

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

Pursuant to Ohio Admin. Code §4901-1-12(B)(1), Environmental Defense Fund, Environmental Law & Policy Center, the Ohio Environmental Council, and the Sierra Club (collectively “Environmental Advocates”) hereby submit the following Memorandum Contra and urge the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to deny the Motion to Strike Supplemental Briefs, filed by The Dayton Power and Light Company (“DP&L” or “the Company”), dated August 21, 2019.

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above-captioned case.<sup>1</sup> The July Entry provided only one limiting directive: the supplemental briefs must narrowly focus on the issue of the applicability of *In re Application of Ohio Edison Co.*

As parties to both the present case and the FirstEnergy DMR Decision, Environmental Advocates are in a unique position to brief the presented issue. Accordingly, Environmental Advocates filed their brief on August 1, 2019. They argued that DP&L's Rider DMR is exactly the type of rider the Ohio Supreme Court ruled as not meeting the statutory definition of incentive and are unlawful under R.C. 4928.143(B)(2)(h) in the FirstEnergy DMR Decision. *See* Environmental Advocates Supplemental Brief at pp 6-7.

On August 21, 2019, DP&L moved to strike the supplemental briefs filed in response to the July 2, 2019 Entry by Environmental Advocates (and other parties of record), despite the parties following the July Entry to the letter, and despite the parties' experience litigating both cases. DP&L challenges Intervenor Supplemental Briefs under perceived procedural failures and **not** for the substance of Environmental Advocates' arguments in opposition to the legality of Rider DMR. Nevertheless, by confounding the posture of the intervening parties in the present case and the impetus of the Environmental Advocates' Supplemental Brief, DP&L has manufactured a misguided opportunity to convince the Commission to disregard valid arguments against the legality of Rider DMR.

The Environmental Advocates have standing in all aspects of this proceeding, have not waived the right to address any issue presented, and are entitled the opportunity to respond to the Attorney Examiner's request for Supplemental Briefs. DP&L's Motion to Strike, as

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<sup>1</sup> Specifically the Entry stated in paragraph 10, "Given the Supreme Court of Ohio's recent ruling in *Ohio Edison*, the attorney examiner finds that parties should have the opportunity to brief the impact of *Ohio Edison* on this proceeding."

Environmental Advocates contend, is wholly without merit, and must be denied.

### **Argument**

Through a combination of challenging party standing and suggesting issue waiver, the Company urges the Commission to strike the Environmental Advocates' Brief—all of it. The Company rightly states that “[p]rinciples of waiver and standing are rooted in Ohio law.” DP&L Motion to Strike, p. 1. However, as it relates to the Environmental Advocates, the Company's arguments are not rooted in the law nor facts related to this proceeding.

### **THE COMPANY'S ATTACK ON ENVIRONMENTAL ADVOCATES' SUPPLEMENTAL BRIEF BASED ON STANDING AND WAIVER IS WITHOUT MERIT**

The Company first attacks the settled issue of standing to intervene in this case. While admitting it did not challenge Environmental Advocates' intervention in this proceeding, the Company is apparently challenging the standing of the Environmental Advocates in this case by suggesting it believes the intervenors now lack interest in Rider DMR. There are two flaws in the Company's reasoning—one legal and one factual.

As stated in the Opinion and Order October 20, 2017, Environmental Advocates were granted intervention in this case. Intervention for the Environmental Advocates was not conditioned on any issue or for any particular posture. No cases were cited by the Company—nor do any exist—that deny standing to a party to address issues in a case where it was otherwise granted intervention. The Commission's standard for intervention is broad; it has never before restricted participation of a party once intervention has been accepted.<sup>2</sup> DP&L's attempt to

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<sup>2</sup> The Commission permits intervention of any party who has a real interest in the proceeding, whose interest will be affected by the proceeding, and whose interest will not be adequately represented by existing parties. Notably, the Commission's regulations and enacting statutes never articulate a rule limiting participation in any part of a proceeding after intervention is granted. See Ohio Admin. Code 4901-1-11.

challenge the standing two years after it was granted by the Commission is, on its face, legally without merit.

The legal flaw in the Company's standing argument should foreclose the Motion to Strike outright. Nevertheless, it is important that, in light of this newly conjured challenge to the standing of parties in this proceeding, that the Environmental Advocates address the injury to them and their interests by the Rider DMR.

First, DP&L argues that the Environmental Advocates are only concerned with the ownership of Conesville, Miami Fort, and Zimmer Station power plants. That is incorrect. The claim grossly misrepresents their interest in the environmental impact which will result from a failure to truly incentivise grid modernization. While erroneously insinuating that none of the Environmental Advocates pay for the rider—though they have individual members who live in the DP&L service territory—the Company also fails to recognize the adverse effects of the rider on the Environmental Advocates and their membership.

Mere payment of a rider does not set the parameters of the parties whose interests may be injured in this proceeding. The positive environmental impacts of a modern and efficient grid have been outlined by the Environmental Advocates in many cases, including DP&L's. Grid modernization benefits the organizations and their members, for instance, by creating a more efficient grid and reducing greenhouse gas emissions, mitigating climate change in the process.<sup>3</sup> Spending money earmarked for grid modernization but used for other projects with no accountability to the Commission or ratepayers, however, delays the positive environmental impacts and injures the interests of the Environmental Advocates.

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<sup>3</sup>Energy efficiency, grid modernization, and clean energy are all projects related to this proceeding, and investment (or lack of it) in those programs will play

Environmental Advocates have an interest in this proceeding that will be harmed by Rider DMR, and as shown through their involvement in this proceeding and the *First Energy* appeal, have a right to be heard. But in addition to the attack on standing, the Company attempts to strike the Environmental Advocates' Supplemental Brief as it relates to Sierra Club and ELPC, under a presumed waiver of the DMR issue by those two parties for not filing an application for rehearing in October of 2017. This argument is similarly meritless.

First, there were no parameters on the Attorney Examiner's Entry beyond requesting arguments regarding the implication of the FirstEnergy DMR Decision on the present case. Thus, there were no limits placed on the parties who wished to file supplemental briefs. It didn't matter whether they had filed Applications for Rehearing on October 20, 2017 or had raised the issue of "incentive" in any application for rehearing.

The cases cited by the Company to support its argument expose the fatal flaw in its waiver argument as it pertains to the current case. The cases cited<sup>4</sup> address the issue of waiver as it pertains only to an appeal of a decision of the Public Utilities Commission to the state Supreme Court, and thus the cases are distinguishable from this current moment in this proceeding. Ohio Consumers Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300, addresses a case in which the court affirms the Public Utilities Commission decision to grant an application for rehearing which accepted an alternative plan. Disc. Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St. 3d 360, addresses a case in which appellants waived the issue of their dismissal in an application for rehearing, which the court subsequently considered waived. Finally, Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St. 3d 329, addresses a premature notice of appeal that was filed

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<sup>4</sup> Ohio Consumers Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300; Disc. Cellular, Inc. v. PUC, 112 Ohio St. 3d 360; and Senior Citizens Coalition v. PUC of Ohio, 40 Ohio St. 3d 329.

before the Commission denied the last application for rehearing. None of the cases cited involve briefs submitted pursuant to a request for Supplemental Briefs.

The response to the request for Supplemental Briefs is clearly not an appeal to the Ohio Supreme Court. As the Environmental Advocates have stated, and do continue to state throughout this Memorandum, the brief which the Company moves to strike is a Supplemental Brief invited by the Attorney Examiner within this proceeding. The Environmental Advocates are not appealing for reconsideration of any issues previously raised or unraised by the parties, but are providing the Commission with the requested opinion of an interested party on the implications of a case for which they have first hand knowledge and will impact their interests. While the Environmental Advocates do not agree that concerns over the legality of the Company's DMR or any Rider in this proceeding have been waived if this case is appealed to the Ohio Supreme Court, this proceeding is obviously in a different procedural posture than the waiver cases cited by the Company. The Company and others may raise the waiver argument if and when that appeal arises, but not as it pertains to the *requested* Supplemental Brief.

### **Conclusion**

Environmental Advocates were granted intervention in this proceeding over two years ago, and continue to maintain standing through the entire proceeding—including the Attorney Examiner's invitation for supplemental briefs. Throughout the proceeding, the Environmental Advocates have challenged the legality and reasonableness of Rider DMR. Waiver of the issue presented by the July 2, 2019 Entry does not attach to the Environmental Advocates nor any party individually. In responding to the Attorney Examiner's inquiry as to the implications of the First Energy case on the present case involving DP&L's DMR rider, the Environmental

Advocates were and are free to respond—whether or not the Rider experiences the same fate as First Energy’s Rider DMR.

Simply put, the DP&L DMR is an unlawful and unreasonable rider that does not benefit DP&L’s customers, injures the interests of Environmental Advocates and their members, and violates R.C. §4928.143(B)(2)(h). The Supreme Court of Ohio ruled in the *FirstEnergy DMR Decision* that a virtually identical rider was unlawful and unreasonable, and ordered FirstEnergy to immediately remove the DMR from their electric security plan. The Company has attempted to strike the supplemental briefs of intervenors with interests in this proceeding, interests that will be injured if the DMR is not removed. The Company’s misguided procedural ploy should not be permitted to stand, and neither should Rider DMR.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Supplemental Brief of the Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and the Sierra Club has been served upon the parties of record in this proceeding via electronic mail on September 5, 2019.

/s/ Trent Dougherty  
Trent Dougherty



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Summary: Memorandum Environmental Advocates' Memorandum Contra DP&L's Motion to Strike electronically filed by Mr. Trent A Dougherty on behalf of Environmental Law & Policy Center and Ohio Environmental Council and Environmental Defense Fund and Sierra Club