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 IN THE FORM OF AN ELECTRIC SECURITY PLAN.	**CASE NO. 16-395-EL-SSO**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF REVISED TARIFFS.	**CASE NO. 16-396-EL-ATA**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF CERTAIN ACCOUNTING AUTHORITY.	**CASE NO. 16-397-EL-AAM**

SUPPLEMENTAL OPINION & ORDER

Entered in the Journal on November 21, 2019

I. SUMMARY

{¶ 1} In this Supplemental Opinion and Order, the Commission modifies and approves the Amended Stipulation filed in this case in light of the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458.

II. HISTORY OF THE PROCEEDING

{¶ 2} The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission. On February 22, 2016, DP&L filed an application for a standard service offer pursuant to R.C. 4928.141. DP&L's application is for an electric security plan (ESP) in accordance with R.C. 4928.143. Additionally, DP&L filed accompanying applications for approval of revised tariffs and for approval of certain accounting authority.

{¶ 3} On October 11, 2016, DP&L filed an amended application for an ESP.

{¶ 4} On January 30, 2017, a stipulation and recommendation was filed by DP&L and various parties. Subsequently, on March 14, 2017, an amended stipulation and recommendation (Amended Stipulation) was filed by DP&L and various parties, including additional parties that were not part of the first stipulation. The Amended Stipulation's "Section XI. Other Provisions" includes the following language regarding a signatory party's ability to withdraw from the settlement (Withdrawal Provision):

> This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification. * * * If the Commission does not adopt the Stipulation without material modification upon rehearing, * * * then within thirty (30) days of the Commission's Entry on Rehearing * * * any Signatory Party may withdraw from the Stipulation by filing a notice with the Commission ("Notice of Withdrawal") * * *. * * * No Signatory Party shall file a Notice of Withdrawal * * * without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation. * * * If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are unsuccessful, and a Signatory Party files a Notice of Withdrawal, then the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based on the record and briefs. * * *

(Jt. Ex. 1 at 38-39.)

{¶ 5} On October 20, 2017, the Commission issued its Opinion and Order (Opinion and Order) modifying and approving the Amended Stipulation.

{¶ 6} On September 19, 2018, the Commission issued a Third Entry on Rehearing granting, in part, and denying, in part, DP&L's application for rehearing and denying all other applications for rehearing. Subsequently, on October 19, 2018, Interstate Gas Supply, Inc. (IGS) invoked the Amended Stipulation's Withdrawal Provision by filing a Notice of Withdrawal accompanied by a motion for a procedural schedule. The hearing necessitated by IGS's Notice of Withdrawal began on April 1, 2019, and continued through April 3, 2019, with rebuttal testimony taken on April 15, 2019.

{¶ 7} Substantive initial post-hearing briefs were timely filed by Staff, DP&L, Ohio Energy Group (OEG), Ohio Consumers' Counsel (OCC), and IGS. The Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Company (Kroger) each filed a document indicating its position has not changed since the original round of briefing occurred in May 2017 and, therefore, each rested on and incorporated those arguments set forth in the May 2017 briefs. On May 30, 2019, Staff, IGS, DP&L, OCC, and Retail Energy Supply Association (RESA) filed reply briefs; OEG filed a notice indicating it would not file a reply brief.

{¶ 8} On July 2, 2019, the attorney examiner found that the parties should have the opportunity to brief the impact of the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d, 2019-Ohio-331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d. 1487, 2019-Ohio3331, 129 N.E.3d 458 (*Ohio Edison*),[1] on this proceeding and indicated that supplemental briefs narrowly focused on the applicability of *Ohio Edison* could be filed by August 1, 2019. On that date, DP&L, IGS, and OCC each filed separate supplemental briefs, and the Environmental Defense Fund, Environmental Law & Policy Center (ELPC), Ohio Environmental Council, and Sierra Club (collectively, Environmental Advocates or Advocates) filed a joint supplemental brief.

---

1 On October 11, 2017, the Commission issued a final appealable order in the fourth ESP proceeding filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. *FirstEnergy ESP IV Case*, Case No. 14-1297-EL-SSO, Ninth Entry on Rehearing (Oct. 11, 2017). Among other terms, the ESP included a distribution rider (Rider DMR) approved by the Commission. *FirstEnergy ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016). On June 19, 2019, the Supreme Court of Ohio issued its decision in *Ohio Edison*, affirming the Commission's order in part, reversing it in part as it related to Rider DMR, and remanding with instructions to remove the rider from FirstEnergy's ESP. Specifically, the Supreme Court of Ohio held that Rider DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of Rider DMR's revenues were not sufficient to protect ratepayers. *Ohio Edison* at ¶¶ 14-29.

III. Discussion

A. *Procedural Issues*

1. DP&L's Motion to Strike Supplemental Briefs

{¶ 9} On August 21, 2019, DP&L filed a motion to strike the August 1, 2019 supplemental briefs filed by OCC, IGS, and the Environmental Advocates arguing a combination of standing and waiver. DP&L asserts that OCC waived the right to challenge whether the DMR qualifies as an incentive to implement grid modernization under R.C. 4928.143(B)(2)(h) by failing to do so prior to its August 1, 2019 supplemental brief. DP&L states that, as a group, the Environmental Advocates lack standing to challenge the DMR because there is no showing that they, or any of their members, have been adversely affected by the rider. DP&L additionally contends that because the Sierra Club and ELPC never filed an application for rehearing, each waived the right to challenge the DMR's authorization under R.C. 4928.143(B)(2)(h). Finally, the DP&L reasons that IGS both waived the ability to challenge the authorization of the DMR under R.C. 4928.143(B)(2)(h) by failing to raise the issue in its post-hearing briefs and lacks standing to challenge the rider because, like the Environmental Advocates, IGS is not adversely affected by the DMR.

{¶ 10} Each of the parties whose brief was challenged filed a memorandum contra DP&L's motion to strike. As a whole, these parties observe that the August 1, 2019 supplemental briefs were filed in response to the express invitation extended by the attorney examiner's July 2, 2019 Entry, which renders DP&L's motion to strike meritless; OCC adds that DP&L's motion to strike should itself be stricken as an untimely interlocutory appeal of the July 2, 2019 Entry. Separately, the parties continue to address DP&L's party-specific statements. With regard to standing, IGS asserts that DP&L's challenge is procedurally and substantively flawed. IGS explains that the Commission granted it the right to intervene in this proceeding—without any objection from DP&L—in an August 16, 2016 Entry, rendering any current challenge to IGS's standing untimely. Similarly, the Environmental Advocates point out that DP&L did not challenge their ability to intervene before the Commission granted them that right in the October 20, 2017 Opinion and Order; nor did the

Commission condition their rights of intervention to any specific issue or for any particular posture. The Advocates also argue against DP&L's premise that only those entities that pay any particular rider charge have standing to challenge the legality of that charge; instead, the Advocates promote a wider view of how any particular party can be affected or injured by the existence and operation of a rider. With regard to waiver, IGS explains that its post-hearing briefs did, in fact, argue that the DMR does not qualify as a grid modernization incentive under (B)(2)(h); therefore, waiver is not an issue. OCC asserts that, because the case remains ongoing after IGS withdrew from the Amended Stipulation, all issues remain open to argument and, thus, cannot have been waived. Additionally, both OCC and the Environmental Advocates contend that the cases cited by DP&L in support of the waiver arguments are misplaced, as those cases address the ability of a party to present an argument on appeal to the Supreme Court of Ohio, not the ability of a party to raise an argument with the Commission in an ongoing proceeding.

{¶ 11} In its reply memorandum, DP&L states that it does not dispute the attorney examiner's authority to request briefing on the impact of *Ohio Edison* on this proceeding. DP&L does, however, indicate that the parties opposing the Amended Stipulation should have established their legal interest in the DMR and argued against its qualification as an incentive for grid modernization under R.C. 4928.143(B)(2)(h) at some previous point in these proceedings. In this, DP&L also asserts that *Ohio Edison* does not represent "new law" that would allow the parties to expand previous attacks on the DMR. Instead, DP&L asserts that subsection (B)(2)(h) has remained unchanged since DP&L commenced the proceeding and that any party could have raised the "incentive" argument at any time. The remainder of DP&L's reply brief reiterates its previously expressed position on the issues of waiver and standing.

{¶ 12} The Commission finds that DP&L's motion to strike the supplemental briefs should be denied. By Entry dated July 2, 2019, the attorney examiner provided the opportunity for all parties in this case to file supplemental briefs regarding the impact of *Ohio Edison* on this case. We are not persuaded any party waived its right to weigh in on a new Supreme Court of Ohio decision that directly impacts the issues raised in this proceeding.

{¶ 13} The Commission further notes that DP&L is not prejudiced by this ruling. Even if DP&L's motion to strike had been granted, it would not have changed our decision on the applicability of *Ohio Edison* to this case, which is apparent irrespective of the supplemental briefs DP&L seeks to strike.

2. EVIDENTIARY RULINGS

{¶ 14} IGS states that, in two instances, the attorney examiners improperly excluded relevant evidence. First, IGS argues that cross-examination on and admission of three Moody's Credit Rating Reports regarding Oncore Electric Delivery (Oncore), as well as witness testimony regarding Oncore's investment-grade credit rating during the bankruptcy of its parent company, were improperly excluded. In support of its position, IGS asserts that the IGS exhibits marked 1003, 1004, and 1005 were relevant, as the Moody's Credit Rating actions with respect to Oncore provide the greatest insight into how a credit agency evaluates regulated utilities in the event of financial distress at the parent company level. IGS states that Moody's identified factors and scenarios in the exhibits to support upgrading Oncore's credit rating that would be applied to DP&L; the Commission need not treat the facts relating to Oncore as identical to those of DP&L, but IGS avers that they are highly relevant to the matters at issue. IGS also asserts that sufficient foundation was laid by DP&L's testimony to admit the exhibits regarding Oncore's credit rating, stating that DP&L witness Malinak explicitly relies on the credit rating of Oncore during the 2014-2015 timeframe to support his analysis (DP&L Ex. 2 at 34-35; Tr. VI at 1046). Further, IGS points out that Witness Malinak testified that the information he relied on when preparing his prefiled testimony must have originally been provided by Moody's (Tr. VI at 1046). IGS argues that it is unreasonable to allow Mr. Malinak to testify with respect to Oncore's credit rating while simultaneously finding no foundation to admit Moody's actual Oncore credit rating reports into the record. Regarding the attorney examiners' conclusion that the exhibits regarding credit ratings are hearsay, IGS avers that the exhibits should have been admitted as admissions by party opponent. IGS cites Ohio Rule of Evidence Rule 801(D)(2), which says that a statement is an admission by an opposing party when "the party has manifested an adoption or belief in its truth." IGS then argues that, because DP&L relies upon Moody's credit rating of Oncore during the relevant period identified in the documents, DP&L has manifested a belief in the credit rating's truth; thus, IGS submits the rating is an opposing party's statement and not hearsay. Alternatively, IGS states that the Commission is not strictly bound by the rules of evidence and that the Commission should treat all similar information consistently. IGS states that the Commission has not done so in this situation; IGS argues that it is fundamentally unfair to permit DP&L to rely upon credit rating agency reports when it may further its case, while also preventing an interested intervenor from relying on similar documents when the evidence suggests a contrary result. In response to the attorney examiner's indication that the information should have been included in IGS's direct testimony, IGS asserts that there is no requirement to include evidence in direct testimony, and that cross-examination allows for broad admission of relevant matters and matters affecting credibility. Evid.R. 611(B). Finally, IGS argues that, should the Commission find the exhibits were not admissible for any purpose, the Commission still should have taken administrative notice of them. To bolster this argument, IGS states that it sought to take administrative notice during the beginning of the hearing while the record was open without seeking any restriction on DP&L's opportunity to respond, and that DP&L can not claim surprise where it relied on the financial information related to Oncore in its own testimony. Furthermore, even if the attorney examiner's exclusion of actual documents was proper, IGS avers that its witnesses should not have been precluded from providing testimony regarding what occurred during the bankruptcy of Oncore's parent (Tr. VIII at 1422). IGS states that there was sufficient foundation for its witnesses' testimony based upon personal knowledge and facts perceived by them relating to Oncore's credit rating, and that their testimony was in the same form as that of DP&L's witnesses on the same subject.

{¶ 15} DP&L avers that the attorney examiners' evidentiary rulings were correct. Contrary to IGS's position, DP&L states that the attorney examiners properly excluded the three Moody's Credit Reports relating to Oncore because IGS failed to lay a foundation for them and there was no evidence sufficient to support a finding that the matter in question is what its proponent claims. Evid.R. 901(A). DP&L points out that IGS had no witness sworn in to testify that these specific documents were Moody's Credit Reports. Further, DP&L posits that the documents are hearsay offered into evidence to prove the truth of the matter asserted. Evid.R. 801(C). Although IGS argues that the documents are admissions by an opposing party and therefore are not hearsay, DP&L responds that the individual who referred to the documents, DP&L witness Malinak, is an outside expert, not a party to the case. Further, DP&L states that witness Malinak never cited to the document nor affirmed a belief in the statements in them (Tr. VI at 1048). Therefore, DP&L argues that the evidence was properly excluded.

{¶ 16} The Commission will affirm the attorney examiner's ruling denying admission of IGS Ex. 1003, 1004 and 1005. The record at the hearing demonstrates that IGS failed to lay a proper foundation to question the witness on the exhibits (Tr. VI at 1045-1051). Evid.R. 602. The witness clearly testified that he did not rely upon the documents in the preparation of his testimony (Tr. VI at 1048). Although the Commission is not strictly bound by the Ohio Rules of Evidence, we are guided by them. Here, the record lacks evidence sufficient to support a finding that a proper foundation has been laid for the introduction of the exhibits. The witness had not previously reviewed the individual documents and the information used by the witness contained in the documents was obtained from a secondary source. Evid.R. 901(A) (the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims).

{¶ 17} Further, the Commission will affirm the attorney examiner's ruling denying administrative notice of IGS exhibits marked 1003, 1004, and 1005. Upon review of the documents, the Commission finds that, although the documents contain the actual credit ratings of Oncore which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the documents also contain commentary that consists of statements of fact and opinion which are not "capable of accurate and ready determination resort to sources whose accuracy cannot reasonable be questioned." Evid.R. 201. In addition, the Commission notes that there is neither an absolute right nor an absolute prohibition against the Commission taking administrative notice of facts outside the record of a case. *In re Application of Ohio Edison Co.,* 2016-Ohio-3021 at ¶ 29 (*citing Canton Storage and Transfer Co. v. Pub. Util. Comm.,* 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995)). Instead, each case should be resolved on its facts, including whether the complaining parties have had an opportunity to prepare and respond to the evidence and whether they are prejudiced by its introduction. *Canton Storage* (citing *Allen v. Pub. Util. Comm.,* 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988)). In this case, DP&L demonstrably had no opportunity to prepare and respond to the evidence for which IGS seeks administrative notice. The exhibits were attempted to be introduced on cross-examination and DP&L's witness had no prior knowledge of the exhibits (Tr. VI at 1045-1049, 1050-1051, 1052-1054).

{¶ 18} Second, IGS argues that the attorney examiner should have admitted the testimony of its witness, Mr. Hess, regarding AES's acquisition of a large solar and wind developer. IGS states that the proffered testimony is relevant because it (1) touches on the Commission's obligations under state policy to ensure diversity of suppliers, ensure effective competition, and facilitate the state's effectiveness in the global economy and (2) discusses the impact of the DMR on the competitive playing field in DP&L's service territory. As such, IGS submits that the testimony should have been admitted and given whatever weight the Commission deemed appropriate.

{¶ 19} DP&L responds that IGS failed to demonstrate the testimony was relevant; thus, it was appropriately stricken from the record. DP&L states that, although IGS claims AES's acquisition of the developer negatively impacts IGS's ability to compete in the market, neither Mr. Hess nor IGS established a causal relationship between the execution of the

Stipulation (i.e., the creation and funding of the DMR) and the acquisition. Absent this causal connection, DP&L contends that IGS cannot establish a link between the DMR funds and any alleged competitive disadvantage, which renders the acquisition—and any testimony concerning that acquisition—irrelevant.

{¶ 20} The Commission affirms the attorney examiner's ruling. The mere fact that AES announced the subject acquisition shortly after the execution of the Stipulation (but before the execution or approval of the Amended Stipulation) does not render the acquisition relevant. IGS never explains how the acquisition was subsidized by DMR funds when that acquisition occurred before the DMR was approved and/or DMR revenues were recovered. In addition, the Amended Stipulation provides that no dividends will flow from DPL Inc. to AES during the ESP; in fact, the Amended Stipulation provided that, during the period in which DMR revenue was recovered, AES would inject equity into DPL Inc. in the form of forgone tax sharing payments.

B. Consideration of the Amended Stipulation

{¶ 21} On March 14, 2017, the Amended Stipulation[2] was filed by DP&L and various parties. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E. 2d 480 (1978). This concept is particularly valid where the stipulation is supported or unopposed by nearly all of the parties and resolves all issues presented in the proceeding in which it is offered.

{¶ 22} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Dominion Retail v. Dayton Power and Light*, Case Nos. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005);

---

2 The Amended Stipulation was thoroughly summarized in the original Opinion and Order in this proceeding. Opinion and Order (Oct. 20, 2017) at ¶ 14.

In re Cincinnati Gas & Elec. Co., Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, et al., Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of the stipulation, the Commission has used the following criteria:

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

(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?

The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve cases in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E. 2d 423 (1994), citing *Consumers' Counsel* at 126.

{¶ 23} In addition to specific arguments related to the three-prong test for the consideration of stipulations, the parties raised a number of general arguments related to the Amended Stipulation.

{¶ 24} DP&L avers that the Amended Stipulation originally agreed to by IGS provides significant customer benefits, including the ability to provide safe and reliable service and an incentive to implement grid modernization. DP&L argues that the Amended Stipulation still satisfies the Commission's three-prong test for determining whether a stipulation is reasonable and should be adopted, and the Commission should reject IGS's arguments following its withdrawal from the Amended Stipulation.

{¶ 25} DP&L also challenges the propriety of IGS's withdrawal from the Amended Stipulation and consequent reopening of this proceeding. DP&L states that, according to the Amended Stipulation, to permissibly withdraw from the Amended Stipulation, IGS must show that the Commission's modification to the Amended Stipulation was material (Joint Ex. 1 at 38-39). However, according to DP&L, the only modification made by the Commission was changing the Reconciliation Rider from a bypassable to a nonbypassable charge. Opinion and Order at ¶ 63. Because IGS "[did] not support but agree[d] to not oppose" the provision that was modified by the Commission, DP&L asserts that IGS should not be able to argue that the Commission's decision to modify the Reconciliation Rider was material to IGS (Joint Ex. 1 at 13, fn. 6). Further, DP&L states that IGS has failed to offer any evidence demonstrating that the modification made by the Commission was material to IGS, as it made no showing that customers would be likely to switch to a competitive provider if the Reconciliation Rider remained bypassable. Accordingly, DP&L urges the Commission to reject IGS's argument that the modification to the Reconciliation Rider was material and to conclude that IGS does not have the right to withdraw from the Amended Stipulation.

{¶ 26} OEG adds that, since withdrawing from the Amended Stipulation, IGS has failed to present any new arguments regarding its position that the Reconciliation Rider should be bypassable and instead offers testimony already considered and arguments already denied by the Commission. While expressing its continued support for the Amended Stipulation's bypassable Reconciliation Rider, OEG states that the Commission has already heard and rejected IGS's arguments in the Third Entry on Rehearing. Thus, OEG asserts that IGS's repeated arguments should again be rejected.

{¶ 27} As mentioned above, OMAEG and Kroger filed documents indicating no change in their positions regarding the Amended Stipulation since the filing of briefs in May 2017. While OMAEG presents no further argument, Kroger reiterates its belief that the

Amended Stipulation is the product of serious bargaining among capable and knowledgeable parties, creates significant benefits for customers, is in the public interest, and does not violate any regulatory principle or practice. Accordingly, Kroger argues the Amended Stipulation is just and reasonable, and should be approved again.

{¶ 28} Staff argues that, as the support of IGS was not pivotal to the approval of the stipulation, IGS's present opposition to the Amended Stipulation should not alter the Commission's conclusion. Staff states that the Amended Stipulation still passes the Commission's three-part test, and that many objections raised by IGS have already been addressed and rejected by the Commission.

{¶ 29} IGS argues that the Amended Stipulation as modified by the Commission proposes an environment that makes it more difficult for competitive providers of energy to compete while simultaneously insulating DP&L from risks associated with its own investments. IGS contends that the Amended Stipulation allows DP&L's distribution customers to provide a bailout of DP&L's parent company under the veil of distribution modernization.

1. THE AMENDED STIPULATION IS A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

{¶ 30} DP&L states that IGS does not dispute that serious bargaining occurred or that the Amended Stipulation was signed by a diverse group of parties, which is the first prong of the three-part test utilized by the Commission in cases with a stipulation. First, DP&L notes that the Commission already found the Amended Stipulation to be the product of serious bargaining among capable, knowledgeable parties. Opinion and Order at ¶ 23. Further, DP&L states that RESA remains a signatory party to the Amended Stipulation (Joint Ex. 1 at 40). According to DP&L, this is significant because IGS witness White is the President of RESA, and IGS is also a member of RESA (Tr. VIII at 1368).

{¶ 31} OEG avers that the Amended Stipulation continues to satisfy the Commission's three-prong test for determining whether a settlement is reasonable and should be adopted. According to OEG, the first prong, that the Amended Stipulation is the product of serious bargaining among capable and knowledgeable parties, is satisfied, as the parties explicitly supporting or not opposing the Amended Stipulation represent diverse interests, including interests of DP&L, Staff, municipal customers, low-income advocates, industrial customers, commercial customers, demand response providers, hospitals, and renewable energy advocates. Further, OEG states that most if not all of these parties have significant experience in Commission proceedings.

{¶ 32} OCC states that IGS's proposal violates the first prong of the Commission's test, as the proposal was not a result of serious bargaining among parties with diverse interests. In OCC's words, there can be no bargaining when only one party disagrees with the result after the fact. Further, OCC avers that the Commission is not bound to a settlement negotiated by the parties and was within its capacity to amend the Amended Stipulation. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978).

{¶ 33} The Commission notes that IGS presented no new evidence regarding the first prong of the test for the consideration of stipulations. Accordingly, based upon the evidence in the record, we affirm our decision in the Opinion and Order in this case that the Amended Stipulation is the product of serious bargaining among capable and knowledgeable parties. Opinion and Order at ¶ 20. Notwithstanding IGS' withdrawal from the Amended Stipulation, the remaining signatory parties routinely appear in complex hearings before the Commission and are all represented by counsel with extensive experience (Staff Ex. 2 at 3-4). The diversity among the signatory parties was not affected by IGS' withdrawal because CRES provider interests are still represented on the Amended Stipulation by RESA. Moreover, testimony in the record demonstrates that the Amended Stipulation was the result of an extensive negotiations process (Co. Ex. 3 at 7-8).

2. THE AMENDED STIPULATION, AS A PACKAGE, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST.

{¶ 34} DP&L avers that the second prong of the Commission's three-part test, that the stipulation benefit customers and the public interest, is also satisfied. In support of this, DP&L states that IGS signed the Amended Stipulation, confirming by its signature that the Amended Stipulation benefited customers and the public interest (Joint Ex. 1 at 2; 40). Further, IGS submitted a brief in support of the Amended Stipulation, asserting that the Amended Stipulation benefited customers and the public interest as a package (May 5, 2017 Joint Initial Brief of IGS and RESA at 6). In response to IGS's objections to the Amended Stipulation, DP&L argues that IGS has identified particular provisions, instead of evaluating the Amended Stipulation as a package in relation to its impact on customers and public interest. DP&L proceeds to point out numerous provisions of the Amended Stipulation that IGS ignored which purportedly benefit many customers, including: equity investments by AES; competitive bidding; transfer of generation assets; sales process for certain coal assets; economic development incentives; economic development grant fund; competitive enhancements; benefits for the City of Dayton; and funds for low-income customers. DP&L states that the Amended Stipulation as a package not only provides significant customer benefits, but that a typical resident will experience a rate decrease (DP&L Ex. 3 at 20).

a. Distribution Modernization Rider

{¶ 35} DP&L proceeds to argue that the DMR benefits customers for a number of reasons. First, DP&L states that IGS lacks standing to challenge the DMR. DP&L points out that the Supreme Court of Ohio has held that to establish standing, a party must show an injury that is fairly traceable to the defendant's unlawful conduct, which is likely to be redressed by the requested relief. *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19. According to DP&L, as IGS presented no evidence that it is harmed by the DMR, meaning IGS can't establish an injury, IGS lacks standing. However, if IGS were to have standing, DP&L maintains that the DMR benefits customers because it is necessary to provide safe and reliable service and to implement grid modernization. In support of this claim, DP&L witness Jackson testified that without the DMR, DP&L would have insufficient cash flow, leading to a deleterious effect on the utility's ability to provide stable and certain utility service to customers (DP&L Ex. 1B at 17-18). DP&L also states that the Amended Stipulation provides a specific path and plan for modernizing DP&L's grid. As DP&L witness Malinak suggested, without the DMR, DP&L would not have the funds to implement robust grid modernization in a timely manner (DP&L Ex. 2B at 66). According to Malinak, this proposed grid modernization would provide significant customer benefits, including improved reliability (DP&L Ex. 2B at 65).

{¶ 36} In response to IGS's claim that DP&L would not be injured by a DPL Inc. bankruptcy that would likely result if DP&L stopped paying dividends to DPL Inc., DP&L urges the Commission to reject IGS argument because DP&L's financial integrity is linked to DPL Inc.'s financial integrity (DP&L Ex. 2B at 29). Further, DP&L avers that IGS is ignoring the fact that were DPL Inc. to go bankrupt, DPL Inc.'s lenders would expect their debts to be repaid, which would likely lead to the lenders making significant cuts to DP&L's expenses so they could be repaid (Tr. VII at 1189-90).

{¶ 37} Next, DP&L counters IGS's claim that the DMR does not qualify as revenue and should be treated as customer-funded capital. In support of this, DP&L states that the Amended Stipulation itself establishes that the DMR will be treated as revenue (Joint Ex. 1 at 4). DP&L also emphasizes that the DMR is not customer-funded capital since DMR funds are being used to pay interest and principal on debt at DP&L and DPL Inc., as opposed to being funneled toward specific capital projects. By securing DP&L's financial footing, DP&L argues, it will be in a better position to invest in smart grid in the future. (Joint Ex. 1 at 5.)

{¶ 38} OEG also argues that the second prong is satisfied. In support, OEG emphasizes that, in the process of negotiating the Amended Stipulation, the DMR was reduced from a total of $1.015 billion to a maximum of $525 million (Joint Ex. 1 at 4-5).

Further, OEG alleges that Staff objected to other unreasonable costs that were eventually excluded from the Stipulation, leading to a reasonable Amended Stipulation.

{¶ 39} IGS proceeds to urge the Commission to reject the DMR established in the Opinion and Order issued on October 20, 2017. In support of its position, IGS states generally that the DMR cannot be authorized because it is not needed to ensure that DP&L maintains safe and reliable service or that DP&L has access to capital markets. IGS refers to the record to show that DP&L's distribution and transmission revenues provide it with a reasonable rate of return, and that it will have sufficient cash flow to cover projected expenses and capital expenditures in order to maintain safe and reliable service (Tr. VI at 990-92; IGS Ex. 1015 at 23-24).

{¶ 40} Further, IGS states that DPL Inc.'s financial situation will not impact DP&L. IGS asserts that because DP&L is a regulated distribution utility with stable cash flows, through mechanisms such as revenue decoupling, lost distribution revenues, and capital investment distribution cost recovery, DP&L has a reduced risk from a credit rating perspective (Tr. VI at 955-59). IGS emphasizes that DP&L conceded that creditors view its transfer of generation assets as credit positive (Tr. VII at 1169). DP&L also has ring fencing provisions in place to ensure that it is insulated from actions of unregulated businesses within the same holding structure such as a parent company (IGS Ex. 1006 at 7). IGS states that these factors ensure that DP&L has access to the capital markets at favorable terms without the DMR.

{¶ 41} Next, IGS states that "authorizing the DMR is like providing a cure that is worse than the ailment it would address." IGS argues that DP&L has not presented evidence to demonstrate that it actually needs to borrow additional funds, nor has it presented evidence to demonstrate the amount of any increased borrowing cost without the DMR. In addition to DP&L's access to a $200 million revolver, $100 million for capital investment purposes, and $25 million in unsecured credit, IGS points out that DP&L has not identified in the record any amount of grid modernization costs (IGS Ex. 1001 at 66-67).

Further, DP&L has sufficient cash flows to cover its ongoing expenses (IGS Ex. 1001 at 23-24; Tr. VI at 990-92; Tr. VII at 1140-41, 1166). IGS proceeds to state that based on DP&L's current financial situation, it would have to significantly increase borrowing before the increased cost of borrowing approached the cost of the DMR.

{¶ 42} According to IGS, DPL Inc.'s bankruptcy would likely have a positive impact on DP&L. In support of this position, IGS alleges that since the transaction linking DP&L and DPL Inc. to AES took place, DP&L has constantly been attempting to extract revenues from its Ohio customer base to benefit its financially besieged parent company. IGS refers to DP&L's own testimony that the value of DP&L without the DMR is less than the total amount of debt that is held at the DPL Inc. level (Tr. VII at 1155-56). IGS argues that bankruptcy projection would provide an opportunity to right size the debt of the balance sheet of DPL Inc. through forbearance of debt or through a debt for equity exchange with lenders (Tr. VI at 982).

{¶ 43} IGS states that, at the time of the Amended Stipulation, the federal income tax rate was assumed to be 35 percent. One benefit of the Amended Stipulation is that, while DP&L will pay its share of taxes to DPL Inc., AES will not collect tax sharing payments from DPL Inc. DP&L alleges that this tax forgiveness is an investment from AES (DP&L Ex. 2 at 4). However, IGS points out that the federal government changed the federal income tax rate to 21 percent in 2018 (Tr. VI at 1012). Consequently, AES Corp., DPL Inc., and DP&L will pay less in taxes associated with produced income (Tr. VI at 1012). IGS states that, as a result, AES Corp. would be the recipient of a windfall. Should the DMR be authorized, IGS requests that the Commission account for the change in the federal income tax rate by reducing the DMR by $14.75 million. This would reflect the change in tax payments DP&L would make to DPL Inc., and thus, the amount of tax that AES would have forgone. According to IGS, this would ensure that the tax cut works to customers' benefit rather than AES Corp.'s shareholders.

{¶ 44} DP&L has two responses to IGS's assertion that the terms of DP&L's existing credit agreement would allow DP&L to implement Smart Grid. First, DP&L argues that the evidence at the hearing showed that DP&L issued debt shortly before the original hearing in this case in the junk bond market and that the terms of the credit agreement would preclude DP&L from implementing Smart Grid (DP&L Ex. 1B at 9; Tr. I at 109-10). Further, DP&L points out that the Commission recently authorized DP&L to refinance the same debt. *In re Dayton Power and Light Co.*, Case No. 18-1795-EL-AIS, Finding and Order (May 22, 2019) at ¶ 10, 12. It follows, DP&L argues, that the DMR is doing its job, as DP&L has been able to pay down debt and improve its credit rating. Second, DP&L responds to IGS's assertion that DP&L could access a $200 million revolver, $100 million for capital and $25 million in unsecured debt. DP&L refers to its Chief Financial Officer's testimony at the hearing that DP&L could not use those funds on $576 million Smart Grid expenses because the $200 million revolver is for short-term working capital needs, the $100 million for capital investments includes a condition that it not increase the outstanding principal amount, and the $25 million is not sufficient to fund Smart Grid (Tr. VII at 1151-55).

{¶ 45} Countering, IGS first addresses DP&L's claim that IGS initially supported the DMR or nonbypassable Reconciliation Rider. IGS points out that it included several footnotes in the Amended Stipulation clarifying that it did not support either provision to ensure that the presence of these provisions could not be held against IGS in the future (Jt. Ex. at 1, 5, 6, 11). Further, IGS states that it initially argued that to the extent the Reconciliation Rider is authorized, it should be bypassable. Accordingly, IGS holds that its position has not changed, and it opposes the Amended Stipulation, including the DMR.

{¶ 46} Second, IGS responds to DP&L's claim that an EDU's annual capital expenditures are indicative of its ability to maintain reliability by arguing that there is no nexus between credit rating, capital expenditures, and reliability. IGS first states that the Commission has historically evaluated each EDU's reliability through indexes used to measure the duration and length of outages. Ohio Adm.Code 4901:1-10-10. Because DP&L witness Malinak conceded that he did not use these indexes in determining how reliable

DP&L would be, IGS avers that his assertion is based on speculation (Tr. VI at 965). Further, IGS states that the sample group used by witness Malinak to determine reliability was very limited in size, as several of the utilities were owned by the same holding company, namely, FirstEnergy Ohio (Tr. VI at 968-73). IGS states that witness Malinak failed to explain how the EDUs under FirstEnergy Ohio had differing reliability metrics. IGS proceeds to point out that witness Malinak did not examine whether any other EDUs in the sample were operated under the FirstEnergy umbrella, and argues that given the wide disparity of credit ratings and capital expenditures regarding these entities under common ownership, the sample group provides no probative evidence (Tr. VI at 969-72). Next, IGS states that witness Malinak lacked insight into the financial wellbeing of the companies because he did not review any of the actual credit rating reports for any of the EDUs in the sample (Tr. VI at 1044-45). Last, IGS asserts that factors not considered by witness Malinak may have skewed the data relied upon, such as the timing of rates cases and ability of EDUs to recover capital investment through a rider (Tr. VI at 968, 971).

{¶ 47} Third, IGS responds to DP&L's claim that the DMR is needed to ensure that DP&L can maintain safe and reliable service. As an initial matter, IGS points out that DP&L concedes that it is doing fine. IGS states that DP&L's claim regarding the impacts of changes in the financial health of DPL Inc. on DP&L is irrelevant, since DP&L is not permitted to favor its unregulated parent company at the expense of its regulated service operations under Ohio law. R.C. 4928.17. IGS emphasizes that DP&L has ring fencing in place to ensure that cash flow of the EDU remains within the EDU to support proper credit metrics. According to IGS, DP&L attempts to establish a link between DP&L and DPL Inc. where there is none due to ring fencing and Ohio law.

{¶ 48} Fourth, IGS counters DP&L's position that the DMR is necessary to facilitate grid modernization. In support of its position, IGS first argues that the DMR is not needed to shore up DP&L's credit rating. IGS states that credit rating agencies consider an entity investment grade when it has stable cash flows, a supportive regulator, and ring fencing (Tr. VIII at 1424). As DP&L has all three of these characteristics, IGS posits that as long as DP&L

adheres to its ring fencing provisions, the credit agencies will view DP&L as a standalone entity separate from DPL Inc., and DP&L's credit rating will remain investment grade.

{¶ 49} IGS next responds to DP&L's claim that it needs a ratepayer subsidy to make capital investments that have neither been quantified nor authorized, citing a lack of tangible, credible evidence with respect to the amount of investment DP&L needs to make. Accordingly, DP&L argues that there is no basis to determine that DP&L currently lacks the capital needed for grid modernization. Further, IGS states that DP&L currently has the ability to incur an additional $125 million in long-term debt under its long-term credit agreement (Tr. VI at 996-98). IGS goes on to state that even if DP&L's credit rating is downgraded, the evidence suggests that it could access the capital markets at a reasonable cost.

{¶ 50} IGS also addresses DP&L's allegation that banks would ultimately want to be paid in the event DPL Inc.'s debts are restructured through bankruptcy. More specifically, IGS rejects DP&L's suggestion that banks would be worse owners of equity than DPL Inc., as banks would have ample opportunity to earn their return without degrading distribution service. IGS reasons that any reductions to the banks' outstanding loans that would result from selling DP&L to the highest bidder in bankruptcy would be better than putting the bill for such reductions on customers. Lastly, IGS rejects DP&L's position that a bank might reduce capital expenditures to extract additional profits since DP&L is a regulated EDU. If anything, IGS speculates, a bank is more likely to invest additional capital in DP&L to build additional rate base that would earn the regulated rate of return authorized by the Commission.

{¶ 51} IGS challenges DP&L and Staff's position that the DMR should not be considered customer-funded capital. Specifically, IGS argues that calling the DMR funds "revenue" is a red herring, as customer-provided capital could similarly be considered "revenue," but that has no bearing on the manner in which such revenue should be treated from an accounting or ratemaking perspective. According to IGS, that the DMR does not apply to any specific capital project is irrelevant; the DMR increases the total amount of cash available to DP&L, which in turn increases the net income and earnings of DP&L (Tr. VII at 1134, 1161-62; Tr. VI at 1007-09). IGS posits that some of these funds, which are ultimately provided by DP&L customers, are added to the balance sheet as shareholders equity (Tr. VI at 1007-09). Further, IGS states that if DP&L customers are required to provide cash flows to pay off DP&L's debt principle and interest, they should receive value in return. For these reasons, IGS asserts that the DMR should be recorded on the balance sheet as customer-provided capital (IGS Ex. 1015 at 11).

{¶ 52} Regarding IGS's arguments against the DMR, Staff reiterates that most of the arguments have already been rejected. Staff avers that the DMR is necessary to ensure reliability in the future, as it is needed to allow for Smart Grid development. Opinion and Order at ¶ 42-44. Staff also rejects IGS's argument that the DMR is not authorized under R.C. 4928.143; rather, the Commission's reasoning that DP&L must be in a position to be able to obtain significant additional funds to initiate Smart Grid still holds. Opinion and Order at ¶ 96-102. Staff proceeds to counter IGS's argument that DP&L already has access to capital markets by emphasizing the Commission's explanation that access is limited, and terms are onerous, and changes are needed to implement grid modernization. Opinion and Order at ¶ 37-38. In response to IGS's assertion that the DMR violates core regulatory principles, Staff argues that the Commission is charged to modernize and move the distribution system forward, which is what the DMR is designed to do, and IGS relies on statutes that do not apply. Regarding the MRO/ESP test, Staff refers once again to the Commission's reasoning in the record, and states that the need for the DMR exists whether it be included in an ESP, an MRO, an AIR, or another proceeding. Staff argues that, as the Commission has previously held, the needed modernization will not happen without the DMR. Counter to IGS's argument that the DMR does not relate to distribution service, Staff asserts that the Commission's entire point in creating the DMR was to jump start the modernization of the distribution system. Staff rejects IGS's position that DPL Inc.'s financial health has no impact on DP&L by stating that, in the view of the financial markets, the two are tied, and that the record indicates as much. Opinion and Order at ¶ 36-38. In response to IGS's argument that the bankruptcy of DPL Inc. would be a good thing, Staff simply states that the Commission can hardly advocate for bankruptcy. Staff next restates its rejection of IGS's arguments that the DMR violates cost of service ratemaking and that the DMR should be treated as contributions of aid of construction continuing to be without merit. In its final response to IGS's opposition to the DMR, Staff classifies as unnecessarily risky the request that the DMR be adjusted for the recent change in federal income tax rate, as the DMR is a temporary measure designed to allow for significant investments and adjusting it at this point would undermine the goals of the DMR.

{¶ 53} The Commission notes that IGS has raised a number of arguments detailing why IGS claims that the DMR is not in the public interest. However, we find that, in light of our decision to modify the Amended Stipulation and eliminate the DMR, explained in detail below, the arguments raised by IGS are moot.

b. Reconciliation Rider

{¶ 54} OCC states that the Commission should reject IGS's proposal to make the Reconciliation Rider bypassable and affirm the Opinion and Order already entered in this case. In support of its position that the Commission should deny IGS's proposal to make the Reconciliation Rider bypassable, OCC avers that approving such a proposal would violate the Commission's own settlement standard, as well as Ohio law. While OCC maintains its original position of opposing the Reconciliation Rider in its entirety, OCC urges the Commission to reject IGS's proposal to make the Reconciliation Rider bypassable, which, in OCC's view, would make a bad situation worse (OCC Ex. 1000 at 5). OCC states that IGS's proposal would in effect force charges from the Reconciliation Rider only on SSO customers as opposed to all customers. (OCC Ex. 1000 at 5.) OCC points out that IGS did not take issues with the testimony of OCC witness Willis that the Reconciliation Rider should be paid for by all customers; moreover, the Commission has already ordered that the Reconciliation Rider be nonbypassable.

{¶ 55} OCC claims that the proposal sought by IGS fails the requirement that a proposed settlement, as a package, benefits customers and the public interest. According to OCC, IGS's proposal actually harms customers and the public interest by giving marketers such as IGS a competitive advantage that places the cost of default service solely on SSO customers. OCC stresses that this competitive advantage is not in the public interest, as it would enable anti-competitive behavior, eventually harming markets and consumers (OCC Ex. 1000 at 10). Further, OCC states that the Commission agreed with OCC witness Kahal that making the Reconciliation Rider bypassable would artificially inflate SSO prices. Third Entry on Rehearing at ¶ 51. In response to IGS witness White's claim that DP&L's SSO customers would only be slightly impacted by an estimated cost of $1.84 a month if the Reconciliation Rider were bypassable, OCC states that, even if this calculation is correct initially, the cost would increase substantially as more customers leave the SSO to avoid the charge (Tr. VIII at 1417).

{¶ 56} OCC also countered IGS's position that the Reconciliation Rider's generation hedge is not dedicated to DP&L's SSO customers by stating that the hedge would benefit both CRES and DP&L SSO customers should the power plants become profitable (OCC Ex. 1000 at 10). As a result, OCC argues, DP&L's SSO and CRES customers would be impacted in the same manner (OCC Ex. 1000 at 4-5). OCC witness Willis went on to state that a bypassable Reconciliation Rider would increase DP&L's SSO rate against which IGS competes for customers, making competing against DP&L's SSO easier for marketers such as IGS (OCC Ex. 1000 at 5-7).

{¶ 57} Beyond IGS' request that the Commission reject the DMR, IGS also urges the Commission to reject the Reconciliation Rider or make it a bypassable rider. IGS asserts that the Reconciliation Rider is not a hedge, despite DP&L's insistence that it is a hedge. In support of its position, IGS explains that while a hedge must contain a known amount of risk mitigation, DP&L does not know the cost of wholesale capacity or energy in any year of the ESP, nor does DP&L know the rate at which it will purchase power from OVEC in any year of the ESP (Tr. VII at 1305-06). It follows, IGS argues, that the Reconciliation Rider is based upon a mixture of unknown and unpredictable variables, injecting additional risk to customer electric bills, rather than providing stability. Second, IGS states that should the Commission authorize the Reconciliation Rider, it should be bypassable. IGS/RESA witness White testified that making the Reconciliation Rider bypassable would avoid an anticompetitive subsidy that would result from collecting generation related costs through nonbypassable charges on shopping customers (RESA Ex. 1 at 11-12). IGS refers to the testimony of DP&L witness Schroder, who testified that the impact of a bypassable Reconciliation Rider for the typical DP&L customer would have been between $1.35 and $1.85 in each month of the ESP (DP&L Ex. 3, Ex. A at 1). IGS states that there is no evidence to suggest that these figures will deviate in a significant fashion over the ESP term, meaning that the Commission could easily address any rate shock concerns through more reasonable means than a nonbypassable Reconciliation Rider.

{¶ 58} Staff also responds to IGS witness White's claims that the Reconciliation Rider is not a hedge, stating that the argument has already been dismissed by the Commission and pointing out that Mr. White was unable to give an example of a hedge (Tr. VIII at 1459). Staff points out that the Commission specifically found that the Reconciliation Rider is a hedge. Opinion and Order at ¶ 63. Further, Staff states that simple logic shows that the Reconciliation Rider will operate as a hedge, as it will move in the opposite direction of the auction results. As to whether the Reconciliation Rider should be bypassable, Staff simply refers to the fact that this was included in the Amended Stipulation, and that the Commission explicitly modified it and explained its reasoning, which still holds. Opinion and Order at ¶ 63-64. Finally, in countering IGS's position that the Reconciliation Rider is a transition charge, Staff refers to R.C. 4928.39, which defines "transition cost," and concludes that OVEC assets do not fall within the definition as there was never an opportunity to recover any OVEC costs before restructuring because such costs were never in rate base.

{¶ 59} The Commission notes that IGS raises two arguments with respect to the Reconciliation Rider: First, IGS contends that the Reconciliation Rider should not be approved. Second, IGS argues that, if the Reconciliation Rider is approved, it should be bypassable.

{¶ 60} Under the Reconciliation Rider, DP&L will sell its share of the output from two generation plants into the PJM wholesale marketplace and will net the proceeds against DP&L's share of the generation plant costs. Customers will be credited or charged with the difference between those amounts. Thus, the Reconciliation Rider will act as a hedge and protect customers from spikes in market prices. (Co. Ex. 3 at 14). The Commission finds that the new testimony presented by IGS witnesses that, in their opinion, the Reconciliation Rider is not a hedge is not persuasive and does not outweigh the testimony in the record hat the Reconciliation Rider is, in fact, a hedge (Co. Ex. 3 at 14; Tr. IV at 719-720, 755-756). Mr. White offers his opinion that the Reconciliation Rider is not a hedge but offers little analysis to support his claim (IGS Ex. 1014 at 4-5). Mr. Haugh's testimony is simply speculation on how capacity market changes may affect the Reconciliation Rider at some uncertain point in the future. (IGS Ex. 1018 at 4; Tr. VIII at 1496-1498).

{¶ 61} We also note that our ruling that the Reconciliation Rider is a financial hedging mechanism in this case is consistent with our decision to approve a nearly identical mechanism proposed by AEP Ohio. *In re Ohio Power Co.,* Case Nos. 14-1693-EL-RDR, et al. (*Ohio Power*), Opinion and Order (Mar. 31, 2016) (*aff'd., In re Application of Ohio Power Co.,* 2018-Ohio-4698 at ¶ 45). In that case, we held that the financial hedging mechanism "will provide rate stability during periods of extreme weather, when the rider can be expected to offset severe price spikes." *Ohio Power,* Opinion and Order at 83.

{¶ 62} With respect to whether the Reconciliation Rider should be bypassable or nonbypassable, we do not agree with Mr. White's claim that making the Reconciliation Rider bypassable would avoid an anticompetitive subsidy (RESA Ex. 1 at 11-12). As OCC witness Willis noted, the hedge would benefit both CRES and SSO customers in the event that the generation plants are profitable; thus, CRES and SSO customers would be impacted in the same manner by the Reconciliation Rider (OCC Ex. 1000 at 4-5, 10). We also find that making the Reconciliation Rider bypassable has the potential to create an indirect subsidy for CRES providers because a bypassable Reconciliation Rider would increase the SSO rate against which CRES providers compete for customers, making competing against the SSO easier for CRES providers (OCC Ex. 1000 at 5-7).

{¶ 63} We find that the full record of this proceeding demonstrates that the Reconciliation Rider should be nonbypassable. Making the Reconciliation Rider bypassable would create the risk for escalating bill impacts as shopping increases (Tr. II at 351). Thus, we continue to be persuaded by the testimony of OCC witness Kahal that making the Reconciliation Rider bypassable would artificially inflate SSO prices and that any costs recovered (or credits provided) by the Reconciliation Rider should be shared by all distribution customers on an equitable basis (OCC Ex. 12 at 38).

c. Supplier Provisions

{¶ 64} IGS first argues that the Commission should reject DP&L's proposal to increase the collateral requirements applicable to CRES providers without an investment grade long-term bond for several reasons. As an initial matter, IGS states that the only discussion of this proposal occurred in DP&L's original application, and the Amended Stipulation does not directly address this proposed change (Jt. Ex. 1 at 26). According to IGS, DP&L has provided no evidence to support its proposed modification of collateral requirements (Tr. VII at 1318-19). IGS refers to R.C. 4903.09, which requires that the Commission issue orders upon findings of fact derived from the record evidence. Thus, IGS argues, the Commission should reject DP&L's proposed modification. Second, IGS emphasizes that DP&L's proposed collateral requirements would be the most burdensome in the state (IGS Ex. 1017 at 9-10). Third, IGS avers that the proposed changes would disproportionately impact privately held companies with strong balance sheets, as they may have little or no business reason to get a credit rating (IGS Ex. 1017 at 3, 10). Fourth, IGS states that DP&L's proposed collateral calculation is inconsistent with its own tariff and standard industry practice; IGS witness Crist testified that utilities typically establish a standard collateral calculation and adjust downward the amount of needed collateral based on a supplier's financial strength (IGS Ex. 1017 at 7). Accordingly, IGS urges the Commission to direct DP&L to consider specific metrics to apply as a reduction to the collateral calculation. Specifically, Crist recommended that DP&L apply its own collateral calculation, and then reduce the total amount of collateral required based on three factors: capital structure, diversity of portfolio, and past performance (IGS Ex. 1017 at 7-8).

{¶ 65} Next, IGS urges the Commission to reduce or eliminate unreasonable and unsubstantiated historical usage fees. According to IGS, the only basis for the current $150 fee charged to CRES providers to access twelve months of hourly load date is a case that was settled eight years ago; further, the accumulated fees must be passed on to customers (IGS Ex. 1014 at 9). IGS states that it is much more difficult and far less accurate to tailor a product to a specific customer's needs when a CRES provider develops a prospective customer's quote without reviewing historical usage information, and that such a burdensome fee suppresses the retail electric market in DP&L's service territory. Given that DP&L has allegedly provided no justification for what IGS argues is an exorbitantly unreasonable fee despite interrogatories on the matter, IGS requests that the Commission eliminate the historical usage fee.

{¶ 66} IGS also asks the Commission to eliminate, or at a minimum, equally apply, switching fees imposed by DP&L's supplier tariff. IGS points out that the $5.00 fee only applies when a customer leaves SSO service to begin service with a CRES provider, and not when a customer returns to SSO service from CRES service (IGS Ex. 1014 at 7). According to IGS, this amounts to an uneven and discriminatory playing field that provides an indirect subsidy to SSO service in violation of R.C. 4928.02(A). Further, IGS argues that DP&L was unable to identify any distinguishing differences in administrative costs between a customer leaving or returning to the SSO, and that DP&L was also unable to provide any evidence as to the actual costs associated with the switching fee (Tr. VII at 1322). In order to comply with state policy of fostering a nondiscriminatory and open electric market, IGS requests that the Commission either eliminate the switching fee or require DP&L to apply the fee in a non-discriminatory manner.

{¶ 67} Next, IGS states that the Commission should modify the supplier consolidated billing program (SCB program or SCB pilot) to require CRES providers to purchase receivables at a discount. The Amended Stipulation currently requires CRES providers to purchase DP&L's receivables at no discount. IGS avers that this allows DP&L's uncollectible distribution expense to decrease while forcing CRES providers to increase their generation-related prices to recover the cost of the purchase of DP&L's receivables, amounting to a windfall to DP&L and customers not participating in the SCB program. According to IGS, modifying the Amended Stipulation to require CRES providers to purchase receivables at a discount would mitigate some of the allegedly anti-competitive and anti-consumer elements of the Amended Stipulation. (IGS Ex. 1014 at 11).

{¶ 68} Next, IGS requests that the Commission establish a rider to unbundle SSO and reallocate SSO costs embedded in distribution rates. IGS states that the Amended Stipulation fails to propose any methodology or rider to reallocate SSO costs proposed for recovery in distribution rates. Because the Commission recognized in the distribution rate case that it lacked authority to establish a rider to effectuate the proposal, IGS suggests that the Commission establish the SSO unbundling rider in this case (IGS Ex. 1014 at 10). The rider proposed by IGS would credit to all distribution customers any costs identified in distribution rates relating to the provision of the SSO, and then reallocate those costs to SSO customers. IGS argues that authorizing an unbundling rider would be consistent with Ohio law and policy. R.C. 4928.02(B); R.C. 4928.05(A)(1); R.C. 4928.02(A); R.C. 4928.02(H). According to IGS, an unbundling rider would allow the Commission to fulfill the General Assembly's directive as interpreted by the Supreme Court of Ohio to have each service component of electric service to stand on its own. *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 4.

{¶ 69} In response to IGS's arguments regarding collateral requirements, Staff states that because IGS lacks a rating from a credit agency, collateral is necessary. Without a credit rating, the parties are unable to verify IGS's assertion that it is financially strong. Thus, Staff argues, in the absence of a credit rating, the collateral is required verification. Next, Staff avers that Mr. White's claim that historical usage and switching fees have not been justified is unsupported by evidence contained in the record. Staff submits that, as the party seeking to change the status quo, IGS bears the burden of proof and, with no record evidence, cannot support its argument. (Tr. VIII at 1387-90) Finally, Staff states that IGS's concerns regarding the consolidated billing pilot program are unfounded; as a pilot, the program's purpose is to evaluate how the program will function in practice, and adjustments will be made as needed.

{¶ 70} DP&L counters IGS's position that the Commission should alter DP&L's collateral requirements, eliminate DP&L's switching fee and interval data fee, and allocate costs to SSO customers (IGS Ex. 1017; IGS Ex. 1014). In support of this, DP&L first states that the Commission already rejected IGS's arguments in the distribution rate case, to which IGS was a party. *In re Dayton Power and Light Co.,* Case No. 15-1830-EL-AIR, Opinion and Order (Sept. 26, 2018) (*Distribution Rate Case Order*) at ¶ 42-43, 47. Further, DP&L avers that the fact that RESA signed the Amended Stipulation and remains a signatory party shows that it was a negotiated agreement which includes reasonable fees. Next, DP&L argues that the collateral requirements should remain in place because DP&L's tariff treats privately-held and public companies the same, meaning public companies are less risky, and because IGS presented no supporting calculations detailing the risk DP&L would face should IGS default (Tr. VIII at 1478-81, 1474).

{¶ 71} DP&L states that the Commission should not allocate $12 million of additional costs to SSO customers, as IGS witness White suggested, for four reasons (IGS Ex. 1014). First, DP&L states that IGS failed to submit evidence to support the $12 million figure and how it was calculated. Second, DP&L argues that the SSO is a distribution company function, and that all customers benefit from the SSO whether they shop or not (Tr. VIII at 1404; Tr. IX at 1574). Third, DP&L states that if the Commission were to make an allocation of SSO costs to SSO customers, then it should also provide for allocation costs that DP&L incurs to support shopping to those customers who shop. Fourth, DP&L points out that no DP&L customers have raised the issue, and that OCC opposes it (OCC Ex. 1000). Further, DP&L argues that IGS's suggestion is an attempt to inflate the cost of the SSO so that more customers would switch.

{¶ 72} OCC also states that the Commission should reject IGS's proposal to establish a rider mechanism to unbundle DP&L's SSO-related costs into two charges (IGS Ex. 1014 at 3). OCC maintains that unbundling the costs associated with SSO rates by creating two new riders would make the Amended Stipulation worse and harm customers (OCC Ex. 1000 at 5). OCC rebuts IGS's proposal by pointing out that IGS is the sole party supporting them, while six parties filed responses against IGS's effort to rewrite the Commission's Opinion and Order in this matter. According to OCC, the lack of support confirms OCC's recommendations in this case, and IGS's proposals should be rejected. OCC argues that the unbundling proposal harms customers and is not in the public interest, as all customers, whether shopping or not, receive benefits from the existence of DP&L's SSO (OCC Ex. 1000 at 11-12). Therefore, OCC argues, it is equitable and in the public interest that all customers share in the costs. OCC witness Willis testified that the net effect of the proposed riders is that millions of dollars per year would be shifted from marketer customers to DP&L's SSO customers (OCC Ex. 1000 at 11-12). Willis further testified that the competitively-bid SSO provides benefits to both marketer and DP&L customers, including DP&L's obligation to provide service to all customers in its service territory in the event of a supplier's default and DP&L customers' ability to receive competitively-bid service without having to engage in the process of selecting an alternate supplier (OCC Ex. 1000 at 12-13). OCC maintains that these are benefits available to all in customers in DP&L's service territory; however, if IGS's proposal were to be approved, the benefits would be available to shopping customers without their paying for it (OCC Ex. 1000 at 15-16). OCC notes that Willis's testimony that IGS's unbundling proposal harms customers, is not in the public interest, and violates important regulatory principles and practices was not addressed in IGS's brief either. In OCC's view, because this witness's testimony went unchallenged by IGS, the proposals put forth by IGS should be rejected.

{¶ 73} In response to IGS's statement that DP&L failed to introduce evidence supporting the reasonableness of the collateral requirements, historical usage fees, and switching fees that are included in DP&L's tariffs, DP&L states that IGS does not cite any provision of the Revised Code or Commissions rules that require DP&L to file cost support for the items at issue. Finally, DP&L asserts that IGS presents no evidence that the amount of collateral required of IGS is not commensurate with the risks DP&L would face in the event IGS defaults (Tr. VIII at 1474). Therefore, DP&L urges the Commission to reject IGS's proposed revisions to DP&L's collateral terms.

{¶ 74} Next, DP&L states that the Commission should reject IGS's arguments regarding the SCB pilot. DP&L avers that, because RESA signed the Amended Stipulation and because IGS is a member of RESA, IGS's claims that the pilot program has unreasonable terms and should be modified should be rejected. DP&L also states that IGS appears to be seeking the benefits of a competitive market by having a customer interface through the bill, but wants the protection of a regulated monopoly by not having to purchase receivables, thereby subsidizing the costs of the retail market on the shoulders of SSO customers.

{¶ 75} DP&L also urges the Commission to reject IGS's arguments relating to allocating costs to the SSO. In support of its position, DP&L states that IGS has no evidence in this case as to the amounts that it claims should be allocated to the SSO. DP&L further states that SSO service is a distribution company function, so it is reasonable that associated costs be recovered from distribution customers. If such an allocation were to be made, DP&L suggests that the costs it incurs to support shopping should be allocated to shopping customers, not SSO customers. Lastly, DP&L points out that no customers have raised this issue; IGS is simply trying to raise the cost of the SSO to induce customers to switch.

{¶ 76} In its reply brief, RESA responded to two claims made by DP&L. First, although DP&L stated in its initial brief that the SSO is a distribution function and that SSO costs should be recovered through distribution rates, RESA states that DP&L agreed in the Amended Stipulation that there would be an evaluation of costs contained in distribution rates that may be necessary to provide SSO service in DP&L's filed distribution rate case. RESA contends that DP&L's current claim that the costs of supporting the SSO should be recovered through distribution rates is contrary to DP&L's agreement in the Amended Stipulation. As a party to the negotiation of this particular provision of the Amended Stipulation, RESA argues that DP&L should not be allowed to present a contrary argument. Therefore, RESA requests that the Commission disregard DP&L's argument on this issue.

{¶ 77} As a separate matter, RESA refers to DP&L's claim in its initial brief that "[i]f the Commission were to make an allocation of SSO costs to SSO customers, then it should also allocate costs that DP&L incurs to support shopping customers to shopping customers." RESA states that neither RESA nor DP&L agreed in the Amended Stipulation to such a review. Accordingly, RESA requests that the Commission also disregard DP&L's claim, as it appears to diminish DP&L's other commitments under the Amended Stipulation.

{¶ 78} In its reply brief, IGS first argues that the Commission should reject DP&L's proposals regarding collateral requirements and interval data and switching fees. IGS states that DP&L's proposed collateral requirements are unreasonable, countering DP&L's claim that the Commission has already rejected IGS's argument. According to IGS, it is irrelevant that the Commission addressed collateral requirements in the distribution rate case, because the distribution rate case is a separate proceeding from this case. IGS proceeds to counter DP&L's position that the collateral requirements do not treat privately held companies differently by alleging that DP&L's proposed changes would disproportionately impact companies with strong balance sheets, as those companies are less likely to obtain a credit rating due to lacking a need to borrow long-term debt. Separately, IGS responds to DP&L's criticism of IGS's failure to provide supporting calculations of the risk to DP&L if IGS defaulted by stating that DP&L has wrongfully assumed that its collateral requirements are reasonable and that the burden should not be on IGS to refute DP&L's proposal. Responding to Staff's argument that IGS should be required to post collateral, IGS states that it is not proposing to eliminate the requirement to post collateral, but is contesting DP&L's proposed modification to the collateral calculation.

{¶ 79} Second, IGS responds to DP&L's position that its proposed interval data fees and switching fees are reasonable by asserting that the Commission failed to consider relevant evidence in the distribution rate case in which the fees were authorized. Specifically, IGS witness White testified that the level of the interval data fee is harming CRES providers and their customers (Tr. VII at 1324-26). IGS argues that as a result of this high fee, CRES providers may forego obtaining a customer's actual interval usage before offering a product to a customer, which leads to the customer being less likely to receive accurate pricing (Tr. VII at 1324-26). As to the switching fee, IGS states that the Commission must independently evaluate the switching fee in this case since IGS withdrew from and has been granted an opportunity to contest the Amended Stipulation. IGS avers that the *Distribution Rate Case Order* is of no aid to DP&L in supporting the switching fee. Further, IGS argues that the changes to the supplier tariff proposed by DP&L should not be evaluated in a vacuum. According to IGS, because DP&L proposed changes to the supplier tariff, it opened the door to changes to other provisions in the tariff, including the switching fee; requiring IGS to file an independent claim would duplicate litigation and waste resources. Finally, IGS rejects argument that the fees should be considered market-based. In support of its position, IGS states that DP&L is the only entity that can provide these non-competitive services, so they are not subject to market-based recovery. Further, IGS argues that RESA's signature on the Amended Stipulation is not a substitute for record evidence, and that RESA actually challenged the interval data fee and switching fee since the Amended Stipulation was signed. *Distribution Rate Case Order* at 13. Accordingly, IGS urges the Commission to modify or eliminate the switching and interval data fees.

{¶ 80} In response to Staff's claim that the SCB pilot should be allowed to develop in order to find out how the program works in practice, IGS avers that there are certain changes that should be made now to ensure the pilot's success. Specifically, IGS argues that requiring CRES providers to purchase DP&L's receivables at 100 percent with no discount would be a one-sided deal, as DP&L does not purchase CRES providers' receivables. Further, IGS points out that CRES providers have no rider mechanism to recover uncollectible expenses, where utilities are able to recover uncollectible expenses through such a rider. According to IGS, this would result in requiring CRES providers to increase their generation rates to subsidize DP&L's distribution service. Further, IGS alleges that the pilot will increase costs for CRES providers while the Commission has yet to allocate to SSO service all the costs to support that service, leading to a scenario in which CRES providers might decline to participate in the program, causing the pilot to fail. According to IGS, its proposed changes can provide CRES providers with sufficient confidence to move forward with the pilot.

{¶ 81} Next, IGS responds to DP&L's claim that the Commission should not authorize a rider to reallocate SSO-related costs embedded in distribution rates. Responding to DP&L's claim that IGS recommended that the Commission allocate $12 million in costs in this case, IGS clarifies that it recommended that the Commission create a rider to effectuate the terms of the Amended Stipulation under review because the Commission identified the need to create such a rider. *Distribution Rate Case Order* at 10-12. Regarding the actual evaluation and quantification of costs, IGS avers that that has already occurred in a separate case, and there is no need to relitigate in this proceeding. In response to DP&L's position that if distribution costs that support the SSO are allocated to the SSO, then such costs that support choice should also be allocated to choice customers, IGS responds that the terms of the Amended Stipulation provide for an evaluation and reallocation of costs to the SSO only (Joint Ex. 1 at 9). IGS proceeds to state that Ohio law provides the Commission no authority to regulate or provide compensation to support competitive retail electric service through distribution rates, meaning the Commission lacks authority to authorize the recovery of costs related to competitive retail electric services in a distribution rate case.

{¶ 82} Even if the Commission were able to authorize such recovery, IGS argues, there is no good reason to require shopping customers to subsidize the SSO, as Ohio law and policy favors competition and prohibits the recovery of competitive retail electric service costs through non-competitive service rate structures. R.C. 4928.02; R.C. 4928.03;

R.C. 4928.17. Finally, responding to DP&L's statement that no customers have raised the issue and OCC opposes it, IGS states that it is one of the largest CRES providers in DP&L's service territory, and has the right to take positions to eliminate subsidies in an effort to level the playing field.

{¶ 83} In response to IGS's claim that DP&L's collateral requirements have no evidentiary support and place an undue burden on financially stable privately held companies, Staff points at that IGS shows the very problem: without a credit rating, IGS is asking DP&L to trust that IGS has a strong balance sheet with no independent verification. Regarding IGS's objection to DP&L's utilization of historic usage and switching fees, Staff states that such a complaint is beyond the scope of this proceeding, and that IGS bears the burden of showing that a change is warranted, as the charges were established in a former proceeding. As to IGS's argument that CRES providers should be required to purchase receivables at a discount in the pilot, Staff reasserts its point that the Commission has reviewed the pilot extensively and declined to require that change. Opinion and Order at 35-37. In response to IGS's request that the Commission establish an unbundling rider, Staff states that it is not convinced that there are any significant costs embedded in distribution rates.

{¶ 84} The Commission finds that IGS is seeking to relitigate claims which were fully litigated and decided in DP&L's most recent distribution rate case. *Distribution Rate Case Order*. The Amended Stipulation contains a footnote that states: "[f]or avoidance of doubt, resolution of DP&L's current distribution rate case in Case No. 15-1830-EL-AIR may result in allocation of costs to the SSO rate and therefore IGS and RESA are not prohibited from advocating for unbundling or changes to SSO rate or supplier tariffs in that proceeding * * *" (Jt. Ex. 1 at 38, footnote 10). Based upon this footnote, IGS and RESA raised objections in the distribution rate case regarding DP&L's collateral requirements, DP&L's switching and interval data fees, and the reallocation of distribution costs to SSO customers. With respect to these issues, IGS and RESA had the opportunity to file an objection to the Staff Report, present witnesses, cross-examine opposing witnesses, and file post-hearing and reply briefs.

Because of the language of the footnote, all of these issues were determined to be properly before the Commission and all parties, including IGS and RESA, were afforded an opportunity to fully litigate them in the distribution rate case. *Distribution Rate Case Order* at ¶ 36. In the *Distribution Rate Case Order*, the Commission addressed IGS's and RESA's objections regarding: DP&L's collateral requirement (*Distribution Rate Case Order* at ¶¶ 44-47); DP&L's switching and interval data fees (*Distribution Rate Case Order* at ¶¶ 39-43); and the reallocation of distribution costs to SSO customers (*Distribution Rate Case Order* at ¶¶ 17-31).

{¶ 85} IGS chose to, and was able to, fully litigate these claims in the distribution rate case, and the Commission has rendered a decision on each issue. *Distribution Rate Case Order* at ¶¶47, 42-43, 29-30. Having failed to obtain the relief it sought in the distribution rate case, IGS cannot seek the same relief in this case. The issues regarding DP&L's collateral requirements, DP&L's switching and interval data fees, and the reallocation of distribution costs to SSO customers were adjudicated in the distribution rate case and cannot be relitigated here.

{¶ 86} With respect to whether the SCB program should be modified so that CRES providers purchase receivables at a discount, the Commission finds that that issue is premature at this point. The Amended Stipulation provides for the development of a two-year pilot program for supplier consolidated billing. The Amended Stipulation specifically provides that receivables should be purchased at 100 percent (Jt. Ex. 1 at 22). Until the pilot program can provide actual data regarding the collection rate for EDU receivables under supplier consolidated billing, we are not persuaded that the agreement of the signatory parties, which includes RESA on behalf of marketers, should be disturbed. We may revisit this issue once the SCB program is up and running and actual data is available.

{¶ 87} Therefore, the Commission finds that the Amended Stipulation, as modified by the Commission, benefits ratepayers and is in the public interest.

3. AS MODIFIED BY THE COMMISSION, THE AMENDED STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE.

{¶ 88} DP&L argues that the third prong of the Commission's test for stipulations, that the Amended Stipulation does not violate any important regulatory principle, is also satisfied. OEG agrees, stating that the Amended Stipulation advances important policies and principles, such as ensuring the state's effectiveness in the global economy, ensuring adequate and reliable service, protecting at-risk populations, promoting innovation in technology for infrastructure, and facilitating retail shopping.

a. Applicability of the Ohio Edison Decision

{¶ 89} The Environmental Advocates, IGS, and OCC assert that the Supreme Court of Ohio's decision in *Ohio Edison* clearly renders DP&L's DMR unlawful and unreasonable and urge the Commission to remove the DMR from the ESP and cease collection of DMR funds from customers. In short, these parties submit that DP&L's DMR is essentially identical in form and function to the FirstEnergy DMR and therefore suffers the same fatal flaws that necessitate its demise. IGS adds that the DMR fails under *Ohio Edison* for two additional reasons: because it does not relate to distribution service and because it does not reflect sound reasoning under any reasonable interpretation of R.C. 4928.143(B)(2)(h). Additionally, OCC argues in the alternative, stating that if the Commission determines that DP&L may continue to collect the DMR from customers, then it should make the rider subject to refund.

{¶ 90} OCC, IGS, and the Environmental Advocates primarily aver that DP&L's DMR is unlawful and unreasonable for the same two reasons identified by the Supreme Court of Ohio in *Ohio Edison* – the DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of DMR revenue are not sufficient to protect ratepayers. *Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, at ¶ 14-19, 20-29.

{¶ 91} As to the first reason, these parties argue that, with *Ohio Edison*, the Supreme Court of Ohio has made it clear that a rider structured like the DMR is unreasonable and unlawful under (B)(2)(h) because it fails to act as an incentive. In support, the parties invoke the same language used by the *Ohio Edison* Court to assert that, like the FirstEnergy DMR, "[t]he critical problem [here] is that [DP&L] is not *required* to make any investments to modernize the distribution grid in exchange for the DMR revenues." (Emphasis sic.) *Ohio Edison* at ¶ 18. Or, as OCC stresses, the DMR funds are not "conditioned upon completion" of any actual grid modernization. *Ohio Edison* at ¶ 16. These parties submit that there is no real nexus between the DMR funds and grid modernization—the amount authorized is not tied to any level of investment; in fact, they argue, there is nothing in the Amended Stipulation or the Opinion and Order requiring DP&L to spend any of the DMR revenues directly on grid modernization. At best, the parties state that the DMR is intended to position DP&L to invest in grid modernization or to put DP&L on the path toward such modernization by improving access to capital markets, but no level of actual investment is required. Instead, all that is required is that DP&L file a grid modernization plan, which is noted to be the same commitment found lacking for FirstEnergy.

{¶ 92} As to the second reason, IGS, OCC and the Environmental Advocates all assert that DP&L's DMR, like the FirstEnergy DMR struck down in *Ohio Edison*, suffers from inadequate customer protections. These parties observe that the *Ohio Edison* Court concluded that the conditions placed on FirstEnergy's recovery of DMR revenues were not sufficient to protect ratepayers, as "there [were] no discernable consequences or repercussions if FirstEnergy fail[ed] to comply with the conditions imposed for receiving DMR funds." *Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, at ¶ 22. Additionally, the *Ohio Edison* Court found that the Commission's audit review of the DMR expenditures did not save the rider and that the PowerForward initiative delayed implementation of any grid modernization plan such that requiring the plan was rendered meaningless. *Ohio Edison* at ¶ 24-29. The Advocates, IGS, and OCC each argue that DP&L's DMR suffers from the same inadequacies. For example, the parties note that the DMR funds, once collected, are not subject to refund; thus, there is no discernable consequence if DP&L fails to use the funds as intended. Additionally, the parties explain that the audit process envisioned for DP&L's DMR is identical to the one found inadequate in *Ohio Edison*—any effective review of or challenge to the use of the DMR revenues does not occur "until well after the DMR funds have been recovered and spent," leaving it unclear what remedy would be available should misuse of funds be found. *Ohio Edison* at ¶26. Finally, these parties note that, just as in *Ohio Edison*, the Commission's PowerForward initiative delayed the presentation—let alone approval—of any grid modernization plan so that it will not occur until the majority, if not entirety, of the rider funds have already been collected.

{¶ 93} IGS proffers two additional reasons that DP&L's DMR fails when analyzed under *Ohio Edison*, asserting that the DMR does not relate to distribution service and that it does not reflect sound reasoning under any reasonable interpretation of R.C. 4928.143(B)(2)(h). As to the former, IGS argues that, although the *Ohio Edison* Court declined to address the issue, it is clear that nothing about the DMR relates to distribution service. Instead, the DMR simply provides revenues to DP&L to pay down debt at DP&L and DPL Inc.; no service—whether generation, transmission, or distribution service—is actually provided to customers. Thus, IGS asserts that there is an insufficient connection to distribution service for the rider to even qualify for consideration under R.C. 4928.143(B)(2)(h). As to the latter, IGS states that the *Ohio Edison* Court ultimately held that the DMR was not the product of sound decision making and reasoning. Applying that concern here, IGS claims that DP&L's DMR also fails because it fails to align DP&L's interests with those of its customers and because the DMR would provide unjust and unreasonable rates above the zone of reasonableness threshold espoused by the Federal Energy Regulatory Commission.

{¶ 94} Unsurprisingly, DP&L takes a substantially different stance on the viability of the DMR after *Ohio Edison*. To begin, DP&L lists five essential ways in which it believes its DMR is materially different than the one at issue in *Ohio Edison*: (1) DP&L is "required" to implement grid modernization; (2) there are "restrictions" on DP&L's use of the DMR funds;

(3) DP&L may be subject to "penalty;" (4) DP&L is required to pursue specific distribution-modernization projects; and (5) DP&L's DMR is the result of a stipulation, which is entitled to substantial weight. In addition, DP&L asserts four reasons that its DMR is lawful under alternative statutory provisions.

{¶ 95} Initially, DP&L notes that the court's plurality embraced the following definition of the term incentive: "An incentive generally serves to induce someone to take some action that otherwise would not be taken but for the incentive." *Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, at ¶ 16. DP&L asserts that, given this definition, the DMR is lawful because it will "induce" DP&L to take action to implement grid modernization, an action that DP&L "would not have taken but for the [DMR]." *Id.* Under this general umbrella argument, DP&L argues the various different ways it would have the Commission distinguish its DMR from FirstEnergy's.

{¶ 96} First, DP&L disagrees with OCC, IGS, and the Environmental Advocates' assertion that DP&L is not required to make investments in exchange for DMR revenues. DP&L asserts that the Commission has rejected that argument, stating: "Once the modernization plan is approved by and made the order of the Commission, DP&L will be required to implement the modernization plan." Third Entry on Rehearing (Sept. 19, 2018) at ¶ 22. Thus, DP&L asserts that the DMR is materially different that FirstEnergy's in that it does not suffer the "critical problem" of not requiring investments to modernize the distribution grid. *Ohio Edison* at ¶ 18.

{¶ 97} Second, DP&L asserts that, in contrast to FirstEnergy's circumstances, the Amended Stipulation imposes specific instructions on what DP&L can do with DMR funds: (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" (Jt. Ex. 1 at 5). Thus, DP&L contends that the DMR is materially different because there are "real requirements, restrictions, or conditions imposed * * * for the use of DMR funds." *Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, at ¶ 19.

{¶ 98} Third, whereas the *Ohio Edison* Court faulted the FirstEnergy DMR because there was no "penalty * * * if the DMR funds did not serve the intended purpose," DP&L asserts that it is subject to penalty. *Ohio Edison* at ¶ 18. Specifically, DP&L contends that because it is "required" to implement grid modernization, it is subject to statutory penalties for failure to comply with Commission order under R.C. 4905.54, R.C. 4905.60, and R.C. 4905.61. DP&L hypothesizes that FirstEnergy was not subject to these same penalties because it was not "required" to implement grid modernization; thus, there is a difference.

{¶ 99} DP&L continues to explain that the DMR is an incentive because without it, DP&L not only would—but could not—implement grid modernization. DP&L avows that the evidence demonstrates that DP&L could not maintain its financial integrity and provide safe and reliable service without the DMR (Co. Ex. 1A at 17-18; Co. Ex. 2A at 32-35, 58-59, 66; Tr. I at 106-107). Thus, DP&L claims there is ample evidence to support the Commission's conclusion that the DMR acts as an incentive under R.C. 4928.143(B)(2)(h). Furthermore, unlike FirstEnergy, DP&L argues it is required to pursue "specific distribution-modernization projects." *Ohio Edison* at ¶ 18. Here, DP&L points to language within the Amended Stipulation that requires DP&L to file a grid modernization plan including specific projects (Jt. Ex. 1 at 7). DP&L directs the Commission's attention to the application it filed on December 21, 2018 in Case No. 18-1875-EL-GRD that contains and seeks approval to implement its grid modernization plan as further indicia of the DMR's requirement specific distribution-modernization projects.

{¶ 100} In its final attempt to distinguish its DMR from the rider under scrutiny in *Ohio Edison*, DP&L reminds the Commission that the DMR was negotiated as part of a broad stipulation as opposed to being Commission imposed. This is important, states DP&L, because the Supreme Court of Ohio has held that the terms of a stipulation are to be "accorded substantial weight" by the Commission. *Consumers Counsel v. Pub. Util Comm.*, 64 Ohio St.3d 123,125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util Comm.,* 55 Ohio St.2d 155,157, 378 N.E.2d 480 (1978).

{¶ 101} DP&L does not rest on its arguments differentiating the utilities' riders. Instead, DP&L asserts four additional ground under which the Commission should approve the DMR. First, and directly opposite IGS's contention that the DMR is utterly unrelated to distribution service, DP&L contends that the DMR is a lawful distribution charge under R.C. 4928.143(B)(2)(h). Second, DP&L claims that the DMR is a lawful example of single issue ratemaking under R.C. 4928.143(B)(2)(h) with the "single issue" being the maintenance of DP&L's financial integrity so that it can make necessary investments in the distribution system. Third, DP&L says that the DMR is a lawful stability charge under R.C. 4928.143(B)(2)(d). And, fourth, DP&L alleges that the DMR is a lawful economic development charge under R.C. 4928.143(B)(2)(i).

{¶ 102} The Commission notes that DP&L urges the Commission to distinguish the DMR approved in this case from the DMR approved by the Commission in the *FirstEnergy ESP IV Case,* which was reversed by the *Ohio Edison* decision, notwithstanding the fact that the Commission approved both DMRs on substantially similar grounds. In the alternative, DP&L requests that the Commission to change course at this late date and approve the DMR on completely different statutory provisions than those relied upon in the Opinion and Order in this case. However, DP&L's arguments miss the forest for the trees.

{¶ 103} Since the enactment of Am. Sub. S.B. 221 in 2008, which established the electric security plan statutory framework, the Supreme Court of Ohio has ruled on a line of cases on nonbypassable riders in electric security plans established to address financial risk or the financial stability of an EDU in this state. In each of these cases, the Commission relied upon various provisions in R.C. 4928.143(B)(2) as authority for these nonbypassable financial stability riders. In each of these cases, the Supreme Court reversed the Commission.

{¶ 104} In the first of this line of cases, the Commission established a nonbypassable provider-of-last-resort (POLR) charge in AEP Ohio's first electric security plan case, based upon the costs incurred by AEP Ohio as the default service provider. The Supreme Court overturned this POLR charge, holding that the Commission's decision was against the manifest weight of the evidence. *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 29.

{¶ 105} In AEP-Ohio's second ESP case, the Commission authorized a nonbypassable rate stability rider (RSR), which was intended to provide for the recovery of certain deferred capacity costs and to provide AEP Ohio with sufficient revenue to maintain its financial integrity and attract capital during the ESP. The Commission determined that the RSR was authorized by R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.,* 147 Ohio St.3d at 439, 2016-Ohio-1608 at ¶¶ 6-8. The Supreme Court reversed the Commission, finding that the Commission erred when it determined that AEP-Ohio was not recovering transition revenue or its equivalent through the RSR. *Columbus S. Power Co.,* 2016-Ohio 1608 at ¶ 38. However, the Court also rejected challenges to the Commission's determination that the RSR was authorized by R.C. 4928.143(B)(2)(d). *Columbus S. Power Co.,* 2016-Ohio-1608 at ¶¶ 43-51.

{¶ 106} Subsequently, the Supreme Court reversed the Commission's approval of a service stability rider (SSR) in DP&L's second ESP. *In re Application of Dayton Power & Light Co.,* 147 Ohio St.3d 166, 2016-Ohio-3490. The SSR was a nonbypassable rider which was established to provide stable revenue to DP&L for the purpose of maintaining its financial integrity. Similar to AEP-Ohio's RSR, the Commission had determined that the SSR was authorized pursuant to R.C. 4928.143(B)(2)(d). *DP&L ESP II Case,* Opinion and Order (Sep. 4, 2013) at 21-22. The Supreme Court, however, explicitly "reversed [the Commission's *DP&L ESP II Case* decision] on the authority of *In re Application of Columbus S. Power Co.,* 147 Ohio St.3d at 439, 2016-Ohio-1608, 67 N.E.3d 734." *Columbus S. Power Co.,* 2016-Ohio-3490 at ¶ 1.

{¶ 107} Further, in *Ohio Edison*, the Supreme Court reversed the Commission's decision to establish a distribution modernization rider (DMR), which was fundamentally similar to DP&L's DMR. In the *FirstEnergy ESP IV Case*, the Commission had established the nonbypassable DMR pursuant to R.C. 4928.143(B)(2)(h) in order to provide FirstEnergy with an incentive to modernization its distribution systems. *Ohio Edison* at ¶ 1. The Court held that the Commission erred in establishing the DMR because the DMR did not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of DMR revenue were not sufficient to protect ratepayers.

{¶ 108} The line of cases from *Columbus S. Power Co.,* 2011-Ohio-1788, to *Ohio Edison* demonstrates that nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans. Any modifications to the DMR proposed by DP&L would do nothing to address this fundamental point.

{¶ 109} It should be noted that, in contrast to this line of decisions, the Court has consistently upheld provisions of ESPs which provide for the recovery of identified, specific costs, even where the cost recovery mechanism was nonbypassable. *Columbus S. Power Co.,* 2011-Ohio-1788 at ¶¶ 58-63 (affirming approval of enhanced vegetation management and smart grid programs); *In re Application of Ohio Power Co.,* 2018-Ohio-4698 (affirming approval of cost recovery under power purchase agreement rider). *Ohio Edison Co.,* 2019-Ohio-2401 at ¶ 45-46 (affirming approval of delivery capital recovery rider). DP&L's DMR, however, does not provide for the recovery of any identified, specific costs.

{¶ 110} Accordingly, in light of the Supreme Court's decision in *Ohio Edison*, the Commission finds that the DMR in DP&L's ESP is unlawful and violates important regulatory practices and principles. Therefore, we will modify the Amended Stipulation to eliminate the provisions regarding the DMR. We note that this includes provisions related to tax-sharing payments and certain economic development incentives that are tied to the term or expiration of the DMR, including Amended Stipulation section II.1.b. and Amended

Stipulation section IV (Jt. Ex. 1 at 3, 9). DP&L is directed to file revised final tariffs within seven days providing for the removal of the DMR. These revised final tariffs will be effective immediately, subject to further review by the Commission.

b. ESP v. MRO

{¶ 111} DP&L avers that the ESP is more favorable in the aggregate when compared to an MRO for three reasons. First, DP&L states that, when considering quantifiable differences in price under either an ESP or MRO, the SSO customers would pay the same under either (Staff Ex. 2 at 5; DP&L Ex. 2B at 11; OCC Ex. 12A at 42). Second, DP&L argues that the Amended Stipulation includes numerous benefits funded by shareholders which are not required by statute when calculating an MRO (Joint Ex. 1 at 10-12, 27, 33, 36). According to DP&L, this amounts to between $9 and $11.5 million in quantifiable benefits provided by the Amended Stipulation that would not be provided by an MRO (Staff Ex. 2 at 5-6; DP&L Ex. 2B at 15-17). Third, DP&L states that the Amended Stipulation contains significant non-quantifiable benefits that would not be required under an MRO, including: accelerated implementation of grid modernization; commitments by AES to not collect dividends from DPL Inc. during the ESP term; the continuation of DP&L being subject to the significantly excessive earnings test; future opportunity to file an ESP or MRO; transfer of DP&L's generation assets to an affiliate; a sale process of generation assets with proceeds to be used to make discretionary debt repayments; numerous benefits to customers and signatory parties, including DP&L headquarters remaining in the City of Dayton; and competitive market enhancements such as supplier consolidated billing and non-commodity services (DP&L Ex. 2B at 64-70). DP&L witness Malinak testified that the inability of DP&L to provide safe and reliable service under an MRO would impose significant non-quantifiable costs upon DP&L customers, which would greatly exceed any quantifiable benefits under an MRO absent a DMR (DP&L Ex. 2B at 18-19).

{¶ 112} IGS proceeds to argue that the ESP proposed in this case is not more favorable than the outcome that would occur under an MRO via R.C. 4928.142. Specifically, IGS highlights that Ohio law requires the outcome of an ESP, including its pricing and other terms and conditions, to be more favorable than the result that would otherwise apply under the market rate authorized under an MRO. R.C. 4928.141. IGS states that the ESP proposed in this case is not more favorable than the outcome that would occur under R.C. 4928.142. While an MRO permits some price adjustments, no price adjustments are available to offset the DMR under an MRO, as the DMR is a nonbypassable distribution charge. IGS also points out that the MRO adjustment relates to the legacy portion of the SSO price provided by the EDU, and since DP&L is not supplying the SSO with its own generation, the adjustment would not be available (IGS Ex. 1015 at 34).

{¶ 113} Further, IGS argues that the DMR is not necessary to permit DP&L to address an emergency threatening DP&L's financial integrity, as its distribution and transmission businesses are stable (IGS Ex. 1015 at 34). Finally, referring to R.C. 4928.142(D)(4), IGS witness Hess states that "there can be no claim that resulting SSO revenues are so inadequate to result in a taking of property, given that the cost of providing the SSO revenue is treated as a purchase power expense for DP&L which is fully compensated" (IGS Ex. 1015 at 34). In other words, IGS argues that the DMR cannot be authorized in an MRO, which can only authorize a bypassable SSO. Hess further testified that including the DMR revenues in the rate of return base would result in a rate of return base of 20.07 percent, as opposed to DP&L's total authorized rate of return of 7.27 percent (IGS Ex. 1015 at 27). For these reasons, IGS avers that the DMR would result in the ESP flunking the MRO price test.

{¶ 114} In support of its position that the Amended Stipulation passes the ESP v. MRO test, DP&L claims that IGS lacks standing to challenge the DMR. However, DP&L proceeds to state that the DMR would be lawful under an MRO, since R.C. 4928.142(D)(4) allows the Commission to adjust the SSO price "by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity."

{¶ 115} In responding to DP&L's suggestion that the ESP is less expensive than an MRO, IGS presents three separate counterarguments. As its first argument, IGS simply states that the DMR is a cost. IGS argues that the precedent relied upon by DP&L in which the Commission authorized an emergency rate case presents different facts, and that contrary to a financial emergency, DP&L is financially stable and able to pay its bills. *See In re Cleveland Elec. Illum. Co.,* Case No. 88-170-EL-AIR, et al., Opinion and Order at 6 (Aug. 23, 1988). IGS states that the lack of cash flows or capital to fund grid modernization does not provide a basis to authorize an emergency rate increase under R.C. 4906.16. Second, IGS proceeds to counter DP&L's position that other benefits cause the ESP to pass the MRO test. Specifically, IGS states that the $9-$11.5 million in such benefits claimed by DP&L cannot wash out more than $500 million in costs, and it is not a benefit that shareholder dollars are being used. IGS counters DP&L's claim that no witness disputed that a distribution rate case could authorize the riders identified in the Amended Stipulation, as IGS witness Hess addressed the matter at length, concluding that neither the DMR not the RR could be authorized in a distribution rate case or an MRO (IGS Ex. 1015). Third, IGS responds to DP&L's reference to non-quantifiable benefits (IGS Ex. 1015 at 34). Overall, IGS characterizes the eight benefits cited by DP&L as illusory, meaningless, and at times a cost rather than a benefit. Regarding grid modernization, IGS posits that DP&L has failed to demonstrate that the ESP is a prerequisite to grid modernization. IGS argues that AES's commitment to not collect a dividend from DPL Inc. is meaningless, as DPL Inc. has enough trouble paying its own bills, thus, it is highly unlikely that it could pay a dividend to AES. IGS goes further to state that there is no evidence to suggest that AES tax forgiveness will ever amount to a tangible benefit. Responding to DP&L's claim that applying the SEET test to DP&L is another benefit, IGS argues that, since the Amended Stipulation proposes to exclude the DMR revenues from the test, the SEET test is of no protection to customers. IGS refers to IGS witness Hess's testimony, which communicated that the rate of return permitted by the Amended Stipulation would be in excess of 20%, which is higher than what the Commission has already determined constitutes significantly excessive earnings (IGS Ex. 1015 at 23-24).

{¶ 116} The Commission notes that the issues raised by IGS relate to the impact of the DMR revenue upon the ESP v. MRO Test. In light of our decision above to modify the Amended Stipulation and eliminate the DMR, the arguments raised by IGS are moot. The record demonstrates that, under the ESP, the generation rates to be charged SSO customers will continue to be established through a competitive bidding process; therefore, generation rates in the ESP should be equivalent to the results which would be obtained under 4928.142 (Jt. Ex. 1 at 8-9; Staff Ex. 2 at 5). In addition, there are other qualitative benefits of the ESP. DP&L and DPL's parent, AES Corp., has committed to foregoing dividends from DPL during the ESP (Jt. Ex. 1 at 3; Co. Ex. 3 at 10, 19-19). DP&L has transferred its generation assets to an affiliate and, for certain assets, completed a sale process; the proceeds of those sales were used for debt repayments (Co. Ex. 3 at 19; Jt. Ex. 1 at 3-4).

{¶ 117} Accordingly, we will affirm our decision that, subject to the modifications contained herein, the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO pursuant to R.C. 4928.142.

c. Distribution Modernization Rider

{¶ 118} In addition to its previous arguments against the DMR, IGS asserts that the rider violates a century of ratemaking policy and procedures. IGS submits that 65-70 percent of the DMR is intended to pay off DPL Inc.'s debts, which amounts to transferring the risk of DPL Inc.'s unregulated business activities away from its shareholders and onto DP&L's customers in direct conflict with Ohio law and policy. IGS states that because DPL Inc. is not regulated by the Commission, it would be unlawful to authorize the DMR for DPL Inc.'s benefit, as both an ESP and MRO relate to services provided by an EDU (Tr. VII at 1162). Further, IGS argues that the DMR violates a core tenet of Ohio's restructuring laws, i.e., EDUs may not use non-competitive service functions to convey a competitive advantage to unregulated and competitive business units within the same holding company structure (IGS Ex. 1015 at 17-20). In IGS's view, the DMR is an attempt by a regulated monopoly to manipulate the regulatory process to create wealth without providing anything in return, which could destabilize competitive conditions in the market place and tilt the playing field against nonsubsidized market participants.

{¶ 119} Continuing, IGS contends that DP&L is already being compensated for its debt expenses through cost-based distribution and transmission rates and that the DMR provides additional compensation for those same costs (IGS Ex. 1015 at 29). IGS alleges that this amounts to an unlawful double recovery of debt expenses that is inconsistent with the bedrock regulatory practices and principles (IGS Ex. 1015 at 29). IGS reiterates that with respect to DPL Inc., the DMR would provide compensation to support an unregulated entity, which further violates regulatory practices and principles.

{¶ 120} Finally, IGS argues that nothing in the DMR relates to distribution service as referred to by R.C. 4928.143(B)(2)(h). While DP&L has alleged that the DMR will position DP&L to make grid modernization investments in the future, IGS avers that this is insufficient, as the DMR is simply being used to provide revenue to DP&L to pay down debt at DP&L and DPL Inc. (DP&L Ex. 1 and 2).

{¶ 121} In its reply brief, DP&L responds to IGS's various arguments that the DMR is unlawful and contrary to regulatory principles. First, DP&L refers to R.C. 4928.143(B)(2)(h), which allows for the inclusion of costs related to distribution in an ESP. DP&L emphasizes that the testimony of Staff witness Donlon and DP&L witness Jackson shows that the primary purpose of the DMR was to allow the company to be able to invest in the distribution grid (Tr. V at 875-76; DP&L Ex. 2B at 66). Thus, DP&L argues that the DMR is a distribution charge that incentivizes and makes grid modernization possible.

{¶ 122} Alternatively, DP&L argues that the DMR is properly included in the ESP under R.C. 4928.143(B)(2)(d) or R.C. 4928.143(B)(2)(i). As to the former, DP&L submits that the DMR is a lawful charge relating to limitations on customer shopping or bypassability that has the effect of stabilizing or providing certainty regarding electric service. Accordingly, DP&L posits that R.C. 4928.143(B)(2)(d) establishes a lawful route for the DMR. As to the latter, DP&L asserts that R.C. 4928.143(B)(2)(i) allows an ESP to include provisions under which an EDU may implement economic development and job retention programs. DP&L supports this argument with testimony from Mr. Malinak, in which he explains that residential, commercial, industrial, and governmental customers in West Central Ohio would benefit from the development and new jobs caused by grid modernization, and OCC witness Kahal, who concedes that the economy would be adversely affected if DP&L were unable to provide safe and reliable service (DP&L Ex. 2B at 64; Tr. IV at 708).

{¶ 123} DP&L also argues that the Commission should reject IGS's assertions that the DMR would unlawfully subsidize DPL Inc. because of the statutory authorization relied on by IGS—R.C. 4928.17 and R.C. 4928.02(H)—were enacted before R.C. 4928.143. Thus, under DP&L's reasoning, the "notwithstanding clause" of R.C. 4928.143 controls. In short, DP&L argues that the DMR is lawful and does not violated regulatory practices or principles because the Revised Code enables it and because IGS's position is refutable.

{¶ 124} The Commission finds that, in light of our decision above to modify the Amended Stipulation and eliminate the DMR, the arguments raised by IGS that the DMR violates important regulatory principles or practices are moot.

d. Reconciliation Rider

{¶ 125} IGS urges the Commission that in the event the Reconciliation Rider is made nonbypassable, that it must be considered a transition revenue recovery mechanism. IGS alleges that by its very nature, the Reconciliation Rider is designed to permit DP&L to recover above-market revenue otherwise not recoverable from customers (Tr. VI at 1042-43). In IGS's view, this runs afoul of R.C. 4928.38, allowing DP&L to recover above-market revenue that could not be collected without a rider. Anticipating DP&L's argument that the recovery is permissible under the "notwithstanding clause" of R.C. 4928.143(B), IGS argues that such an arrangement goes against the intent of the General Assembly. IGS explains that the General Assembly's specific directive in R.C. 4928.143(B)(2)(b) and (B)(2)(c) that a nonbypassable generation-related charge may be authorized under those two sections indicates a lack of authority to authorize a charge in any other circumstances. Accordingly, IGS concludes that the Reconciliation Rider should not be authorized as a nonbypassable charge.

{¶ 126} DP&L responds that the Reconciliation Rider is lawful. While IGS argues that the Reconciliation Rider is not a hedge, DP&L states that the Supreme Court of Ohio recently ruled that an identical OVEC rider for AEP is lawful. *In re Application of Ohio Power Co.,* 2018-Ohio-4698, ¶¶ 13-32. DP&L points out that IGS neglected to reference this decision and urges the Commission to reject its argument.

{¶ 127} OCC states that the proposal put forth by IGS fails the requirement that a stipulation must not violate any important regulatory practice of principle. Specifically, OCC witness Willis testified that the proposal would shift all Reconciliation Rider costs onto SSO customers, which violates the regulatory principle of cost causation, since marketer customers would be receiving the same benefit of the safety net service option as SSO customers without paying for it (OCC Ex. 1000 at 12). Further, Willis testified that as more customers shift away from default SSO service to marketer service to avoid the charge, the inequality between SSO customers and marketer customers would multiply quickly (OCC Ex. 1000 at 6-10). According to OCC, this result would be anti-competitive, anti-market, and discriminatory against SSO customers. Therefore, OCC argues that the Commission should deny IGS's proposal.

{¶ 128} OCC next states that IGS's proposal violates Ohio law. Specifically, OCC avers that IGS's proposal is at odds with R.C. 4905.22, which requires that every public utility furnish necessary and adequate service and facilities, and that all charges for any service be just and reasonable. In support of this position, OCC argues it is not just and reasonable to force only SSO customers to fund a subsidy of coal plants through the

Reconciliation Rider, while shopping customers get the full advantage of the default service at no cost.

{¶ 129} OCC also avers that IGS's unbundling proposal violates the important regulatory principle of cost causation. According to OCC, the proposal shifts certain costs onto SSO customers and away from shopping customers, and although marketer customers are receiving the same benefit of default service as a safety net, they are not paying for it; this would lead to DP&L's SSO easier to compete against for marketers. For these reasons, OCC urges the Commission to reject IGS's proposal to unbundle the alleged cost of the SSO.

{¶ 130} The Commission finds that the Supreme Court of Ohio has fully addressed the question of whether a rider authorizing an EDU to recovery OVEC-related costs (and to credit any net proceeds of the sales of OVEC generation) violates the prohibition against recovery of transition revenues. The Supreme Court held that R.C. 4928.143(B) allows an ESP to contain charges that are otherwise prohibited:

> We read the "notwithstanding" clause of R.C. 4928.143(B) as allowing an ESP to include items that R.C. Title 49 would otherwise prohibit. This provision expressly states that with certain limited exceptions, any contrary provision of R.C. Title 49 does not apply to an ESP. So even though R.C. 4928.38 bars transition revenue, the "notwithstanding" clause renders R.C. 4928.38 inapplicable if the revenues are recoverable as one of the nine types of provisions listed in R.C. 4928.143(B)(2).

Ohio Power, 2018-Ohio-4698, ¶ at 19.

{¶ 131} The Commission finds that the Reconciliation Rider is substantially identical to AEP Ohio's power purchase agreement rider addressed in *Ohio Power*, 2018-Ohio-4698. Moreover, the Commission has noted previously noted in this proceeding that the Reconciliation Rider is authorized pursuant to R.C. 4928.143(B)(2)(d). Third Entry on Rehearing at ¶ 66. Further, upon review of the record in this case, we affirm our determination that the Reconciliation Rider, like AEP Ohio's power purchase agreement rider, constitutes is a financial limitation on shopping authorized pursuant to R.C.

4928.143(B)(2)(d). Therefore, IGS's claim that the Reconciliation Rider improperly collects transition revenues, or their equivalent, must be rejected.

{¶ 132} Accordingly, the Commission finds that the Amended Stipulation, as modified by the Commission herein, does not violate any important regulatory principles or practices.

IV. ORDER

{¶ 133} It is, therefore,

{¶ 134} ORDERED, That the Amended Stipulation filed in this proceeding be further modified and approved by the Commission. It is, further,

{¶ 135} ORDERED, That DP&L file, in final form, two complete copies of revised final tariffs, consistent with this Supplemental Opinion and Order. DP&L shall file one copy in its TRF docket and one copy in this case docket. It is, further,

{¶ 136} ORDERED, That the revised final tariffs shall be effective upon filing, subject to final review by the Commission. It is, further,

{¶ 137} ORDERED, That DP&L shall notify all affected customers via a bill message or via a bill insert within 30 days of the effective date of the tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

{¶ 138} ORDERED, That a copy of this Supplemental Opinion and Order be served upon all parties of record.

COMMISSIONERS:
Approving:
Sam Randazzo, Chairman
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Lawrence K. Friedeman

GAP/PAS/hac