BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR REHEARING

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I. INTRODUCTION AND SUMMARY

On October 20, 2017, the Commission modified and approved the March 14, 2017 Amended Stipulation and Recommendation ("Stipulation"), establishing the third Electric Security Plan for The Dayton Power and Light Company ("DP&L"). Oct. 20, 2017 Opinion and Order ("Order"). The Stipulation was signed by a diverse group of knowledgeable and capable parties after serious negotiations, and provides significant customer benefits. Most importantly, the Stipulation ensures that DP&L can provide safe and reliable service and can implement grid modernization while at the same time providing a rate decrease to typical residential customers who are paying the lowest rates in the state.

DP&L supports the applications for rehearing that were filed by customers and marketers asserting that the Reconciliation Rider should be made bypassable, with a "circuit breaker" or "trigger mechanisms." That proposal would restore the bargained-for exchange in the Stipulation and protect customers from unexpected price increases.

The Commission should reject, however, the applications for rehearing filed by The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Environmental Counsel ("OEC"), Environmental Defense Fund ("EDF"), Murray Energy Corporation ("Murray") and Citizens to Protect DP&L Jobs ("Citizens"), which attack the Commission's approval of the Stipulation on various grounds. DP&L responds to the arguments of those parties below.

II. STANDARD OF REVIEW

The Order in this proceeding modified and approved a stipulation. Pursuant to Ohio Admin. Code § 4901-1-30(A), "[a]ny two or more parties may enter into a written or oral stipulation concerning . . . the proposed resolution of some or all of the issues in a proceeding."

Although stipulations are not binding on the Commission, their terms are "'properly accorded substantial weight.'" Office of Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) (per curiam) (quoting Akron v. Pub. Util. Comm., 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978) (per curiam).

When the Commission considers a stipulation, "the ultimate issue . . . is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted." In re Application of The Cincinnati Gas & Elec. Co., Case No. 91-410-EL-AIR (Order on Remand, Apr. 14, 1994). The Commission considers whether (1) "the settlement [is] a product of serious bargaining of capable, knowledgeable parties," (2) "the settlement, as a package, benefit[s] ratepayers and the public interest," and (3) "the settlement package violate[s] any important regulatory principle or practice." The Supreme Court of Ohio has endorsed the Commission's use of these criteria "to resolve its cases in a method economical to ratepayers and public utilities." Office of Consumers' Counsel, at 126, 592 N.E.2d 1370.

Applications for rehearing following an order of the Commission must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Ohio Rev. Code § 4903.10(B). The Supreme Court of Ohio has strictly construed that requirement, holding that when an appellant's grounds for rehearing fail to specifically allege in what respect the Commission's order was unreasonable or unlawful, "the requirements of R.C. 4903.10 have not been met." Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59. Accord: City of Cincinnati v. Pub. Util. Comm., 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949) ("[T]he General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.").

III. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING

The Commission found that the Stipulation was "the product of serious bargaining among capable, knowledgeable parties." Order, ¶ 23 (p. 19). No party challenges the Commission's finding that the first criterion is satisfied.

IV. THE STIPULATION, AS A PACKAGE, IS IN THE PUBLIC INTEREST

In its Order, the Commission identified significant benefits of the Stipulation, including:

1. DP&L's credit rating had fallen below investment grade, which will "pose a significant obstacle to grid modernization in the DP&L service territory." Order, ¶¶ 36-38 (pp. 24-25). The Commission found that the Distribution Modernization Rider ("DMR") in Stipulation, ¶ II.2 would give DP&L the ability and incentive to pursue grid modernization. Id. ¶¶ 42-44 (pp. 26-27).

2. The Commission found that the amount of the DMR was supported by the record, and that the DMR funds were needed to provide financial stability to DP&L so that it could pursue grid modernization. Id. ¶ 45 (p. 28).

3. The Commission found that commitments by AES in Stipulation ¶ II.1.a & b (which impose certain restrictions on DPL Inc.'s ability to make dividend payments and tax sharing payments, and certain commitments to convert tax sharing liabilities into equity) were a significant benefit of the Stipulation. The testimony of DP&L witness Malinak showed that AES was making substantial equity investments (DP&L Ex. 2B, p. 4) and OCC witness Kahal conceded that those provisions constituted equity investments by AES (Trans. Vol. IV, pp. 710-11).

4. The Commission found that the Smart Grid Rider in Stipulation ¶ II.3 was in the public interest. Order, ¶¶ 59-60 (pp. 32-33).

5. The Commission found that the TCRR-N pilot program in Stipulation ¶ VI.1.c was in the public interest. Id. ¶¶ 61-62 (pp. 33-34).

6. The Commission found that the consolidated billing program in Stipulation ¶ IX.2 was in the public interest. Id. ¶¶ 67-70 (pp. 36-37).

7. The Commission found that DP&L's agreements in Stipulation ¶ II.1.c-e to transfer its generation stations to an affiliate, to enter a sales process for certain generation stations, and to use the sale proceeds for those assets to pay debt were in the public interest. Id. ¶¶ 77-78 (pp. 39-40).

8. The Commission also found that economic development incentives (Stipulation ¶ IV), the economic development grant fund (Stipulation ¶ V) and economic development program for the City of Dayton (Stipulation ¶ X.2) were benefits of the Stipulation. Id. ¶ 81 (p. 41).

Regarding the DMR in particular, the Commission agreed with the testimony of Staff witness Donlon that the DMR "will enable the Company to procure funds to invest in its grid modernization initiatives," id. ¶ 42 (p. 26) (citing Staff Ex. 2 at 4), and found that

> "grid modernization will improve reliability by reducing the number of outages and improving responses to outages by the EDUs, and that grid modernization also 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)."

Id. ¶ 44 (p. 27) (citing Co. Ex. 2B at 77).

Based upon its evaluation of these factors, and others, the Commission concluded that the Stipulation "as a package" was in the public interest and would benefit customers. Id. ¶¶ 79-82 (pp. 40-42).

Several intervenors who signed the Stipulation -- Interstate Gas Supply, Inc., Industrial Energy Users-Ohio, The Kroger Company, Ohio Manufacturers' Association Energy Group, and Retail Energy Supply Association -- have filed applications for rehearing challenging the Commission's decision to modify the Reconciliation Rider proposed in the Stipulation from a bypassable rider to a nonbypassable rider. Order, ¶ 63 (p. 35). The Reconciliation Rider was proposed to allow DP&L to recover or credit the net proceeds of selling Ohio Valley Electric Cooperative ("OVEC") energy and capacity into PJM markets. Stipulation, ¶ VI.1.a.ii (p. 13).

DP&L supports granting rehearing to modify the Reconciliation Rider to be bypassable because that would allow the Stipulation's bargained-for agreement to remain for all signatory and non-opposing parties. The bypassable nature of the Reconciliation Rider was an important feature of the Stipulation, and the Commission should restore that feature to ensure that the balance established in the Stipulation is maintained. DP&L also supports the concept of a "circuit breaker" or "trigger point" for the Reconciliation Rider, which was suggested by several parties in their applications for rehearing; such a mechanism would address the Commission's concern about escalating bill impacts (Order, ¶ 63 (pp. 34-35)), by providing protection to customers from unexpected cost increases.

Although the Commission emphasized "that the stipulation must be viewed as a package," OCC, OEC/EDF, and Murray/Citizens each fail to do so, focusing instead on their self-interest -- specific aspects of the Stipulation that they assert particular provisions are not in the public interest and do not benefit customers. Specifically, OCC challenges (p. 8) the allocation of the DMR to residential customers; OEC/EDF (pp. 7-12) argue that the DMR should be rejected; and Murray/Citizens base their entire application for rehearing on the fact that the Commission did not require DP&L to commence a process to sell the Stuart and Killen stations. However, the Commission is required to evaluate the Stipulation "as a package," and those parties failed to do so. Their "public interest" grounds for rehearing should be rejected for this reason alone.

Moreover, even if the Commission were to ignore the "as a package" standard, the arguments of these intervenors are without merit. OCC's argument (p. 8) that the cost allocation methodology used for the DMR is unreasonable fails because the typical residential bills will actually decrease as a result of the Stipulation. Schroder Test. (DP&L Ex. 3), pp. 20-21. In addition, OCC witness Fortney conceded at the evidentiary hearing that: (1) cost allocation includes elements of judgment, and is an art, not a science (Trans. Vol. IV, pp. 806-07); (2) that the National Association of Regulatory Utility Commissioners manual is the most common resource for cost allocation, and it does not address allocation of charges like the DMR (id. at 808-09); and (3) the precedent upon which he relies from a FirstEnergy proceeding was not the product of a Stipulation (id. at 812-13). Allocating DMR charges in part based on historic allocation of DP&L's current nonbypassable charge promotes gradualism, which the Commission has cited as an important factor to be considered in allocating rates. Oct. 12, 2016, Fifth Entry on Rehearing, ¶ 245 (Case No. 14-1297-EL-SSO). The Commission thus correctly found that the rate design was reasonable because it was negotiated by capable and knowledgeable parties. Order, ¶ 112, (pp. 52-53).

OEC/EDF want to have their cake and eat it too. Specifically, they support grid modernization. Finnigan Supp. Test., p. 2 (OEC/EDF Ex. 2) ("The Commission should be applauded for launching [the PowerForward] initiative."); Trans. Vol. V, pp. 856-57. However, they also assert (p. 7) that the Commission should reject the DMR. Their witness readily admitted that he had performed no calculations showing that DP&L could implement grid modernization without the DMR. Trans. Vol. V, p. 857 ("Q. And neither your direct testimony or your supplemental testimony specifically addressed whether DP&L will pursue grid modernization without the DMR, correct? A. Yes."). The evidence at the hearing demonstrated that DP&L could not implement grid modernization without the DMR. Trans. Vol. I, pp. 106-07 (Jackson); Malinak Test. (DP&L Ex. 2B), p. 66. OEC/EDF simply ignore financial realities.

OEC/EDF also argue (pp. 8-9) that DP&L's customers should not have to pay the DMR, but that DP&L's shareholders should bear the cost of restoring DP&L to investment grade. OEC/EDF cite (p. 8) to the testimony of OCC witness Kahal in support of that argument, but ignore his admission that DP&L's shareholders <u>were</u> making equity investments in DP&L pursuant to Stipulation, ¶ II.1.a & b. Trans. Vol. IV, p. 712. The testimony of DP&L witness Malinak shows that the amount of those equity investments is substantial. Malinak Test. (DP&L Ex. 2B), p. 4. The Commission does not have jurisdiction to require DP&L's shareholders to make equity investments, so that is a significant benefit of the Stipulation. OEC/EDF also ignore the fact that DP&L has made significant efforts to cut costs and to maintain its financial integrity. Jackson Test. (DP&L Ex. 1B), p. 18. <u>Accord</u>: Trans. Vol. I, pp. 33-35 (Jackson).

OEC/EDF also argue (pp. 10-11) that the DMR funds should be used directly to pay for grid modernization, and not to pay debt. They are again ignoring financial realities. The evidence at the hearing demonstrated that it was "vitally important" that DP&L have an investment grade credit rating (Trans. Vol. IV, p. 695 (Kahal)), and that DP&L had credit ratings at the time of the hearing that were <u>below</u> investment grade (DP&L Ex. 105; Trans. Vol. IV, pp. 698-700). The evidence showed that DP&L's debt covenants included a term that would preclude DP&L from issuing debt to finance grid modernization. DP&L Ex. 1B (Jackson), pp. 9-10; Trans. Vol. I, pp. 109-10. The Commission correctly found that DP&L's existing debt poses "a significant obstacle to grid modernization in the DP&L service territory." Order, ¶ 38 (p. 25). The DMR is thus necessary to allow DP&L to implement grid modernization.

Indeed, OEC/EDF ignore the fact that the Stipulation includes a commitment by DP&L to file a Distribution Infrastructure Modernization Plan, to pursue grid modernization. Stipulation, ¶ II.3. The Stipulation thus provides for grid modernization. The Company should file its plan by February 1, 2018, or anytime thereafter at its discretion.

Murray Energy/Citizens argue (pp. 1-2) that DP&L's Stuart and Killen plants should be included in the sale process. However, their witness conceded at the hearing that there was nothing in the Stipulation that would require DP&L to close those plants, and there was nothing in the Stipulation that would preclude DP&L from selling those plants to a third party. Trans. Vol. III., p. 565 (Medine). The Commission should thus reject their argument as DP&L or its affiliate remains free to sell those plants if a third party wants to buy them.

V. THE COMMISSION'S APPROVAL OF THE STIPULATION DID NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

A. THE STIPULATION IS MORE FAVORABLE IN THE AGGREGATE THAN A MARKET RATE OFFER

The Commission found that the Stipulation passed the more-favorable-in-the-aggregate ("MFA") test of Ohio Rev. Code § 4928.143(C)(1) for two reasons. First, the Commission found that the Standard Service Offer rates, the DMR and the other riders established by the Stipulation would be available under a market rate offer ("MRO") under Ohio Rev. Code 4928.142. Order, ¶¶ 89-91 (pp. 44-45). There was ample evidence to support that finding. Donlon Test. (Staff Ex. 2), p. 5; Malinak Test. (DP&L Ex. 2B), p. 12; Kahal Dir. Test. (OCC Ex. 12A), p. 42. Those charges are thus a "wash" for purposes of the MFA test. Second, the Commission found that the Stipulation provided the following benefits that would not be available under an MRO: (1) the Stipulation contains commitments by DP&L shareholders to fund $9 million in economic development funds (Order, ¶ 92 (pp. 45-46)); and (2) AES committed to making significant equity investments in DP&L (id. ¶ 93 (p. 46)). There was also ample evidence to support those findings. Donlon Test. (Staff Ex. 2), pp. 5-6 ($9 million in economic development benefits, assuming 3-year DMR); Malinak Test. (DP&L Ex. 2B), pp. 15-17 ($11.5 million in economic development benefits, assuming 5-year DMR); Malinak Test. (DP&L Ex. 2B), p. 4 (calculating value of AES' equity investments).

OCC makes a very limited challenge to the Commission's MFA findings – namely, OCC argues (pp. 4-5) that the ESP established by the Stipulation fails the MFA test because several riders approved by the Commission are initially set to zero, and OCC claims that those riders thus have "unknown costs." However, as discussed above, the evidence showed and the Commission found that those riders would be available under either an ESP or an MRO. OCC does not contest that finding. The fact that the amounts of certain riders is presently unknown does not matter for purpose of the MFA test, since those riders would be available under either the Stipulation or under an MRO.

B. THE DMR IS LAWFUL

1. THE DMR IS AUTHORIZED BY STATUTE

In its Order (¶¶ 100-02 (pp. 48-49)), the Commission found that the DMR is authorized by Ohio Rev. Code § 4928.143(B)(2)(h), which allows an ESP to 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."

OEC/EDF argue (pp. 12-13) that the DMR does not constitute an "'incentive.'" However, as Staff witness Donlon testified, the primary purpose of the DMR was "to allow the company to be able to invest in the distribution grid." Trans. Vol. V, pp. 875-76. Similarly, DP&L witness Jackson explained that without the DMR, the financial integrity of DP&L and DPL Inc. will continue to be imperiled, and DP&L will not have "access to debt and/or equity to finance capital expenditures <u>necessary to maintain, modernize or grow existing transmission and distribution infrastructure</u>." Jackson Test. (DP&L Ex. 1B), pp. 17-18 (emphasis added). <u>Accord</u>: Malinak Test., (DP&L Ex. 2B), p. 66.

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

The Commission's finding that the DMR constitutes an incentive for DP&L to implement grid modernization is thus amply supported by the evidence. Order, ¶ 101 (pp. 48-49).

OEC/EDF also argue (pp. 13-14) that the evidence at the hearing failed to establish that DP&L has been placing sufficient emphasis on the reliability of its distribution system and that DP&L's reliability was aligned with the expectations of its customers. Ohio Rev. Code § 4928.143(B)(2)(h). However, the testimony of Staff witness Nicodemus, DP&L witness Hall (sponsored by DP&L witness Schroder) and OCC witness Williams establish that DP&L has been achieving its reliability targets and DP&L's customer satisfaction scores are acceptable. Nicodemus Test. (Staff Ex. 1), pp. 5-7; Hall Test. (DP&L Ex. 4), p. 4; Trans. Vol. IV, pp. 781-82 (Williams). Further, a survey of DP&L's residential and business customers showed that it is important to those customers that DP&L continue to improve its reliability. Williams Dir. Test. (OCC Ex. 13A, Ex. JDW-14, pp. 6034, 6046) (showing that it was important to DP&L's residential and business customers that DP&L reduce by half the frequency of sustained outages, the duration of sustained outages, and the number of monthly outages). It is undisputed that grid modernization will improve reliability, so DP&L and its customers' expectations are aligned.

2. The DMR Is Not an Illegal Transition Charge or an Equivalent Charge

Contrary to the assertions of OCC (pp. 5-6) and OEC/EDF (pp. 14-16), the DMR is not an illegal transition charge or an equivalent charge for three separate and independent reasons. First, the DMR is not a transition charge or an equivalent charge. Second, even if it were a transition charge or an equivalent charge, it would be lawful "notwithstanding" the prohibitions against such charges pursuant to Ohio Rev. Code §§ 4928.143(B) and 4928.143(B)(2)(h). Third, Ohio Rev. Code § 4928.143, which authorizes the DMR, was enacted after the prohibition against transition costs and, therefore, controls.

a. <u>The DMR is Not a Transition Charge</u>

The DMR is not a transition charge because transition charges, by definition, are "directly assignable or allocable to retail electric generation service provided to electric consumers in this state." Ohio Rev. Code § 4928.39(B). The DMR does not relate to retail electric generation service for three separate and independent reasons.

First, the Stipulation as approved the Commission provides that DP&L will transfer all of its generation assets to an affiliate. Stipulation, ¶ II.1.c (p. 4); Order, ¶ 107 (p. 51). The Stipulation also provides that DP&L or its affiliate will initiate a sale process for certain of its coal-fired generation assets (Stipulation, ¶ II.1.d (p. 4)) and DP&L has announced plans to close its other coal-fired generation plants (Malinak Test. (DP&L Ex. 2B), p. 70.) The DMR thus is not "directly assignable or allocable to retail electric generation service provided to electric consumers in this state," since DP&L does not own generation assets.

Second, as demonstrated above, the purpose of the DMR is to allow DP&L to provide safe and reliable <u>distribution</u> service and to implement <u>distribution</u> grid modernization. The DMR funds will not be used to support generation. Stipulation ¶ II.2.b (p. 5) (DMR funds will be used to pay interest obligations, pay debt, and position DP&L to invest in distribution infrastructure); Schroder Test. (DP&L Ex. 3), pp. 22-23. Indeed, the Commission ordered Staff to audit how the DMR revenues will be used (Order, ¶ 43 (p. 27)), ensuring that the funds will not be used for generation. The DMR thus is not a transition charge.

Third, the Stipulation establishes that DP&L will provide SSO service through 100% competitive bidding. Stipulation, ¶ III (p. 8); Order, ¶ 107 (p. 51). The Commission cited that factor in concluding that FirstEnergy's DMR was not a transition charge. Oct. 12, 2016 Fifth Entry on Rehearing, ¶ 287 (Case No. 14-1297-EL-SSO).

The Commission's finding that the DMR was not a transition charge was thus correct. Order, ¶¶ 107-08 (p. 51).

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

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

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

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

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

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

> "Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. "

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

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

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

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

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

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

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

3. The DMR Is Not an Anticompetitive Subsidy

OEC/EDF (pp. 17-18) argue that the DMR is an anticompetitive subsidy in violation of Ohio Rev. Code § 4928.02(H), which provides that it is state policy that distribution charges not support generation service. However, as shown above, the DMR is intended to allow DP&L to implement grid modernization and does not support generation service. Witness Schroder also testified that the Stipulation satisfied that state policy. Schroder Test. (DP&L Ex. 3), pp. 21-22. Moreover, even if the DMR did violate that policy, it is lawful "notwithstanding" § 4928.02(H) pursuant to § 4928.143(B) and § 4928.143(B)(2)(h).

4. The DMR Does Not Constitute an Acquisition Premium

OCC argues (p. 7) that the DMR violates the Commission's order in DP&L's merger case (11-3002-EL-MER) as an impermissible acquisition premium. The only evidence that OCC submitted in support of that argument was from witness Kahal, who asserted that the DMR would collect an "acquisition premium" in violation of the Commission's November 22, 2011 Finding and Order in Case No. 11-3002-EL-MER in which the Commission's approved AES' acquisition of DPL Inc. Kahal Dir. Test. (OCC Ex. 12A), pp. 27-28.

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

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

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

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

was an "acquisition premium." Rather, the witnesses criticize all of the debt and conclude, without any analysis or evidence, that it must be an acquisition premium.

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

In the absence of any evidence that the DMR would collect an acquisition premium, the Commission should conclude the AES acquisition of DPL Inc. (including associated debt at DPL Inc.) is irrelevant. For example, at the hearing in First Energy's recent ESP case, OCC attempted to introduce evidence of debt that First Energy took on in a past acquisition. The Attorney Examiner ruled that the evidence was not relevant because "[w]e can't undo what happened in the past." July 13, 2016 Transcript Vol. III, pp. 662-63, 666 (Case No. 14-1297-EL-SSO) (filed on July 27, 2016). Similarly here, the transaction occurred in 2011 and it cannot be undone. It is not relevant in this case.

C. THE COMMISSION'S APPROVAL OF THE REMAINING PROVISIONS OF THE STIPULATION DID NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

1. The Reconciliation Rider is Not a Transition Charge or Equivalent Charge

OCC argues (pp. 5-6) that the Reconciliation Rider violates Ohio Rev. Code § 4928.38 as a transition charge. The Commission should reject that argument for the following separate and independent reasons:

1. <u>"Notwithstanding clause"</u>: The Reconciliation Rider is lawful pursuant to Ohio Rev. Code § 4928.143(B)(2)(d). Nov. 3, 2016 Fourth Entry on Rehearing, pp. 21-22 (Case

No. 13-2385-EL-SSO). As discussed above, there is a "notwithstanding" clause in § 4928.143(B), and § 4905.39 and § 4905.35 are not among the listed exceptions to that clause.

2. The Reconciliation Rider is not a transition charge: The Commission has already rejected the argument that a charge similar to the Reconciliation Rider is a transition charge. Nov. 3, 2016 Second Entry on Rehearing, ¶ 253 (Case No. 14-1693-EL-RDR).

2. The SEET Test Properly Excludes DMR Revenues

OCC argues (pp. 7-8) that the Commission should not have excluded DMR revenues from the significantly excessive earnings test ("SEET") of Ohio Rev. Code § 4928.143(F). The testimony of DP&L witness Jackson, however, demonstrated that the exclusion was reasonable.

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

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

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

OCC witness Kahal testified that the DMR should be subject to the SEET. Kahal Dir. Test. (OCC Ex. 12A), pp. 35-36. However, at the hearing, he admitted that it was "vitally important" that DP&L maintain an investment grade, and that he did not perform any calculations showing that DP&L could achieve the necessary FFO-to-debt ratios if DMR funds were subject to the SEET. Trans. Vol. IV, pp. 695, 715.

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

The Commission thus correctly found that excluding DMR funds from the SEET was reasonable. Order, ¶ 126 (pp. 57-58).

3. The Economic Development Incentives in the Stipulation Are Lawful

OCC argues (p. 6) that the economic development incentives in the Stipulation are unlawful, since there has not been a showing of need or any specific commitments. OCC witness Haugh (OCC Ex. 11, pp. 10-11) testified that the Economic Development incentives in Stipulation, ¶ IV (pp. 9-10) do not comply with the reasonable arrangement statute in Ohio Rev. Code § 4905.31(E). However, DP&L does not seek approval of those incentives under that section; instead, DP&L seeks approval under Ohio Rev. Code § 4928.143(B)(2)(i), which authorizes economic development incentives and does not contain the same requirements as § 4905.31(E). Mr. Haugh conceded that the reasonable arrangement statute does not apply to the economic development incentives in the Stipulation. Trans. Vol. III, pp. 613-14. Further, OCC's claim that there was no evidence supporting the economic development incentives is not correct. Schroder Test, pp. 12-13(DP&L Ex. 3).

The Commission thus correctly found that the economic development incentives in the Stipulation were lawful. Order, ¶ 123 (pp. 56-57).

VI. CONCLUSION

DP&L supports the applications for rehearing that assert that the DMR should be bypassable, and DP&L also supports the "circuit breaker" or "trigger point" concept that was proposed by several parties. Those provisions should be approved, to return to those parties the benefit of their bargain in the Stipulation, while also protecting customers from unforeseen cost increases.

However, the applications for rehearing of The Office of the Ohio Consumers' Counsel, Ohio Environmental Council, Environmental Defense Fund, Murray Energy Corporation, and Citizens to Protect DP&L Jobs should be denied.

Respectfully submitted,

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