BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND INTERSTATE GAS SUPPLY, INC.

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I. INTRODUCTION AND SUMMARY

The Commission should reject the Applications for Rehearing filed by The Office of the Ohio Consumers' Counsel ("OCC") and Interstate Gas Supply ("IGS") for the following reasons:

First, The Dayton Power and Light Company ("DP&L") has exercised its statutory right to terminate this case. R.C. 4928.143(C)(2)(a). Further proceedings in this case violate DP&L's right to terminate it.

Second, the Commission should reject OCC's arguments that the Federal Power Act preempts the Reconciliation Rider for two reasons: (1) DP&L is no longer collecting the Reconciliation Rider, so the issue is moot; and (2) the Reconciliation Rider is not preempted by the Federal Power Act for various reasons, including that the rider is a retail rate.

Third, the Commission should reject OCC's argument that revenue from DP&L's Distribution Modernization Rider ("DMR") should be included in the significant excessive earnings test ("SEET") for two reasons: (1) the Supreme Court of Ohio has held that the issue is not ripe for review in an Electric Security Plan ("ESP") case, and should be resolved in a SEET case; and (2) in any event, the Commission reasonably held that the DMR should be excluded from the SEET.

Fourth, the Commission should reject IGS' arguments regarding supplier terms for two reasons: (1) the Commission considered IGS' arguments in DP&L's recent distribution rate case, and rejected them; and (2) the arguments have no merit in any event.

II. THIS CASE HAS BEEN TERMINATED

Section 4928.143(C)(2)(a) provides that if the Commission modifies a utility's ESP Application, then the utility "may withdraw the application, thereby terminating it." (Emphasis added.) DP&L has lawfully withdrawn and terminated its ESP Application in this matter. Nov. 26, 2019 Notice of Withdrawal, pp. 1-2; Dec. 18, 2019 Finding and Order, ¶¶ 16-22.

Further proceedings in this case violate DP&L's right under R.C. 4928.143(C)(2)(a) to "terminat[e]" it. The Commission should thus deny the Applications for Rehearing filed by OCC and IGS.

The remainder of this memorandum assumes for sake of argument that the Commission considers the Applications filed by OCC and IGS, and demonstrates that they have no merit.

III. THE COMMISSION SHOULD REJECT OCC'S ARGUMENT REGARDING THE RECONCILIATION RIDER

OCC asserts that the Reconciliation Rider is preempted by the Federal Power Act. The Commission should reject that argument for the following reasons:

A. OCC's Arguments regarding the Reconciliation Rider Are Moot

In light of DP&L's termination of ESP III, the Commission held that DP&L can no longer collect the Reconciliation Rider. Dec. 18, 2019 Second Finding and Order, p. 14 (Case No. 08-1094-EL-SSO). OCC's argument that the Reconciliation Rider is preempted is thus moot.

The mootness doctrine has existed in Ohio for over 100 years. Miner v. Witt, 82 Ohio St. 237, 238-39, 92 N.E. 21 (1910) ("The duty of this court . . . is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."). A case is moot if there cannot be an "effective remedy." Cincinnati Gas & Elec. Co. v. Pub. Util. Comm., 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 17 (per curiam).

Issues should not be decided once they become moot. Cincinnati Gas & Elec. at ¶ 17 ("In the absence of the possibility of an effective remedy, this appeal constitutes only a request for an advisory ruling from the court. The court should decline the invitation to undertake such an abstract inquiry. That is not the proper function of the judiciary . . . ."); City of Cincinnati v. Pub. Util. Comm., 64 Ohio St.3d 279, 281 n.3, 595 N.E.2d 858 (1992) (per curiam); Ohio Domestic Violence Network v. Pub. Util. Comm., 65 Ohio St.3d 438, 440, 605 N.E.2d 13 (1992) (per curiam); Armco, Inc. v. Pub. Util. Comm., 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982) ("[I]t is well-settled that this court does not indulge itself in advisory opinions"); Travis v. Pub. Util. Comm., 123 Ohio St. 355, 359, 175 N.E. 586 (1931) ("[T]he time and energy of this court should not be expended in doing a vain thing . . . ."); Pollitz v. Pub. Util. Comm., 93 Ohio St. 483, 484, 113 N.E. 1071 (1916).

Since DP&L is no longer collecting the Reconciliation Rider, OCC's arguments regarding that rider are moot.

B. <u>The Reconciliation Rider Is Not Preempted by the Federal Power Act</u>

The Reconciliation Rider passed through to customers the net benefits or costs of DP&L's 4.9% interest in the Ohio Valley Electric Cooperative ("OVEC"). March 14, 2017 Amended Stipulation and Recommendation, p. 13 (Case No. 16-0395-EL-SSO).

Through its contract with OVEC, DP&L pays 4.9% of OVEC's costs and receives 4.9% of the generation from two OVEC power plants. March 22, 2017 Testimony of S. Schroder, pp. 13-14 (Case No. 16-0395-EL-SSO).

Pursuant to the Reconciliation Rider, DP&L sells that OVEC generation into markets operated by PJM, and will then credit or charge the difference to customers. March 14, 2017 Amended Stipulation and Recommendation, p. 13 (Case No. 16-0395-EL-SSO). The Commission found that the Reconciliation Rider thus operates as a hedge that protects customers from market volatility. Oct. 20, 2017 Opinion and Order, pp. 34-35 (Case No. 16-0395-EL-SSO).

The Supreme Court recently rejected arguments by OCC that an identical charge was unlawful. <u>In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Purchase Power Agreement</u>, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶¶ 12-64. In particular, the Court stated that the OVEC rider "was designed to act as a financial hedge against market volatility, particularly during extreme weather conditions. In brief, the rider is intended to provide added rate stability during periods of extreme weather, when the rider is expected to offset severe price spikes in retail electric service." <u>Id</u>. ¶ 59.

Undeterred by the failure of its first attempt, OCC now argues that the Reconciliation Rider is preempted by the Federal Power Act. Preemption analysis starts with a "presumption against pre-emption." City of Girard v. Youngstown Belt Ry. Co., 134 Ohio St.3d 79, 2012-Ohio-5370, 979 N.E.2d 1273, ¶ 15 (citations omitted). "The party seeking to overcome the presumption against preemption bears a heavy burden." Id. Accord: PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241, 250 (3d Cir. 2014) (there is a "basic assumption that Congress did not intend to displace state law") (citation omitted).

As demonstrated below, the Commission should conclude that OCC cannot overcome that "heavy burden" here for the following separate and independent reasons.

1. The Reconciliation Rider Is a Retail Rate: Under the Federal Power Act, FERC has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 340, 102 S.Ct. 1096 (1982) (emphasis added). However, "[s]tates retain jurisdiction over retail sales of electricity and over local distribution facilities." Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm., 452 F.3d 822, 824 (D.C.Cir. 2006) (emphasis added). Accord: Fed. Power Comm. v. S. Cal. Edison Co., 376 U.S. 205, 214, 84 S.Ct. 644 (1964) (Congress has "allowed state regulation of a sale [of electricity] at local retail rates to ultimate customers.") (citation omitted).

The Supreme Court of Ohio has held that "retail deals are explicitly excluded from FERC's exclusive jurisdiction." Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 76 Ohio St.3d 521, 525, 668 N.E.2d 889 (1996) (emphasis added). Accord: Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc., 707 F.3d 883, 887 (7th Cir. 2013) ("In general, the federal government through FERC regulates the interstate wholesale electricity market, while the states regulate the retail sale of this power to consumers.") (emphasis added).

OCC (pp. 6-12) relies on Hughes v. Talen Energy Mktg., LLC, __ U.S. __, 136 S.Ct. 1288 (2016), for its argument that the Reconciliation Rider is preempted, but the contract that was held to be preempted in that case was a wholesale contract. Id. at 1299.[1] Specifically, in that case, the State of Maryland became concerned that existing market mechanisms were not sufficient to encourage development of in-state generation. Id. at 1294. Maryland thus solicited bids to build a new generation plant, and the winning bidder was CPV Maryland, LLC ("CPV"). Id. at 1294-95. Maryland then ordered the in-state utilities ("Load Serving Entities" or "LSEs") to sign a "contract for differences" with CPV. Id. Thus, the contract for differences was a wholesale transaction between a generator (CPV) and a utility. Id.

Under that contract for differences, CPV would sell the generation from its new plant into PJM's wholesale auctions. If the price in the contract for differences was higher than the PJM rate, then the LSEs would pay the difference to CPV; if the PJM price was higher than the price in the contract for differences, then CPV would pay the difference to the LSE. Id. at 1295. The Court held that the contract for differences was preempted because it "guarantees CPV a rate distinct from the [PJM] price." Id. at 1297.

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[1] OCC's reliance (p. 5) on PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014) is misplaced because that is the appellate decision in Hughes.

OCC's reliance (p. 5) on PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014) is similarly misplaced because the New Jersey program at issue there is similar to the one at issue in Hughes. As in Hughes, the state solicited bids from generators and required utilities to enter into contracts with the winning bidders. Id. at 248-49. The Court held that the state program was preempted because the state fixed the wholesale rate that the utility would pay to the generator. Id. at 251-52. As demonstrated in the text, that holding is distinguishable because (1) the Reconciliation Rider is a retail mechanism; and (2) the Commission did not compel DP&L to sign its contracts with OVEC.

Here, two wholesale transactions occur – OVEC sells its power to DP&L at cost pursuant to a contract, and DP&L sells that power into PJM's auction. March 14, 2017 Amended Stipulation and Recommendation, p. 13 (Case No. 16-0395-EL-SSO); March 22, 2017 Testimony of S. Schroder, pp. 13-14 (Case No. 16-0395-EL-SSO). But OCC does not claim that either of those transactions are preempted. Nor could OCC make such a claim. The Hughes Court in fact explains that "wholesale transactions in deregulated markets typically occur through two mechanisms" and then explains that those two mechanisms are bilateral contracts and auctions. Hughes, 136 S.Ct. at 1292-93. There is nothing in the Hughes decision to suggest that those types of "typical[]" wholesale sales are preempted. Accord: Cleveland Elec. Illum. Co., 76 Ohio St.3d at 525-26 (Commission has jurisdiction over complaint challenging two wholesale contracts since the two wholesale contracts could be found to be a disguised retail transaction).

The mechanism at issue here is the Reconciliation Rider that DP&L refunds to or collects from retail customers. A critical distinction between Hughes and this case is that the contract for differences was a wholesale transaction between a generator and a utility. Hughes, 136 S.Ct. at 1294-95. In contrast, the Reconciliation Rider is a retail credit to or charge paid by customers. March 14, 2017 Amended Stipulation and Recommendation, p. 13 (Case No. 16-0395-EL-SSO). The Reconciliation Rider falls outside of Hughes, and is not preempted.

Finally, OCC's reliance (pp. 8-9) upon FERC's decision in New England Ratepayers Assn., 168 F.E.R.C. ¶ 61, 169 (Sept. 19, 2019) is misplaced because the rate at issue in that case was a wholesale rate. Specifically, in that case, a New Hampshire statute required utilities "to make offers to purchase the net output of eligible biomass and waste facilities within their service territories" at a specific rate. Id. ¶ 2. FERC described the New Hampshire statute as "mandating a purchase price for wholesale sales." Id. ¶ 1. FERC held that the state statute was unlawful because it set a wholesale rate:

> "SB 365 requires utilities to offer to purchase the net output of eligible biomass and waste facilities at a state-established rate. As explained below, this requirement establishes a rate for wholesale sales of electric energy in interstate commerce, which intrudes on the Commission's exclusive jurisdiction over wholesale sales of electric energy in interstate commerce. We therefore conclude that the rate established by SB 365 is preempted by the FPA."

Id. ¶ 41.

Here, in contrast, the Commission does not set the rate that DP&L pays to acquire generation from OVEC (that rate was set in a contract between the parties), and the Commission does not set the rate at which DP&L sells that generation (that rate is set in the PJM market). Thus, unlike the FERC case, the Commission does not set any wholesale rate associated with OVEC. And, as demonstrated above, the Commission has jurisdiction to set retail rates.

2. The Reconciliation Rider Is Not Conditioned on Capacity Clearing an Auction: Another critical distinction between this case and Hughes relates to the fact that in Hughes, "CPV receives no payment from Maryland LSEs or PJM if its capacity fails to clear the [PJM] auction." Hughes, 136 S.Ct. at 1295. The Court made clear that the auction-clearing condition is what doomed the contract for differences: "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." Id. at 1299. Accord: Vill. of Old Mill Creek v. Star, N.D.Ill. Nos. 17 CV 1163, 17 CV 1164, 2017 U.S. Dist. LEXIS 109368, at *40 (Jul. 14, 2017) ("[s]ince a generator can receive [financial credits from the state] for

producing electricity and the credits are not directly conditioned on clearing wholesale auctions, [the credit] payments do not suffer from the 'fatal defect' in Hughes").

Here, OCC does not claim that the Reconciliation Rider is conditioned on OVEC capacity clearing an auction. Nor could OCC make such a claim. There is no such condition in the Amended Stipulation or in the Commission's Order approving that Stipulation. The Reconciliation Rider is not conditioned on any capacity clearing a PJM auction, and is not preempted.

3. The Reconciliation Rider Falls Outside the Express Limits of Hughes: Hughes expressly states that its decision does not extend to "financial hedging contracts based on the auction clearing price" (Hughes, 136 S.Ct. at 1299, n. 12) or "direct subsidies" (id. at 1299). Since the Reconciliation Rider would act as a hedge when market prices are high (Oct. 20, 2017 Opinion and Order, pp. 34-35 (Case No. 16-0395-EL-SSO)), and as a payment to DP&L when market prices are low (id. at 54), the Reconciliation Rider falls precisely within the types of matters that Hughes said that it did not decide.

4. DP&L Was Not Compelled to Sign a Contract: In Hughes, Maryland "required" the LSEs to sign contracts with CPV. Hughes, 136 S.Ct. at 1294. Here, in contrast, the Commission has not required DP&L to sign a contract with OVEC. DP&L voluntarily signed that contract years ago. March 22, 2017 Testimony of S. Schroder, pp. 13-14 (Case No. 16-0395-EL-SSO). Hughes is distinguishable on that ground as well. Allco Fin. Ltd. v. Klee, 861 F.3d 82, 100 (2d Cir. 2017) (rejecting argument that Hughes preempted state program because state program did "not compel[] utilities to enter into agreements"), cert. denied, ____ U.S. ___, 138 S.Ct. 926 (2018).

5. The Objectives of the Commission Show That There Is No Preemption: The Hughes Court held that whether federal law "preempts a particular state law turns on 'the target at which the state law aims.'" Hughes, 136 S.Ct. at 1298 (quoting Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 385, 135 S.Ct. 1591 (2015) (emphasis in original)). There is a difference between "'measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at subjects left to the States to regulate.'" Id. (quoting Oneok (emphasis in original)). Accord: Vill. of Old Mill Creek, 2017 U.S. Dist. LEXIS 109368, at *32 ("[a]lthough the [state law] program will affect wholesale electricity rates, those rates were not its target thus, the general rule . . . does not require preemption.") (footnote omitted).

In Hughes, Maryland had acted to correct what Maryland believed were errors by FERC. Specifically, the Court noted that "Maryland electricity regulators became concerned that the PJM capacity auction [which FERC approved] was failing to encourage development of sufficient new in-state generation." Hughes, 136 S.Ct. at 1294. The Court later criticized Maryland for "[d]oubting FERC's judgment." Id. at 1297. The Court further explained that "The problem we have identified with Maryland's program mirrors the problems we identified [in other cases in which] a State determined that FERC had failed to ensure the reasonableness of a wholesale rate." Id. at 1298.

Here, in contrast, the Commission has not acted because it "[d]oubt[ed] FERC's judgment." Instead, the Commission approved the Reconciliation Rider to protect customers (when market prices are high) and DP&L (when market prices are low). Specifically, the Commission held that the Reconciliation Rider "will benefit customers because it will act as a hedge which will mitigate spikes in market prices." Oct. 20, 2017 Opinion and Order, pp. 34-35 (Case No. 16-0395-EL-SSO). When market prices are low, the Reconciliation Rider will "bolster the Company's financial integrity." Id. at 54. The Reconciliation Rider is not "aimed directly at interstate purchasers and wholesalers" under Hughes, but is instead aimed at protecting retail customers and DP&L, which are "subjects left for the states to regulate." The Reconciliation Rider is not preempted for that additional reason.

The Commission should reject OCC's argument that the Reconciliation Rider is preempted under Hughes.

IV. THE COMMISSION SHOULD REJECT OCC'S ARGUMENT REGARDING THE SEET

A. OCC's Arguments Regarding the SEET Are Not Yet Ripe

OCC asserts that the Commission erred in excluding DP&L's DMR from the SEET in R.C. 4928.143(F). OCC made the exact same argument in FirstEnergy's recent ESP case, and the Supreme Court of Ohio held that the issue was not ripe for decision and should be resolved in a SEET proceeding. In re Application of Ohio Edison Co., 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 33. The Commission should thus conclude that OCC's argument is not yet ripe.

B. The DMR Funds Are Not Subject to the SEET

Even if the issue was ripe for review, the Supreme Court of Ohio has previously affirmed a Commission decision excluding particular utility revenue streams from the SEET. In re Columbus S. Power Co., 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 44-51. In that decision, the Court stated "'[l]imited judicial review of a rate of return determination is sound' because 'cost of capital analyses . . . are fraught with judgments and assumptions.'" Id. ¶ 37 (quoting Ohio Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.2d 71, 79, 413 N.E.2d 799 (1980) (emphasis added)). "Thus, if a related determination is 'fraught with similar judgments and assumptions,' it is 'appropriate to apply a similar limited standard of review.'" Id. (quoting Ohio Consumers' Counsel, 64 Ohio St.2d at 79.)

Under the SEET, the Commission must determine whether a utility has significantly excessive earnings "as measured by whether the earned return on common equity" is excessive. R.C. 4928.143(F). The issue is whether the Commission reasonably concluded that the DMR should not be considered part of DP&L's "return on common equity."

The Commission has held that DMR funds should be excluded from the SEET:

> "We affirm our decision in the Opinion and Order to exclude DMR revenues from SEET because failing to exclude the DMR from SEET would add an unnecessary element of risk to DP&L and undermine the purpose of the DMR, which is to allow DP&L and DPL Inc. to improve their financial positions in order to access the capital markets, in the future, for funds to invest in grid modernization (Staff Ex. 2 at 4; Co. Ex. 3 at 10, 18-19). Further, the Amended Stipulation prevents DMR revenue from flowing to shareholders by precluding dividend payments to AES while the DMR is recovered and by restricting the use of cash flow from the DMR to: (1) pay interest obligations on existing debt at DP&L and DPL Inc.; (2) make discretionary debt prepayments; and (3) position DP&L to make capital expenditures to modernize and maintain DP&L's transmission and distribution infrastructure (Jt. Ex. 1 at 3, 5; Co. Ex. 3 at 10). Accordingly, rehearing on this assignment of error should be denied."

Sept. 19, 2018 Third Entry on Rehearing, p. 17 (Case No. 16-0395-EL-SSO). There was ample evidence at the hearing to support such a finding.

For example, Stipulation, ¶ II.2.b, establishes that DMR funds will not go to DP&L's shareholders; instead, they will be used to pay off debt. Mar. 14, 2017 Amended Stipulation and Recommendation ("Stipulation"), p. 5 (Case No. 16-0395-EL-SSO). Further, there will be no dividend or tax sharing payments to AES during the ESP term. Stipulation, pp. 3-4. Testimony introduced at the hearing showed that it was thus reasonable to exclude

DMR funds from a return on equity calculation: "The DMR charge is meant primarily for mandatory debt reduction and capital investments, not 'discretionary' profit. It therefore makes economic sense to exclude it from the [return on equity] calculations." Mar. 22, 2017 Testimony of Jeffrey Malinak, p. 63 n.70 (Case No. 16-0395-EL-SSO).

DP&L's Chief Financial Officer explained why it was reasonable to exclude the DMR from the SEET:

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

Oct. 11, 2016 C. Jackson Test., p. 23 (Case No. 16-0395-EL-SSO).

As the Commission found, including the DMR in the SEET would defeat the very purpose of the DMR. Sept. 19, 2018 Third Entry on Rehearing, p. 17 (Case No. 16-0395-EL-SSO). The purpose of the DMR is to pay down debt and to position DP&L to access equity markets. (Trans. Vol. I, 107) ("The DMR will enable us to pay down debt to put us in a position in the future to be able to access the debt and equity markets.") If DP&L was required to refund to customers some or all of the DMR, then the DMR funds would not be available to pay down debt, which would defeat the very purpose of the DMR.

In short, to conduct the SEET, the Commission will be required to determine DP&L's "return on common equity." R.C. 4928.143(F). The Commission reasonably concluded that the DMR amounts should be excluded from the calculation because none of the DMR funds were paid to DP&L's ultimate parent, and all of the DMR funds were used to pay debt.

V. THE COMMISSION SHOULD REJECT IGS' ARGUMENTS REGARDING SUPPLIER TERMS

IGS seeks rehearing on four issues: DP&L's collateral requirements, DP&L's switching fees, DP&L's historical usage fees and IGS' proposal for an unbundling rider. IGS Application for Rehearing, pp. 4-5. The Commission rejected IGS' arguments in the Commission's Supplemental Order:

> "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).
>
> 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."

Nov. 21, 2019 Supplemental Opinion & Order, pp. 36-37 (Case No. 16-0395-EL-SSO).

The Commission should once again reject IGS' arguments for the same reasons.

To the extent that the Commission decides to reconsider its Order, DP&L demonstrates below that the Commission should once again reject IGS' arguments.

A. <u>The Commission Should Reject IGS' Arguments Related to Collateral Requirements</u>

IGS witness Crist asserted that DP&L's collateral requirements treat privately-held companies less favorably than public companies, and advocated for changes to DP&L's collateral calculation. Crist Test., pp. 3, 7-11 (IGS Ex. 1017). The Commission should again reject his proposal for the following reasons:

1. <u>No legal basis</u>: IGS does not cite any provision in the Ohio Revised Code or in the Commission's rules that required DP&L to file cost support for its collateral requirements.

2. DP&L's Tariff Treats Privately-Held Companies the Same as Public Companies: DP&L's Tariff makes no distinction between private companies and public companies (DP&L Ex. 1002), a fact that Mr. Crist conceded at the hearing. Trans. Vol. VIII, p. 1478. Further, public companies are subject to greater oversight than private companies (Trans. Vol. VIII, pp. 1479-81), so public companies are less risky.

3. No Supporting Calculations: IGS has no support for its proposal to amend the collateral requirements set forth in the tariffs. Trans. Vol. VIII, p. 1474.

B. The Commission Should Reject IGS' Arguments Regarding a Switching Fee

The Commission should reject IGS' argument regarding the switching fee, since that fee was established in a prior proceeding, and DP&L does not seek to modify it here. Specifically, the $5 switching fee was originally established in DP&L's 1999 Electric Transition Plan. Nov. 2, 2000 Tariff Compliance Filing, Tariff D 34, p. 2 (Case No. 99-1687-EL-ETP).

DP&L did not seek to change that $5 switching fee in this case, and there is no requirement that DP&L file cost support in this case for rates that were established in other cases.

C. The Commission Should Reject IGS' Arguments Regarding Historical Usage Fees

As the Commission explained in DP&L's distribution rate case, DP&L's historical usage fees were approved in DP&L's merger case and there was no reason to reconsider that ruling:

> "The interval data fees were approved by the Commission when it adopted the stipulations recommending approval of the merger between DP&L's parent, DPL Inc., and AES Corporation. In re AES Corporation, Case No. 11-3002-EL-MER, Finding and Order

at 10 (Nov. 22, 2011) (Merger Case). The Supreme Court of Ohio has held that when the Commission has made a lawful order, the Commission is bound by certain institutional constraints to provide an explanation before such order may be changed or modified. Ohio Consumers' Counsel v. Pub. Util. Comm., 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984). The Court has explained that this does not mean that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-0hio-2056, 40 N.E.3d 1060, ¶ 16, citing In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (citations omitted). At the hearing in this case, RESA witness Ringenbach testified in support of RESA's objection on this issue. Ms. Ringenbach testified that access to customer interval data is a 'monopoly service' and, as such, the Commission should eliminate all fees associated with competitive retail electric service provider's access to the customer's data (RESA/IGS Ex. 1 at 2, 3). However, Ms. Ringenbach did not explain how any circumstances have changed since the Commission approved the current fee for interval data in the Merger Case. In short, Ms. Ringenbach provided no persuasive basis for the Commission to depart from our decision in the Merger Case. Further, we are not persuaded by the argument that there should be no charge for access to interval data because it is a 'monopoly service.' All components of distribution service are currently non-competitive, and principles of cost causation still apply to the provision of non-competitive services. The amount of the fee was established as part of a settlement approved by the Commission in the Merger Case. We will not revisit that decision here. We may, however, revisit this issue through the working groups or proceedings implementing the PowerForward Initiative."

Sept. 26, 2018 Opinion and Order, pp. 17-18 (Case No. 15-1830-EL-AIR) (emphasis added).

The Commission should reject IGS' arguments for the same reasons.

D. The Commission Should Reject IGS' Arguments Regarding the Unbundling Rider

IGS witness White testified that the Commission should allocate "$12 million in SSO-related costs" to SSO customers. White Supplemental Test., p. 10 (IGS Ex. 1014). The Commission should reject that argument for the following reasons:

1. IGS failed to submit evidence: IGS has not submitted any evidence in this case to support that $12 million figure. Mr. White's testimony does not contain any calculation of that figure or provide any supporting quantification.

2. The SSO is a distribution company function: Providing an SSO is a distribution company function. R.C. 4928.141. All customers benefit from the SSO — whether or not they shop. Trans. Vol. VIII, p. 1404 (White); Trans. Vol. IX, p. 1574 (Willis). It is thus reasonable that the costs that DP&L incurs to provide SSO service be recovered through distribution rates. Trans. Vol. IX, p. 1572 (Willis); Willis Rebuttal Test., pp. 11-14 (OCC Ex. 1000).

3. Allocation to shopping customers: If 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 to shopping customers. IGS failed to make any showing of that amount in this case.

4. No customers have raised the issue: No DP&L customers have raised the issue, and OCC opposes it. Willis Rebuttal Test., pp. 11-14 (OCC Ex. 1000). IGS' request that costs be allocated to the SSO simply serves to inflate the costs of the SSO so that more customers would switch.

VI. CONCLUSION

The case has been terminated, so the Commission should not consider the applications filed by OCC and IGS. To the extent the Commission considers those applications, they have no merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Applications for Rehearing by The Office of the Ohio Consumers' Counsel and Interstate Gas Supply, Inc., has been served via electronic mail upon the following counsel of record, this 13th day of January, 2020:

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