.

H. Approving the Settlement would give Staff "veto power," contrary to consumers' interests.

Both DP&L and OPAE argue that, under the first prong of the three-prong test, the OCC does not have veto power over a Settlement.⁸⁴ They argue that the PUCO has held that "one party cannot effectively nullify a stipulation."⁸⁵ But approving this Settlement would do exactly that. It 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,⁸⁶ and the PUCO Staff itself,⁸⁷ recognizes as inappropriate.

Approving the Settlement effectively gives the PUCO Staff an after-the-fact veto power in the settlement process, fostering uncertainty and chilling settlements. A stipulation was signed and filed in this docket on January 30, 2017.⁸⁸ That stipulation

⁸⁴ DP&L's Initial Brief at 4-5; OPAE Brief at 5-6.

⁸⁵ OPAE Brief at 6 (citations omitted).

⁸⁶ 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).

⁸⁷ See Hearing Transcript, Vol. V at 865:19-866:5.

⁸⁸ See January 30, 2017 Stipulation and Recommendation.

was not signed by the PUCO Staff.⁸⁹ DP&L changed its settlement position to get the PUCO Staff on-board, which resulted in the Settlement and numerous original signatory parties receiving less than they bargained for in the January 30, 2017 settlement (e.g., OEC, RESA, IGS, MAREC, etc.).⁹⁰ In the process, DP&L initially lost the support and non-opposition of three parties.⁹¹ Only after DP&L paid off MAREC with \$200,000 did DP&L gain two of the three parties back.⁹²

DP&L presumably seriously bargained with the parties that signed the January 30, 2017 stipulation. It abandoned the results of that serious bargaining to (presumably) seriously bargain a second time to get the PUCO Staff's support. In doing so, it left numerous parties worse off and receiving less than they initially "seriously" bargained for. Were the Settlement approved, future settlement negotiations would be chilled because no settlement without the PUCO Staff would be signed for fear that it could change (and result in less than what was originally bargained for). The result of approving the Settlement would, therefore, effectively give the PUCO Staff a veto power on settlements. And to make matters worse, this veto power could be exercised after a stipulation has been signed and filed. The Settlement should not be approved.

⁸⁹ See *id.*

⁹⁰ See Schroder Testimony at 4:9-17.

⁹¹ Those parties are the Ohio Environmental Counsel ("OEC"), RESA, and the Mid-Atlantic Renewable Energy Coalition ("MAREC"). See January 30, 2017 Stipulation and Recommendation (OEC agrees not to oppose, RESA and MAREC support); Settlement at 40, note 17 (RESA's signature only effective if all signatory parties to the January 30, 2017 Stipulation and Recommendation sign the Settlement or agree not to oppose; MAREC neither a signatory party nor a non-opposing party).

⁹² MAREC as a non-opposing party and RESA as a signatory party. See The Dayton Power and Light Company's Notice of Filing its Letter Agreement with Mid-Atlantic Renewable Energy Coalition (OCC Ex. 4); see also Settlement at 40, note 17.

I. The cash payments included in the Settlement are not “justified” and would harm consumers.

In discussing the third prong of the PUCO’s three-prong test for evaluating settlements, OPAE cites to a case⁹³ (cited by the OCC for the holding that the PUCO does not favor cash payments⁹⁴) and suggests that “cash payments are justified” because parties “worked hard” during a “lengthy procedural history.”⁹⁵ OPAE argues that based on the “circumstances of hard work over a long period of time on the part of the signatory and non-opposing parties” in this case, the cash payments in the Settlement should be approved.⁹⁶

A simple review of the facts demonstrates that OPAE’s characterization of the 05-376-EL-UNC case is incorrect. For example, Case No. 05-376-EL-UNC was originally filed in March 2005, approved in 2006 (originally and on rehearing),⁹⁷ went through an application to the Ohio Power Siting Board (that required that AEP must commence a “continuous course of construction” within five years – something that was determined AEP failed to do in 2012),⁹⁸ appeals to (and remands from) the Court, and more litigation at the PUCO.⁹⁹ Ultimately, another hearing on the remanded issues was set in December

⁹³ *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 (Feb. 11, 2015).

⁹⁴ See Haugh Testimony at 12.

⁹⁵ OPAE Brief at 16.

⁹⁶ OPAE Brief at 15-16.

⁹⁷ Case No. 05-376-EL-UNC Order on Remand at 2.

⁹⁸ *Id.* at 3-4.

⁹⁹ *Id.*

2014 but was continued to allow settlement discussions. A settlement – that the PUCO found “no party opposes” – was reached and approved by the PUCO in 2015.¹⁰⁰

Thus, OPAE’s reliance on this case for the existence of “hard work” and a “lengthy procedural history” as being sufficient to approve cash payments is misplaced. That case covered nearly 10 years, numerous rounds of litigation at the PUCO and the Ohio Power Siting Board, and appeals to the Court. Here, OPAE admits that the “hard work” is limited to “hours” of negotiations and the procedural history merely spanned a “period of months.”¹⁰¹ Further, unlike the facts in Case No. 05-376, parties oppose the Settlement at issue here. The case cited by OPAE does not support the notion that the PUCO “justifies” “cash payments” when there is hard work and a lengthy procedural history. If so, those circumstances are clearly not present here. OPAE’s argument – and the Settlement that includes cash payments – should be rejected.

III. CONCLUSION

The Settlement could add \$432 (or much more) to the cost of hard-working Ohioans’ electric bills. A big part of that cost-increase flows from the DMR. By DP&L’s own admissions, 100% of DMR funds are going to be used to pay generation debt. It is an illegal transition charge or equivalent revenue. Ohioans bills should not be increased based on illegal charges. The Settlement and its DMR should be rejected.

Ohioans’ bills should also not be increased due to a utility’s broken promises. In the Merger Finding and Order, AES, DPL, and DP&L promised that they would not charge consumers for the Merger. This is exactly what the Settlement does now.

¹⁰⁰ Id. at 11.

¹⁰¹ OPAE Brief at 15.

The PUCO should protect consumers and the electric markets that serve them, as intended by the Ohio General Assembly, so that consumers can reap the continued benefits. The best place to start is rejecting this Settlement.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ William J. Michael
William J. Michael, (0070921)
Counsel of Record
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Andrew Garver (PHV-10193-2017)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: [Michael] (614) 466-1291
Telephone: [Moore] (614) 387-2965
Telephone: [Kumar] (614) 466-1292
Telephone: [Garver] (614) 466-9569
william.michael@occ.ohio.gov
kevin.moore@occ.ohio.gov
ajay.kumar@occ.ohio.gov
andrew.garver@occ.ohio.gov
(All will accept service via email)

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 15th day of May 2017.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

SERVICE LIST

william.wright@ohioattorneygeneral.gov	michael.schuler@aes.com
dboehm@bkllawfirm.com	cfaruki@ficlaw.com
mkurtz@bkllawfirm.com	djireland@ficlaw.com
jkylercohn@bkllawfirm.com	jsharkey@ficlaw.com
kboehm@bkllawfirm.com	mfleisher@elpc.org
fdarr@mwncmh.com	kfield@elpc.org
mpritchard@mwncmh.com	jeffrey.mayes@monitoringanalytics.com
mjsettineri@vorys.com	evelyn.robinson@pjm.com
smhoward@vorys.com	schmidt@sppgrp.com
glpetrucci@vorys.com	rsahli@columbus.rr.com
ibatikov@vorys.com	tony.mendoza@sierraclub.org
wasieck@vorys.com	kristin.henry@sierraclub.org
tdougherty@theOEC.org	gpoulos@enernoc.com
cmooney@ohiopartners.org	mdortch@kravitzllc.com
joliker@igsenergy.com	rparsons@kravitzllc.com
mswhite@igsenergy.com	Bojko@carpenterlipps.com
ebetterton@igsenergy.com	perko@carpenterlipps.com
Slessor@calfee.com	Ghiloni@carpenterlipps.com
jlang@calfee.com	paul@carpenterlipps.com
tallexander@calfee.com	sechler@carpenterlipps.com
mkeaney@calfee.com	rick.sites@ohiohospitals.org
slessor@calfee.com	mwarnock@bricker.com
jlang@calfee.com	dparram@bricker.com
amy.spiller@duke-energy.com	dborchers@bricker.com
elizabeth.watts@duke-energy.com	lhawrot@spilmanlaw.com
jeanne.kingery@duke-energy.com	dwilliamson@spilmanlaw.com
gthomas@gtpowergroup.com	charris@spilmanlaw.com
stheodore@epsa.org	ejacobs@ablelaw.org
laurac@chappelleconsulting.net	cpirik@dickinsonwright.com
todonnell@dickinsonwright.com	wvorys@dickinsonwright.com
rseiler@dickinsonwright.com	jdoll@djflawfirm.com
	mcrawford@djflawfirm.com

Attorney Examiners:

gregory.price@puc.state.oh.us

bryce.mckenney@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

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5/15/2017 4:02:12 PM

in

Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM

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