BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	)	
the Dayton Power and Light Company	)	
to Establish a Standard Service Offer	)	Case No. 16-0395-EL-SSO
in the Form of an Electric Security	)	
Plan.	)	

APPLICATION FOR REHEARING OF THE OPINION AND ORDER, ENTERED OCTOBER 20, 2017, BY THE OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND

Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code 4901-1-35, the Ohio Environmental Council and the Environmental Defense Fund (collectively, "Environmental Advocates") file this application for rehearing of the October 20, 2017 Public Utilities Commission of Ohio (the "Commission") Opinion and Order regarding Case No. 16-0395-EL-SSO. The Opinion and Order approved the Electric Security Plan of the Dayton and Power and Light Company (the "Company") as proposed in the, Amended Stipulation and modified by the Commission, which provided for a Distribution Modernization Rider ("Rider DMR"). The Rider DMR will allegedly provide the Company with the "ability to access capital markets and to invest in grid modernization." *Opinion and Order*, Public Utilities Commission of Ohio, Case No. 16-0395-EL-SSO, 26, (Oct. 20, 2017), *available at* http://dis.puc.state.oh.us/TiffToPDf/A1001001A 17J20B21255J00544.pdf (hereinafter "Opinion and Order").

The Environmental Advocates object to the Commission's decision to approve the Electric Service Plan and Amended Stipulation due for the following reasons, explained more fully in the accompanying Memorandum in Support.

A. The approved Rider DMR is unreasonable and unlawful because it does not benefit the ratepayers nor the public interest.

   1. Rider DMR allocates costs to customers who are without blame for the financial problems of the Company or its parent.
   2. Rider DMR is not an "incentive" because it fails to require the Company to finance grid modernization initiatives**.**

B. The approved Rider DMR is unreasonable and unlawful because it violates important state regulatory principles and practices.

   1. Rider DMR provides the Company with illegal Transition Revenues.
   2. Rider DMR violates Ohio energy policies, and lacks any tangible requirement to encourage distribution and smart grid innovation and development.

Accordingly, the Commission must remove Rider DMR from the Amended Stipulation of DP&L's ESP or, in the alternative, modify the Amended Stipulation to include mandatory provisions that require DP&L to use the funds received from Rider DMR for distribution and grid modernization.

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Miranda Leppla (0086351)
Counsel of Record
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
(614) 487-5825 – Telephone
(614) 487-7510 – Fax
mleppla@theOEC.org

Counsel for Environmental Defense Fund

Trent Dougherty (0079817)
Counsel of Record
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
tdougherty@theOEC.org

Counsel for Ohio Environmental Council

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND

The ESP and Amended Stipulation, as a package, do not benefit ratepayers and is not in the public interest, and it violates important regulatory principles and practices. As a result, approval of the ESP and Amended Stipulation is unlawful and unreasonable, and should be reversed.

I. Facts and Procedure

As a public utility, Dayton Power and LIght Company ("DP&L") is subject to the jurisdiction of the Public Utilities Commission of Ohio (the "Commission"). Accordingly, DP&L filed its application for a standard service offer in the form of an electric security plan (ESP) under the laws outlined at O.R.C. § 4928.143. On March 24, 2016, the Ohio Environmental Council and Environmental Defense Fund ("Environmental Advocates") intervened in the case to represent the interests of their members, hoping to develop with the other intervening parties an equitable ESP. In total, dozens of parties intervened in the case, from Honda and Kroger to the City of Dayton and the Ohio Consumers' Counsel.

The Commission held a hearing on April 3, 2017, where they heard seven witnesses in support of the Amended Stipulation, and twelve witnesses in opposition to the Amended Stipulation. In addition, many comments were filed on the docket in opposition to DP&L's ESP.

The Amended Stipulation originally included the following provisions, opposed by the Environmental Advocates:

1. Distribution Modernization Rider/Distribution Investment Rider
    a. DP&L will implement a non-bypassable Distribution Modernization Rider ("DMR") for years 1 through 3 of the term of the ESP. The DMR shall be designed to collect $105 million in revenue per year. With Commission approval, DP&L may have the option of extending the duration of Rider DMR for an additional two years….
    b. Cash flow from the DMR will be used to (a) pay interest obligations on existing debt at DPL Inc and DP&L; (b) make discretionary debt prepayments at DPL Inc. and DP&L; and (c) position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure.

Am. Stip. and Recommendation, Case No. 16-0395-EL-SSO, Pub. Util. Comm. Ohio, (Mar. 13, 2017), at 5.

The Environmental Advocates, along with other intervenors, argued against Rider DMR in their post-hearing briefs. Yet the Commission, in its October 20 Opinion and Order, ruled that the Amended Stipulation satisfied statutory requirements, finding that the stipulation appeared to be the product of serious bargaining among capable, knowledgeable parties; that Rider DMR benefits the public interest because "grid modernization will improve reliability by reducing the number of outages and improving responses to outages by the EDUs"; that grid modernization "is necessary to deliver innovative products to consumers, to empower consumers to make informed decision[s] in the marketplace and to improve the efficiency of the grid, all of which are consistent with state policy set forth in R.C. 4928.02(B), (C), (D), and (F)." *Opinion and Order*, Case No. 16-395-EL-SSO, et al., Public Utilities Commission of Ohio, (Oct. 20, 2017), at 19, 28.[1]

[1] In support of its conclusion, the Commission found that "the possible downgrade of DP&L's credit rating and the actual downgrade of DPL's credit rating has had an adverse effect upon the Company's ability to access capital markets and invest in the grid," *Id.* at 24, that "DP&L and its parent company have taken affirmative steps to address

The Commission also ruled that Rider DMR does not violate any important regulatory principles, finding that Rider DMR is authorized under O.R.C. § 4928.143(B)(2)(h)[2] because it is purportedly a distribution modernization incentive. The Commission concluded that Rider DMR does not allow DP&L to collect transition revenues because, "DP&L's SSO is entirely served through a competitive bidding process", DP&L's generation assets no longer serve SSO customers….[and] DP&L has committed to transferring its generation assets to a third-party or to an affiliate and has taken the appropriate steps to implement that commitment." *Id.* at 51. The Commission further states that the "purpose of the DMR is to put the Company in a financial position to provide safe and reliable distribution service and to modernize its distribution grid." *Id.* The Commission does not address whether Rider DMR acts as an "anti-competitive subsidy," as argued by the Environmental Advocates in their initial Brief.

II. Standard of Review

The standard of review for an Amended Stipulation is whether "the agreement is reasonable and should be adopted." *See e.g., Cincinnati Gas & Electric Co.,* Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.,* Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.,* Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993). To ascertain what constitutes a "reasonable" stipulation, the Commission has established the following three criteria:

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

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their financial difficulties," *Id.* at 25, and that "the DMR would provide a needed incentive to DP&L to focus its efforts on grid modernization." *Id.* at 26.

[2] The relevant text of O.R.C. §4928.143(B)(2)(h) is as follows: "Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and *provisions regarding distribution infrastructure and modernization incentives* for the electric distribution utility." (emphasis added by Commission).

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?

Opinion and Order, Case No. 16-395-EL-SSO, et al., Public Utilities Commission of Ohio, (Oct. 20, 2017) at 16. *See also In re Columbus S. Power Co.,* Case No. 11-346-EL-SSO, *et al., Opinion and Order* (Dec. 14, 2011) at 27.

In addition to these considerations, the Commission must ensure that its reasoning and decision are "guided by the policies of the state as established by the General Assembly in" O.R.C. § 4928.02. *In re Columbus S. Power Co.,* Opinion and Order (Dec. 14, 2011) at 17. The parties signing the Amended Stipulation carry the burden of proving that it meets the applicable standard of review. *In re Columbus S. Power Co.,* Case No. 11-346-EL-SSO, *et al.,* Entry on Rehearing (Feb. 23, 2012) at 8.

Per O.R.C. § 4903.10, the Environmental Advocates set forth the following arguments on Rehearing, which specifically demonstrates why the order to be unreasonable or unlawful and the Opinion and Order should be reversed.

III. Argument

The Environmental Advocates file this Application for Rehearing because the Commission's approval of the Amended Stipulation results in an unlawful and unreasonable order, because Rider DMR does not benefit ratepayers nor the public interest, and it violates important state regulatory principles and practices. For the reasons set forth below, the Commission must remove Rider DMR from the Amended Stipulation of DP&L's ESP or, in the alternative, modify the Amended Stipulation to include mandatory provisions that require DP&L to use the funds received from Rider DMR for distribution and grid modernization.

A. The approved Rider DMR is unreasonable and unlawful because it does not benefit the ratepayers nor the public interest.

Rider DMR does not benefit ratepayers or the public interest, and should not have been approved by the Commission. While DP&L argued that approval of the Amended Stipulation, and in particular the DMR, would permit it to maintain its financial integrity and therefore continue to provide safe and reliable service to customers, AES, DP&L's parent company, already had the ability to alleviate the financial problems faced by DPL Inc. and DP&L. *Opinion and Order*, Case No. 16-395-EL-SSO, *et al.*, (Oct. 20, 2017) at 19. The Environmental Intervenors stressed on briefing and continue to remind the Commission that it is not the responsibility of ratepayers to pay for the Company's debts. *See, e.g., id.* at25. The Commission disagreed, finding that DP&L and its parent company have possible credit issues, that DP&L has taken affirmative steps to combat these problems, and that Rider DMR provides an "incentive to DP&L to focus its efforts on grid modernization," making Rider DMR beneficial and in the public interest. *Id.,* at 26 - 28.

However, the Commission's reasoning in approving Rider DMR is unreasonable and unlawful. Rider DMR unreasonably allocates costs to customers who are without blame for the financial problems of DP&L or its parent. 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 made bad investments--and the Amended Stipulation asks ratepayers to do the latter. Additionally, Rider DMR is unlawful because it fails to act as an incentive rulemaking as allowed by O.R.C. §4928.143(B)(2)(h) as: the "incentive" described by the Commission fails to require *any action* on the part of the Company *whatsoever* to finance grid modernization initiatives. It is merely a hope that DP&L, a Company that the Commission notes has financial problems, will spend money on the right thing.

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

Customers rely on DP&L to provide safe and reliable service. Company Ex. 3 at 3. 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.* Embedded in this statement, and most troubling here, is the idea that it is not the executives or shareholders of the monopoly DP&L Company who should bear the responsibility for DP&L's financial crisis, but the people of its service territory--customers who have zero responsibility for the Company's financial mismanagement or misfortune. Yet DP&L still believe customers should pay over $300 million to support the Company's bad decisions. As Ohio Consumers' Counsel ("OCC") Witness Matthew Kahal states,

> 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, OCC 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, Rider DMR merely puts the Company "on a path toward achieving and maintaining investment grade," without no assurance of that result. Company Ex. 3 at 10. Customers do not owe the Company beyond payment of

Commission-approved rates for the cost of electric service. The Company, in exchange for monopoly powers granted by the Commission, owes the customers the duty to stay healthy and provide reliable services. It is inappropriate and unreasonable for the Commission to bail out utilities that make bad business decisions by placing the bill on the backs of blameless customers.

Rather than burden its customers, it is DP&L's executives and shareholders, like any company within America's free enterprise system, that must take measures to reduce its own debt, including reducing executive pay and bonuses, cutting shareholder dividends, issuing more equity, and more. 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 entity that inappropriately props up bad business decisions rather than a Commission powering forward toward a more modern and efficient future that attracts innovation and investment.

In response to these arguments, the Commission found in its Opinion and Order that because DP&L has encountered serious financial trouble, such financial problems act as a roadblock to distribution and grid modernization.[3] The Commission states that DP&L and DPL

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[3] Specifically, the Commission writes: "THe record demonstrates that at the time of DP&L's testimony was filed in this case on October 11, 2016, DPL's ratings were B+/BB/BA4 with negative outlooks (Fitch/S&P/Moody's) and DP&L's secured bond rating was BBB/BBB-/Baa2 with negative outlooks (Fitch/S&P/Moody's). Thus DPL was

"have taken affirmative steps to address their financial difficulties prior to seeking relief from the Commission in this proceeding."[4] *Opinion and Order*, Case No. 16-395-EL-SSO, et al., Pub. Util. Comm. Ohio, (Oct. 20, 2017) at 25. For example, DP&L has paid dividends to DPL, including $50 million in 2015 which was used to retire DPL's debt. *Id.* at 26.

The Commission makes the leap that because the new cash flow would "improve its ability to access capital markets," DP&L would then also invest in grid modernization. *Id.* at 26. The Commission also orders its Staff "to conduct an ongoing review of the use of Rider DMR cash flow during the ESP." *Id.* at 27. The Commission tries to establish this result as equitable and in the public interest of ratepayers, but the Commission fails to provide any accountability should DP&L misuse of the funds that would be funneled to the Company through the Rider, or any substantive guarantee on what proportion of funds must be used for distribution modernization. The money has no restrictions on use, and no obligations on usage.

The Amended Stipulation directs the Company to use the approximately $100 million a year from Rider DMR to:

(1) Pay interest obligations on existing debt at DP&L and its parent, DPL Inc.;
(2) Make discretionary debt prepayments at DP&L and DPL Inc.; and
(3) Allow DP&L to make capital expenditures to maintain and modernize its distribution and transmission infrastructure." *Id.* at 26 - 27.

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below investment grade while DP&L was investment grade with negative outlooks. (Co. Ex. 1B at 28; Co. Ex. 2B at 42.43) However, the record also reflects that, by the time of the hearing, S&P had downgraded the issuer credit rating of both DPL and DP&L to BB- which is below investment grade (Tr. Vol. IV at 698 - 700; Co. Ex. 105).

"As a result, in its recent refinancing of debt, DP&L was unable to refinance the debt on terms typical for a traditional investment grade utility. Instead, DP&L was forced to accept credit terms including: a short-term maturity (six years); a relatively high variable cost of borrowing; and a covenant package which, among other terms, prevents the Company from raising debt to modernize the transmission and distribution system for the term of the loan (Co. Ex. 1B at 9-10; Tr. Vol. I at 109-110). The Commission finds that these terms pose a significant obstacle to grid modernization in the DP&L service territory." *Opinion and Order*, Case No. 16-395-EL-SSO, et al., Public Utilities Commission of Ohio, (Oct. 20, 2017) at 25.

[4] DPL sold interest in a retail affiliate, acquiring $90 million; DP&L sold its interest in a generation facility, eliminating "the negative cash flow from [its] operations" while acquiring $15-20 million in cash." Id. at 26, citing Tr. Vol. I at 33 - 34.

It is manifestly unreasonable to claim that a plan that allows three options yet mandates none of them spurs action on any of the three. Even if it is true that DP&L can only pursue grid modernization if they are given this handout through Rider DMR, the Rider should only be for distribution modernization. Only then can Ohio, and DP&L's customers, know that the Rider is actually in the public's best interest--because then we would have a guarantee that customers' dollars were modernizing their grid, not paying down bad debt owed to a parent company. Otherwise, the belief that the plan is in the public's best interest is completely reliant on DP&L willingly choosing to use any portion of the funds for distribution modernization. The Commission does not even mandate a minimum proportion of the DMR funds be used for distribution modernization; DP&L could use every dollar for modernization, or, and more likely, DP&L could use every dollar to pay down debt. And if DP&L uses all of the funds to repay debt, then the public has not benefited at all and Rider DMR is a sham; DP&L customers will instead have subsidized the debt of a Company whose bad business decisions were made without any input or participation by its customers. DP&L's bad debt is a result of its own poor choices and the blame, and funds to correct those choices, should remain with DP&L and not its customers.

The Commission suggests accountability by directing Staff to conduct ongoing review, but the Commission does not provide Staff with any authority or power to stop DP&L if they fail to use the cash flow from Rider DMR for distribution modernization. Instead, the Commission only requires that the report be included in "any proceeding in which DP&L seeks an extension of the DMR." *Id.* at 27. DP&L does not need to apply for extension for at least three years, so they could receive over $300 million without spending a cent on distribution modernization before the Commission could do anything to stop them--$300 million acquired from the customers not responsible for DP&L's poor financial decisions.

2. Rider DMR is not an "incentive" because it fails to require the Company to finance grid modernization initiatives.

In its Opinion and Order, the Commission finds that Rider DMR is in fact an "incentive" for distribution modernization, and thus serves that purpose as permitted by O.R.C. §4928(B)(2)(h). The Commission quotes Webster's Dictionary, defining "incentive" as "something that stimulates one to take action, work harder, etc.' stimulus, encouragement." *Opinion and Order*, Case No. 16-395-EL-SSO, et al., Pub. Util. Comm. Ohio, (Oct. 20, 2017) at 48 - 49, citing Webster's New World Dictionary, Third College Ed. 682 (1988); *see In re FirstEnergy*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 90. The Commission's belief that Rider DMR actually comports with the definition of "incentive" is, plainly, wrong.

Rider DMR provides DP&L with the funds necessary to pay down its debt, the debt of its parent, and/or to invest in distribution modernization. Before the Rider is reconsidered, DP&L will receive over $100 million from the Rider. The Commission argues that because Rider DMR "provides DP&L with the *ability* to access the capital markets at favorable rates to ensure investment in the distribution system and that accessing the capital markets will *enable* the Company to procure funds to jumpstart their distribution grid modernization initiatives," (emphasis added) Rider DMR incentivizes the company to focus on innovation and distribution modernization. *Id.* at 49. But just because DP&L has the *ability* to do something, or because the Rider *enables* them to perform that action, that does not mean they are incentivized to do that action. DP&L is getting these funds whether they use them to benefit customers and modernize the grid or not. It is impossible to know how much money DP&L will actually spend on distribution modernization, if any, precisely because the Amended Stipulation does not incentivize (or require) any particular action. DP&L could use all of the funds from the first three years of the Rider for debt reduction; it could use all of the funds for distribution modernization. There is no mechanism that pushes DP&L in one direction or another, other than the whims of those who control DP&L and answer to DP&L shareholders.

In addition, the Commission fails to consider the second part of O.R.C. § 4928(B)(2)(h). The full provisions states that an ESP may provide for or include:

> "Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission *shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.*"

O.R.C. §4928(B)(2)(h), *emphasis added*. The Commission failed to ensure that customers' and the electric distribution utility's expectations were actually aligned when including a distribution modernization "incentive." The Commission failed ensure that the electric distribution utility would actually emphasize and dedicate resources to the reliability of the distribution system through the funds gained through the Rider. The Commission failed to do anything other than give DP&L options on how they could spend the money, and then hand the money over. The

Commission's order gave no incentivizing push or any sort of "stimulus to take action" toward distribution modernization.

B. The approved Rider DMR is unreasonable and unlawful because it violates important state regulatory principles and practices.

The Commission concluded that Rider DMR did not violate important state regulatory principles and practices. In particular, the Commission found that Rider DMR "does not permit DP&L to collect transition revenue or its equivalent," and that the purpose of Rider DMR "is to put the Company in a financial position to provide safe and reliable distribution service and to modernize its distribution grid and that the DMR is tied to distribution, not generation." *Id.* at 51. The Commission did not consider the arguments of the Environmental Advocates that Rider DMR violates state energy policy, codified at O.R.C. § 4928.02. The Commission did not consider whether Rider DMR acts as an impermissible anti-competitive subsidy, in violation of O.R.C. § 4928.02.

But as the arguments below prove, Rider DMR *does* violate state energy policy by acting as an anti-competitive subsidy while contravening past Commission rulings; and further, it does, contrary to the Commission's opinion, allow DP&L to collect transition revenue. Therefore, the Amended Stipulation is unlawful and unreasonable because the inclusion of Rider DMR violates important state regulatory principles and practices.

1. Rider DMR provides the Company with illegal Transition Revenues.

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. O.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. O.R.C. §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 costs. *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.*, 2016-Ohio-1608, 147 Ohio St.3d 166, 62 N.E.3d 179.

In *In re Application of Columbus S. Power Co.,* the Court made clear that even if an applicant's ESP does not expressly seek transition revenues, that does not "defeat a claim that it is recovering transition revenues." *Id.* at 740. In *In re Application of Columbus S. Power Co.,* the Court found that the Rider was proposed "to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period." *Id.* at 741.

The Commission concluded that Rider DMR is not a transition cost or equivalent because "DP&L's SSO is entirely served through a competitive bidding process and DP&L's generation assets no longer serve SSO customers." *Opinion and Order*, Case No. 16-395-EL-SSO, et al., Pub. Util. Comm. Ohio, (Oct. 20, 2017) at 51. The Commission further supplement this claim by referring to DP&L's commitment to transfer "its generation assets to a third-party or to an affiliate and has taken the appropriate steps to implement that commitment." *Id.*

The Commission fails to analyze DP&L's debt in a comprehensive manner, considering the reality is that Rider DMR allows DP&L discharge its debt. While DP&L has committed to transferring its generation assets, it still presently owns five power plants, all built prior to 1999.[5] The book value of DP&L's steam plants, a portfolio mostly comprised of the five Plants, sits at approximately $2.8 billion. *See* EDF/OEC Ex. 2 at Ex. 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.

The Commission argued that Rider DMR "cannot, and will not, be used to support DP&L's former generation assets," but if DP&L acquires funds through Rider DMR to pay off other debts, Rider DMR frees up other capital to pay off debts associated with generation asset related debt. Even if the dollars coming from their ratepayers technically do not travel into accounts that pay off generation debt, they still make it substantially easier for DP&L to perform transactions that do pay off generation debt. Thus, Rider DMR allows DP&L to collect the equivalent of transition revenues, an act in violation of important Ohio laws and regulatory principles.

2. Rider DMR violates Ohio energy policies, and lacks any tangible requirement to encourage distribution and smart grid innovation and development.

Rider DMR actually acts as an anti-competitive subsidy because it provides a "non-competitive" service in violation of O.R.C. § 4928.02. Further, Rider DMR contradicts previous Commission rulings on similar Riders. But most importantly, because Rider DMR

[5] The five power plants, are Stuart, Zimmer, Miami Fort, Killen, and Conesville (the "Plants"), according to the Company's FERC form 1 (attached to OEC/EDF Witness Finnegan's testimony as Exhibit JF-1).

actually fails to act as a distribution modernization incentive as permitted under O.R.C. §4928.143(B)(2)(h), it also fails to support Ohio's codified energy policies. Staff Witness Donlon referenced O.R.C. § 4928.02 (C) and (D) in his testimony, stating 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. The Staff Witness Donlon claimed that the Amended Stipulation and Rider DMR will further that policy through "the deployment of advanced technology and by enabling competitive providers to offer innovative products and services to customers in Ohio." Staff Ex. 2 at 6. But Staff offers no evidence to support that claim. Rider DMR includes no requirement that the funds received be used for distribution and grid modernization--it is simply a permitted use of the funds in addition to debt reduction.[6]

a) Rider DMR acts as an impermissible anti-competitive subsidy for the Company.

Ohio Rev. Code § 4928.02 establishes the codified state energy policy for Ohio. In pertinent part, subsection (H) of Ohio Rev. Code § 4928.02 provides that it is the policy of the state to:

> "ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."

The proposed Rider DMR allows funds funneled into DP&L, the noncompetitive retail electric service, to help support the credit rating of DPL, the competitive retail electric service (the parent company, DPL). By providing DP&L with funds to pay off debts, it frees up further capital to move upward in the form of dividends to DPL, which has used those dividends in the past to pay

[6] As explained earlier in this Memorandum in Support, Rider DMR does not actually act as a distribution modernization incentive, and thus fails to pursue the stated policies under ORC §4928.02 (C) and (D).

off its own debts. *See Opinion and Order*, Case No. 16-395-EL-SSO, et al., Pub. Util. Comm. Ohio, (Oct. 20, 2017) at 26.

The Amended Stipulation states that cash flow from Rider DMR may be used to "pay interest obligations on existing debt at DP&L and its parent, DPL Inc….[and] make discretionary debt prepayments at DP&L and DPL Inc." *Id.* at 26 - 27. Thus, Rider DMR violates state energy policy against anti-competitive subsidies by creating a funding scheme between a noncompetitive electric service utility and a competitive electric service utility to pay off each other's debts. By approving this scheme, the Commission favors DPL, saying that it will use the funds of unsuspecting ratepayers to subsidize the poor financial decisions of DPL, at the expense of those same ratepayers and DPL's competitors who do not receive the same subsidy.

b) Rider DMR, as presently construed, contradicts previous Commission requirements for distribution and 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 and Recommendation (January 30, 2017) 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 13 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 distribution and 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. *See 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.

In addition, the Commission has initiated PowerForward, a program intended to "chart a clear path forward for future grid modernization projects, innovative regulations and forward-thinking policies." *PowerForward*, Pub. Util. Comm.n .Ohio, http://www.puco.ohio.gov/industry-information/industry-topics/powerforward/#sthash.Ho3p2nBn.dpbs. If the Commission is fully committed to the goals of *PowerForward*, it should add some teeth to this Opinion by at least requiring a significant portion of Rider DMR to fund distribution and grid modernization. The Commission cannot claim it is committed to modernization when it does not place enforceable commitments to such a pursuit in utility ESPs. Without that commitment, it amounts to a utility handout funded by customers.

IV. Conclusion

The Commission has approved an unreasonable Electric Service Plan because Rider DMR does not benefit DP&L's customers; it modifies their electric bills to pay off debts in existence by no fault of their own. The Commission has approved an unlawful Electric Service Plan because Rider DMR is not actually an incentive as required by O.R.C. §4928.143(B)(2)(h), it merely provides DP&L with a host of options from which to choose, as if they were at a four-way stop. It is further unlawful because it violates state energy policies; it does not promote distribution modernization or improvement, it acts as an anticompetitive subsidy, and it contradicts previous Commission requirements for similar Riders. Therefore, the Commission should grant this Application for Rehearing so that it can reconsider the issues specifically identified herein. And in reconsidering, the Commission should remove Rider DMR from the Amended Stipulation.in the alternative, the Commission should amend Rider DMR so it requires a significant portion of the acquired funds go toward distribution and grid modernization while following an established modernization plan.

Respectfully submitted,

/s/ Miranda Leppla
Miranda Leppla (0086351)
Counsel of Record
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
(614) 487-5825 – Telephone
(614) 487-7510 – Fax
mleppla@theOEC.org

Counsel for Environmental Defense Fund

/s/ Trent Dougherty
Trent Dougherty (0079817)
Counsel of Record
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
tdougherty@theOEC.org

Counsel for Ohio Environmental Council

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the parties by electronic mail this 17th day of November, 2017.

/s/ Trent Dougherty
Trent Dougherty

thomas.mcnamee@ohioattorneygeneral.gov
natalia.messenger@ohioattorneygeneral.gov
william.michael@occ.ohio.gov
andrew.garver@occ.ohio.gov
kevin.mooregocc.ohio.gov
bojko@carpenterlipps.com
perko@carpenterlipps.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
joliker@igsenergy.com
mswhitegigsenergy.com
Ebettertongigsenergy.com
schmidt@sppgrp.com
jeffrey.mayes@monitoringanalytics.com
evelyn.robinson@pjm.com
sechler@carpenterlipps.com
paul@carpenterlipps.com
cmooney@ohiopartners.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
rsahli@columbus.rr.com
chris@envlaw.com
tony.mendoza@sierraclub.org
kristin.henry@sierraclub.org greg.
wannier@sierraclub.org
michelle.d.grant@dynegy.com
mfleisher@elpc.org
kfield@elpc.org
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com

charris@spilmanlaw.com
Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com
mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
wasieck@vorys.corn
gthomas@gtpowergroup.com
stheodore@epsa.org
laurac@chappelleconsulting.net
ejacobs@ablelaw.org
slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com
jdoll@djflawfirm.com
mcrawford@djflawfirm.com
rick.sites@ohiohospitals.org
mwarnock@bricker.com
dborchers@bricker.com
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com
crtamm@classicconnectors.com
jstock@beneschlaw.com
ocollier@beneschlaw.com
mlandes@isaacwiles.com
bzets@isaacwiles.com
todonnell@dickinsonwright.com
rseiler@dickinsonwright.com
cpirik@dickinsonwright.com
wvorys@dickinsonwright.com
prosecutorkelley@usa.com
dana.whalen@adamscountyoh.gov
dparram@bricker.corn