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 REPLY IN SUPPORT OF ITS MOTION TO STRIKE SUPPLEMENTAL BRIEFS

The Dayton Power and Light Company ("DP&L") does not dispute that the Attorney Examiner had authority to issue the July 2, 2019 Entry requesting briefing regarding the impact of In re Application of Ohio Edison Co., Slip Opinion No. 2019-Ohio-2401 on this case. In doing so, however, the Attorney Examiner did not cast aside well-established principles of waiver and standing. The fact remains that parties opposing the March 14, 2017 Amended Stipulation and Recommendation have had two-and-a-half years – including two evidentiary hearings, two rounds of post-hearing briefs, and three rounds of applications for rehearing – to establish their interest in the Distribution Modernization Rider ("DMR"), and argue that the rider is not an "incentive" for grid modernization under R.C. 4928.143(B)(2)(h). Since The Office of the Ohio Consumers' Counsel ("OCC"); Interstate Gas Supply, Inc. ("IGS"); and Environmental Law & Policy Center ("ELPC"), Sierra Club, Ohio Environmental Council ("OEC"), and

Environmental Defense Fund ("EDF") (collectively, the "Environmental Parties") have failed to do so, the Commission should strike their supplemental briefs.

I. OCC CANNOT CHALLENGE WHETHER THE DMR IS A LAWFUL INCENTIVE FOR GRID MODERNIZATION

Following the Opinion and Order in this proceeding, OCC did not specifically argue whether the DMR qualifies as an "incentive" for grid modernization pursuant to R.C. 4928.143(B)(2)(h) in any of its three applications for rehearing. R.C. 4903.10(B) (requiring all applications for rehearing to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful") (emphasis added.). Accord: Disc. Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 ("we have strictly construed the specificity test set forth in R.C. 4903.10"). OCC does not dispute that fact in response to the Motion to Strike. Instead, OCC argues that (1) it preserved the issue with a vague reference to Subsection (B)(2)(h) in its May 15, 2017 post-hearing reply brief, (2) it should be allowed to avoid waiver by piggybacking on other parties' rehearing applications, and (3) the Supreme Court's reading of the word "incentive" in Ohio Edison is a "new law" allowing OCC to rescind its waiver. OCC is wrong on each point.

First, whether OCC sufficiently argued that the DMR is an "incentive" under Subsection (B)(2)(h) in its post-hearing reply brief is immaterial given its failure to include that argument in not only its applications for rehearing as required by R.C. 4903.10, but also its initial post-hearing brief. OCC, thus, waived the issue. In the Matter of the Applications of Columbia Gas of Ohio, Inc., Case Nos. 89-616-GA-AIR, et al., May 24, 1989 Entry on Rehearing, 1989 Ohio PUC LEXIS 1396, *13. OCC's attempt to distinguish Columbia Gas as a rate case "where there are rules specifically governing waiver of certain matters in certain instances" (p. 13) is not persuasive since those "certain matters" were not at issue in that case. "In a rate case proceeding,

an objection to a staff report will be deemed withdrawn if a party fails to address the objection in its initial brief." Ohio Admin. Code § 4901-1-28(D) (emphasis added.) The waiver in Columbia Gas, however, did not result from the utility's failure to address its own objections to the Staff Report in its initial brief, but rather from its failure to rebut evidence supporting an objection by OCC to the Staff Report. Thus, the unique waiver rule for rate cases is inapplicable. That case, instead, stands for the broader principle that when a party fails to raise an issue in its initial post-hearing brief, the party waives that issue and cannot later assert it.

Second, the Commission should not allow OCC to raise an argument that it has waived just because another party asserted the argument in another filing. OCC has not raised the "incentive" issue at any time, despite having many opportunities to do so. OCC should not be allowed to avoid waiver principles just because other parties raised the issue in another filing, particularly when those other parties (two of the Environmental Parties) lacked standing to raise the issue in the first place (see below, § II).

Further, although the Supreme Court of Ohio has allowed parties to raise issues on appeal that were raised in other parties' rehearing applications, In re Columbus S. Power Co., 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 16, the Court and the Commission are situated differently and have their own interests in enforcing the rules of waiver. The Supreme Court of Ohio is the last stop for Commission proceedings, and its rulings are subject only to limited reconsideration. S.Ct.Prac.R. 18.02. The Court should, therefore, be less concerned about when its decisions will become final. Orders of the Commission, on the other hand, are subject to indefinite rounds of rehearing. R.C. 4903.10; Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 332-33, 533 N.E.2d 353 (1988) (holding that R.C. 4903.10 and 4903.11 "link all parties in the rehearing process following issuance of the commission's original

order and, in effect, hold the original order hostage to the outcome of the final rehearing"). Parties are required to make arguments to preserve them, and allowing any party to litigate any issue at any time would unreasonably extend the hearing and rehearing process. In this vein, the Commission recognized in this proceeding that R.C. 4903.10 does not allow a party to have "two bites at the apple" or "file rehearing upon rehearing of the same issue." Nov. 7, 2018 Fourth Entry on Rehearing, ¶ 17. Likewise, OCC should not be allowed to do the same by piggybacking on another party's arguments.

Third, Ohio Edison does not represent "new law created during the pendency of this case" (p. 15) that would allow OCC to expand its attack on the DMR. Subsection (B)(2)(h) has remained unchanged since DP&L commenced this proceeding, and OCC could have argued that the DMR was not a sufficient "incentive" when the case was initially tried. Indeed, DP&L expressly argued in its initial post-hearing brief that the "DMR is thus a distribution charge that incentivizes and makes grid modernization possible." May 5, 2017 The Dayton Power and Light Company's Initial Post-Hearing Brief, p. 28. By failing to rebut that point, OCC cannot attack it two years later. Thus, the Commission should strike OCC's supplemental brief.[1]

II. THE ENVIRONMENTAL PARTIES HAVE FAILED TO SHOW THAT THEY HAVE STANDING TO CHALLENGE THE DMR

At no point in this proceeding have any of the Environmental Parties shown with record evidence that due to the DMR, they have "suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested

[1] OCC also erroneously argues (p. 8) that DP&L's Motion to Strike is either an untimely interlocutory appeal or an improper reply brief. However, DP&L does not challenge the Commission's authority to issue the July 2, 2019 Entry and, in fact, filed a supplemental brief in response to it. Further, the Motion to Strike does not address the substance of the intervening parties' supplemental briefs, but rather focuses exclusively on their procedural impropriety under the doctrines of waiver and standing. Thus, these arguments should likewise be rejected.

relief." State ex rel. Food & Water Watch v. State, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19 (internal quotation marks and citations omitted). In addition, they have not shown with record evidence that "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seeks to protect are germane to the organization[s'] purpose[s]; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Ohio Contrs. Ass'n v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (emphasis added). Instead, the Environmental Parties argue (p. 4) that the DMR adversely affects their interest in "creating a more efficient grid and reducing greenhouse gas emissions." They make no attempt, however, to show how this purported causal link is "fairly traceable" and "likely to be redressed" by eliminating the DMR. Food & Water Watch, at ¶ 19. Nor do they show that they actually pay the DMR.

Indeed, the uncontested evidence at the hearing showed that DP&L could not implement grid modernization without the DMR. As DP&L witness Jackson testified, "The DMR will enable us to pay down debt to put us in a position in the future to be able to access the debt and equity markets. But where we are today, we are not in a position to be able to access capital to fund SmartGrid and DIR." Trans Vol. I, pp. 106-07. Accord: id. at 109-10 (Jackson); Malinak Test. (DP&L Ex. 2B), p. 66; Trans. Vol. VIII, pp. 1454-55 (Hess). The Environmental Parties never explain why they oppose a charge that they do not pay and that is necessary to allow DP&L to implement technology they want.

While DP&L did not oppose their intervention and participation in this proceeding, the Commission should not allow the Environmental Parties to raise any issue, regardless of whether they are adversely affected by it. R.C. 4903.221. Allowing such tactics would only encourages parties with narrow interests who pass the low bar for intervention to

exert undue leverage in Commission cases. City of Cleveland v. Pub. Util. Comm., 127 Ohio St. 432, 440, 189 N.E. 5 (1934) ("If such were the law, it would be bad law, as it would run counter to the fundamental rule to the effect that 'He who has no interest in the subject of litigation has no right to be heard.' Such a departure from the established rules of procedure could result in nothing less than bedlam."). The Commission should, thus, strike their supplemental brief.

In addition, the Environmental Parties do not dispute the fact that Sierra Club and ELPC did not file applications for rehearing. Thus, like OCC, those parties have waived whether the DMR is an "incentive" for grid modernization under R.C. 4928.143(B)(2)(h) and cannot raise it now. R.C. 4903.10(B); Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75.

III. IGS BOTH LACKS STANDING AND HAS FAILED TO PRESERVE WHETHER THE DMR IS AN INCENTIVE FOR GRID MODERNIZATION

Like OCC, IGS has failed to show that it has ever argued that DP&L's rider is not an "incentive" for grid modernization under R.C. 4928.143(B)(2)(h). Instead, it offers (pp. 4-5) only generic references to Subsection (B)(2)(h) and other independent complaints with the DMR. Since IGS failed to preserve the issue in its post-hearing briefs, it waived it. In the Matter of the Applications of Columbia Gas of Ohio, Inc., Case Nos. 89-616-GA-AIR, et al., May 24, 1989 Entry on Rehearing, 1989 Ohio PUC LEXIS 1396, *13. The Commission should strike IGS's supplemental brief for this reason alone.

In addition, like the Environmental Parties, IGS is not adversely affected by the DMR since it does not pay the rider and has not shown with record evidence that the DMR actually injures it. State ex rel. Food & Water Watch v. State, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19. Indeed, due to the unusual posture of this case, IGS was in a unique position to offer

evidence, to the extent it exists, showing that the DMR, which has been collected for nearly two years, actually injured IGS; however, it cites no such evidence in response to DP&L's Motion to Strike. The Commission should therefore strike its supplemental brief for this reason as well.

IV. CONCLUSION

The Commission should strike the August 1, 2019 supplemental briefs submitted by The Office of the Ohio Consumers' Counsel; Interstate Gas Supply, Inc.; and Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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