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

MEMORANDUM CONTRA THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO STRIKE SUPPLEMENTAL BRIEF OF INTERSTATE GAS SUPPLY, INC.

I. INTRODUCTION

On June 19, 2019, the Supreme Court of Ohio issued its decision in *In Re Application of Ohio Edison Co*. in which it struck down FirstEnergy's distribution modernization rider ("DMR") and directed the Public Utilities Commission of Ohio ("PUCO" or "Commission") to remove the DMR from FirstEnergy's Electric Security Plan ("ESP").[1] There, the Court held that FirstEnergy's DMR was unlawful and unreasonable, because it did not qualify as an incentive under R.C. 4928.143(B)(2)(h), and the conditions placed on the recovery of DMR revenues were insufficient to protect ratepayers.[2] In the wake of that decision, the Commission issued an Entry[3] that allowed

[1] *In re Application of Ohio Edison Co.,* 2019-Ohio-2401, at ¶56 (hereinafter "*FirstEnergy Decision*")

[2] *Id*. at ¶¶14-29

[3] Entry Ordering Supplemental Briefs to Be Filed by 08/01/19 (July 2, 2019) (hereinafter "*Entry*").

the parties to this proceeding to file supplemental briefs that addressed the applicability of the *FirstEnergy Decision* to this case. Noting that the October 20, 2017 Opinion and Order issued in this proceeding adopted an Amended Stipulation[4] that included a Rider DMR "similar to, but not identical with, the Rider DMR approved by the Commission in the [*FirstEnergy Decision*]," the Commission directed the parties' to file supplemental briefs that focused on the impact of the Court's decision and its applicability to Dayton Power and Light's ("DP&L") DMR.[5]

On August 1, 2019, Interstate Gas Supply, Inc. ("IGS") timely filed its supplemental brief.[6] Pursuant to the Commission's directive, IGS' Supplemental Brief provided a detailed overview of the *FirstEnergy Decision* and addressed the relevance of the Court's holding in that case to DP&L's DMR.[7] IGS argued that since DP&L's DMR is nearly identical in substance and scope to the DMR the Court rejected in the *FirstEnergy Decision*, the Commission should modify the Amended Stipulation to eliminate DP&L's DMR.

On August 21, 2019, DP&L moved to strike IGS' Supplement Brief. In support of its motion, DP&L argued that the Commission should strike IGS' Supplemental Brief because IGS failed to challenge the Commission's authorization of the DMR as a grid

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[4] *Opinion and Order* (October 20, 2017).

[5] Entry at 3.

[6] Supplemental Brief of Interstate Gas Supply, Inc. (August 1, 2019) (hereinafter "IGS' Supplemental Brief").

[7] See generally IGS' Supplemental Brief.

modernization incentive under R.C. 4928.143(B)(2)(h) in its post-hearing briefs.[8] DP&L also argued that IGS' Supplemental Brief should be stricken because IGS lacks appropriate standing to address claims related to the DMR.[9] The claims DP&L raised in its motion, however, are unsupported by facts or analysis; and its filing amounts to little more than a procedural roadblock that is intended to delay a final decision in this proceeding so that DP&L can continue to reap the benefits of its ill-gotten gains.[10] As set forth below, DP&L's arguments are meritless and its Motion to Strike IGS' Supplemental Brief should be dismissed.

II. ARGUMENT

A. IGS' Post-Hearing Briefs Challenged the Commission's Authorization of the DMR Under R.C. 4928.143(B)(2)(h).

DP&L moves to strike IGS' Supplemental Brief arguing that IGS is precluded from addressing the legality of the DMR under R.C. 4928.143(B)(2)(h), because IGS' post-hearing briefs failed to challenge the lawfulness of the DMR under that section of the law.[11] Specifically, DP&L argues that since IGS' post-hearing briefs allegedly did not challenge the Commission's authorization of the DMR as a grid modernization incentive under R.C. 4928.143(B)(2)(h), IGS waived its right to contest the issue in its Supplemental

[8] The Dayton Power and Light Company's Motion to Strike Supplemental Briefs at 7 (August 21, 2019) (hereinafter "DP&L's Motion to Strike").

[9] *Id*.

[10] IGS states that DP&L has likely already collected nearly two hundred million dollars in DMR revenue from customers. See IGS' Supplemental Brief at 7.

[11] DP&L's Motion to Strike at 7.

Brief.[12] Notwithstanding the fact that IGS' Supplemental Brief was submitted in response to a specific Commission directive,[13] DP&L's argument lacks merit. IGS' post-hearing briefs argued that DP&L's DMR does not qualify as a grid modernization incentive under R.C. 4928.143(B)(2)(h); therefore, DP&L's first argument should be dismissed.

Contrary to DP&L's assertion, IGS' post-hearing briefs argued that DP&L's DMR is not justifiable as a grid modernization incentive under R.C. 4928.143(B)(2)(h) because the DMR is unrelated to distribution service.[14] In support, IGS cited to DP&L's own testimony and argued that the purpose of the DMR is to provide DP&L with an unlawful subsidy that will assist the utility in paying down the debt at DP&L and its parent, DPL Inc.[15] IGS further argued that although DP&L's DMR application suggests that it will undertake grid modernization at a future date, the DMR has no tangible relationship to grid modernization because DP&L's application fails to provide any particular detail regarding the amount of investment DP&L needs, or intends, to make to update its grid infrastructure.[16] Since the DMR is intended to *position* DP&L to make capital expenditures to modernize its transmission and distribution infrastructure — with no

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[12] *Id*.

[13] Entry at 3.

[14] Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc. at 30-31 (May 15, 2019) (hereinafter "IGS' Post-Hearing Brief"); See Also Supplemental Post-Hearing Reply Brief of Interstate Gas Supply, Inc. at 24-27 (May 30, 2019) (hereinafter "IGS' Post-Hearing Reply Brief").

[15] IGS' Post-Hearing Brief at 31.

[16] IGS' Post-Hearing Reply Brief at 27.

specific commitments to actually do so — IGS argued in its post-hearing briefs that DP&L cannot justify its DMR as a grid modernization incentive under R.C. 4928.143(B)(2)(h).[17]

DP&L's first argument also fails because it willingly overlooks the fact that IGS' Supplemental Brief challenged the legality of the DMR under R.C. 4928.143(B)(2)(h) in response to a Commission directive.[18] In an Entry dated July 2, 2019, the Commission asked stakeholders to brief the impact and applicability of the *FirstEnergy Decision* to the DMR at issue in this proceeding.[19] IGS' Supplemental Brief provided a direct and appropriate response to that request, and argued that the *FirstEnergy Decision* further demonstrates that the Commission lacks the authority to authorize DP&L's DMR under R.C. 4928.143(B)(2)(h).[20] Noting that DP&L's DMR is nearly identical in substance and scope to the DMR the court recently rejected in the *FirstEnergy Decision*, IGS' Supplemental Brief argued that DP&L's DMR similarly does not qualify as a financial incentive related to grid modernization because, like FirstEnergy, the DMR was awarded without requiring DP&L to make any tangible investment in grid modernization; nor did the Commission place effective conditions or penalties on the utility should the funds be used outside of their intended purpose.[21]

IGS' argument in its Supplemental Brief that DP&L's DMR does not qualify as a financial incentive related to grid modernization under R.C. 4928.143(B)(2)(h) is based,

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[17] IGS' Post-Hearing Brief at 31.

[18] Entry at 3.

[19] *Id*.

[20] IGS' Supplemental Brief at 14.

[21] *Id*.

in part, upon the Court's precedent in the *FirstEnergy Decision*, and was offered in response to a Commission directive. Its position is merely an extension of the arguments IGS raised in its post-hearing briefs. Accordingly, DP&L's first argument should be rejected.

B. IGS Has Standing to Challenge the DMR.

DP&L also argues that IGS' Supplemental Brief should be stricken because IGS lacks standing to challenge the DMR.[22] Just as it did in its Post-Hearing Reply Brief,[23] DP&L argues that IGS lacks standing to challenge the DMR because it does not pay the DMR, and, therefore, is not adversely affected by the charge.[24] It is for that reason, DP&L argues, that IGS is unable to demonstrate that it has a suffered an injury sufficient to confer standing. Here again, DP&L's argument is procedurally and substantively flawed.

As IGS established in its Post-Hearing Reply Brief,[25] the criteria for standing in Commission cases is set forth in the intervention criteria under R.C. 4903.221 and OAC 4901-1-11. When taken together, those sections provide that the Commission, in ruling upon applications to intervene, shall consider the following criteria:

> (1) The nature and extent of the prospective intervenor's interest; (2) the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.[26]

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[22] DP&L's Motion to Strike at 7.

[23] Post-Hearing Brief of The Dayton Power and Light Company at 6-7 (May 30, 2019) (hereinafter "DP&L's Post-Hearing Brief").

[24] DP&L's Motion to Strike at 7.

[25] IGS' Post-Hearing Reply Brief at 47.

[26] R.C. 4903.221

The Commission determined more than three years ago that IGS satisfied the test necessary to intervene in this proceeding.[27] DP&L did not challenge IGS' right to intervene at that time; and it has undoubtedly waived its right to contest IGS' standing now.

More importantly, IGS has demonstrated that it has suffered an injury that is traceable to the DMR. IGS established in its post hearing briefs that the DMR is contrary to Ohio policy and corporate separation laws, which were enacted by the General Assembly to protect companies such as IGS from electric distribution utilities abusing their regulated monopoly status.[28] IGS also demonstrated that the DMR causes injury by providing excessive compensation to pay for the debts of DP&L's unregulated parent, DPL Inc.[29] As an unregulated entity, DPL Inc. is free to compete with IGS in the competitive retail and wholesale electric markets in any form or fashion that it desires. Since DPL Inc.'s parent, AES Corp., already sells several competitively-based products and services that IGS sells, IGS also established that the DMR is not only anticompetitive, but injurious to its business as well.[30]

DP&L, however, suggests that because IGS is a member of the Retail Energy Supply Association ("RESA"), and RESA remains a signatory party to the Amended

[27] Entry at 3-4 (August 16, 2016).

[28] IGS' Post-Hearing Reply Brief at 49.

[29] *Id*.

[30] *Id*. at 31.

Stipulation, that IGS cannot demonstrate that it suffered injury traceable the DMR.[31] DP&L's argument is not only misleading, but also a logical fallacy. As IGS set forth in its Motion to Intervene, RESA does not represent IGS' interests; nor can other parties participating in this proceeding adequately protect IGS' interests.[32] Though IGS is a member of RESA, it intervened in this proceeding in its individual capacity to address issues that were of direct import to IGS.

The fact that IGS is a member of RESA, and RESA remains a signatory party to the Amended Stipulation, does not mean that RESA speaks on IGS' behalf in this case or that its members also did not suffer injury stemming from the DMR. Moreover, DP&L's suggestion that RESA supports the DMR included in the Stipulation package by remaining a signatory party to that agreement is simply untrue. RESA expressly indicated in the Amended Stipulation that it does not support the DMR.[33] Accordingly, DP&L's suggestion that IGS did not suffer injury because it's a member of a trade association that remains a signatory party to the Amended Stipulation also lacks merit.

IGS has demonstrated time and again that it has standing to challenge the DMR. Based on the foregoing, DP&L's second argument should be dismissed.

III. CONCLUSION

In summary, IGS argued in its post-hearing briefs that DMR does not qualify as a grid modernization incentive under R.C. 4928.143(B)(2)(h). The arguments IGS raised in its Supplemental Brief to support that theory were presented in response to a

[31] DP&L's Motion to Strike at 7.

[32] Motion to Intervene of Interstate Gas Supply, Inc. at 6 (March 23, 2019).

[33] Amended Stipulation and Recommendation at 4 (March 14, 2017).

Commission directive. Despite DP&L's arguments to the contrary, IGS has demonstrated that it suffered a real injury stemming from the DMR. Accordingly, the Commission should deny DP&L's Motion to Strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Memorandum Contra The Dayton Power and Light Company's Motion to Strike the Supplemental Brief of Interstate Gas Supply, Inc.* was filed electronically with the Docketing Division of the Public Utilities Commission of Ohio on this 5th day of September 2019.

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

Summary: Memorandum Contra DP&L's Motion to Strike IGS' Supplemental Brief electronically filed by Mr. Michael A Nugent on behalf of Interstate Gas Supply, Inc.