

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid.)	Case No. 18-1875-EL-GRD
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In the Matter of the Application of the Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2).)	Case No. 18-1876-EL-WVR
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In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods.)	Case No. 18-1877-EL-AAM
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In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2018.)	Case No. 19-1121-EL-UNC
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In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2019.)	Case No. 20-1041-EL-UNC
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In the Matter of the Application of The Dayton Power and Light Company for a Finding that its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and the More Favorable in the Aggregate Test in R.C. 4928.143(E).)	Case No. 20-680-EL-UNC
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**REPLY BRIEF OF
INDUSTRIAL ENERGY USERS-OHIO**

In its Initial Brief, Industrial Energy Users-Ohio ("IEU-Ohio") demonstrated that the Public Utilities Commission of Ohio ("Commission") should approve the Stipulation in this

proceeding because it passes the Commission's 3-part Stipulation review test. In this reply brief, IEU-Ohio responds to the Office of the Ohio Consumers' Counsel's ("OCC") meritless and already Commission-rejected claim that Stipulations are only reasonable when OCC is a signatory to a settlement. IEU-Ohio also responds to OCC's opposition to using the currently approved distribution cost allocations to allocate the costs of DP&L's smart grid plan, and OCC's lack of any specific alternative proposal and the lack of record support for any alternative cost allocation proposal.

I. ARGUMENT

A. There is No Basis to OCC's Attack on the Settlement Process and No Reason to Modify the Commission's 3-Part Test

In reliance on the testimony of Dr. Hill, OCC attacks the settlement process labelling the Signatory Parties as a "redistributive coalition" out for their own interests.¹ OCC further asserts that the "redistributive coalition" signed onto the settlement in this case that provides DP&L with additional nonbypassable revenue through the Rate Stability Charge ("RSC") in exchange for a portion of that revenue being redirected to the Signatory Parties; a cash for signatures exchange OCC claims.² How any of this could be relevant to Staff's position as a Signatory Party is unexplained by OCC, and even OCC Witness Hill admitted that his theory did not hold up when considering Staff's support for the Stipulation.³ In any event, the entire theory is without merit.

Initially, it is important to note that the Signatory Parties in this case did not create the RSC through this Stipulation. As OCC established on the record in this case, the

¹ See OCC Initial Brief at 37-44, (Feb. 12, 2021).

² *Id.* at 40 (claiming that the signatory parties intervene in PUCO proceedings to redistribute cash to them paid for by other customers); *see also id.* at 37-44.

³ See Tr. Vol. 4, at 611 (Jan. 28, 2021).

RSC exists as a result of a widely supported stipulation in DP&L's first ESP case that OCC itself joined and supported.⁴ Since the signing of that Stipulation, and like OCC, IEU-Ohio has vigorously opposed and spent many years litigating against electric distribution utilities' ("EDU") requests for non-distribution-cost-based nonbypassable riders, and IEU-Ohio has vigorously litigated against the Commission's authorization of these charges. And some customer parties that are signatories to the Stipulation, like IEU-Ohio, opposed the Commission's reinstatement of the RSC rates when DP&L withdrew its third ESP and returned to its first ESP.⁵ But the Commission reinstated the full RSC rates over IEU-Ohio's, and others, objections. The Signatory Parties are not corrupting the public interest, as OCC would suggest, by authorizing the RSC in this Stipulation in exchange for special benefits. The RSC exists due to its authorization in DP&L's first ESP and DP&L's recent reversion of the first ESP. OCC Witness Hill's redistribution coalition theory that is premised on the Stipulation providing DP&L the RSC is simply and fundamentally incorrect.⁶

It is also important to note that no provisions in the Stipulation takes RSC revenue collected from customers at large and redistributes that revenue to Signatory Parties.⁷ The smart grid plan will be funded through future charges on all customers, including the customer parties represented among the Signatory Parties.⁸ And nearly all other aspects

⁴ Case Nos., 08-1094-EL-SSO, *et al.*, (DP&L ESP 1) (Oct. 10, 2008); OCC Ex. 8 (ESP I Stipulation) (Jan. 26, 2021).

⁵ DP&L ESP 1, Fourth Entry on Rehearing (Feb. 14, 2020), (granting IEU-Ohio's application for further consideration of issues raised, which included a challenge to the reinstatement of RSC rates).

⁶ See Tr. Vol 4 at 612-13.

⁷ See OCC Initial Brief at 41.

⁸ Stipulation at 5, (Stipulation, Oct. 23, 2020).

of the settlement package will come from shareholder funds, which the Signatory Parties expressly provided could not be funded through customers rates.⁹

Moreover, OCC Witness Hill readily admitted that it is appropriate for the government to provide economic development support as needed.¹⁰ OCC Witness Hill indicated that he “understand[s] that making Ohio as competitive a location as possible . . . is essential for the future well-being of the state and its residents.”¹¹ Accordingly even if the redistribution theory was not fundamentally flawed, the elements of the Stipulation tied to economic development would not be inherently objectionable according to OCC Witness Hill and his redistribution theory.

Furthermore, OCC’s claim that the Signatory Parties only sought to obtain benefits for themselves is incorrect.¹² The statutory framework in R.C. 4928.143(E) sets forth a prospective review of an ESP, and where necessary, provides the Commission the authority to make prospective adjustments to end up at a more reasonable standard service offer. IEU-Ohio and the other Signatory Parties, and within the applicable statutory framework in R.C. 4928.143(E), have set forth in the Stipulation a mandatory glidepath for DP&L to a new ESP that will not contain the RSC charge or similar types of nonbypassable charges. This is a very significant benefit that flows to all customers, even those not participating in the proceeding.

Even OCC’s definition of the group that constitutes a “redistributive coalition” makes no sense. According to OCC Witness Hill, an improper redistributive coalition

⁹ See, e.g., Stipulation at 18.

¹⁰ See Tr. Vol. 4 at 595-96.

¹¹ *Id.* at 596.

¹² OCC Initial Brief at 39-44.

exists in Commission cases when the Signatory Parties do not constitute a large heterogenous mix of customers and interests.¹³ The twenty Signatory Parties represent a very broad and diverse set of interests which includes Staff, DP&L, industrial and commercial customers, a low income residential customer advocate, environmental advocates, hospitals, a university, competitive suppliers, and the largest municipality in DP&L's service territory that represents the interests of its residents, businesses, and its own utility accounts; and, accordingly, the claimed lack of heterogeneity is factually incorrect.¹⁴ In fact, the only way this settlement could have become more heterogenous would be if it included the only other party in the case, OCC, as a signatory.

In any event, in FirstEnergy's ESP IV Case,¹⁵ the Commission rejected the same argument from OCC (that was based in part on the testimony of Witness Hill in that case) that settlements need to be large, heterogenous, and include OCC as a signatory party:

The Commission notes that OCC and OMAEG argued that the Stipulations should only be approved by the Commission if the stipulation is agreed to by a larger, more heterogeneous group of customers, including residential customers (as represented by OCC), in the Companies' service territories. However, we note that the Stipulations are supported by a diverse group of customers, including small businesses, independent colleges and universities, industrial customers, and commercial customers as well as advocates for low- and moderate-income residential customers and Staff. Moreover, we have already rejected proposals that any one class of customers can effectively veto a stipulation, holding that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first prong of the three-prong test. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7.¹⁶

¹³ See Tr. Vol. 4 at 607-09.

¹⁴ DP&L Ex. 4 at 12-13 (Dec. 23, 2020).

¹⁵ Case No. 14-1297-EL-SSO, (FirstEnergy ESP IV), (Aug. 4, 2014).

¹⁶ FirstEnergy ESP IV, Opinion and Order at 43 (Mar. 31, 2016).

Application of OCC's redistributive coalition theory also contradicts OCC's advocacy in this case and others before the Commission. OCC asserts that it should be considered bad public policy to allow a party to obtain any benefit in a settlement that shifts costs to any customer that is not participating in the case.¹⁷ Of course, OCC in this very case presented testimony citing OCC's prior support of a settlement for the purpose of shifting costs to nonresidential customers, and did so in a proceeding that had less parties participating than this case.

Specifically, in OCC Witness Alvarez's testimony he suggests the Commission could more fairly allocate the costs of DP&L's smart grid plan citing the Commission's February 1, 2017, Opinion and Order in Case No. 13-1939-EL-RDR (AEP-Ohio's 2nd Grid Smart Case).¹⁸ As noted in paragraph 18 of that decision, OCC agreed to not contest the AEP-Ohio smart grid settlement in exchange for the costs of the smart grid plan to residential customers being reduced from 62.4% to 45%, with the delta being shifted to nonresidential customers.¹⁹

Ironically, OCC Witness Hill testified in this case on this exact scenario stating that if a party advocated for "shifting of the costs so that the cost did not reflect the cost of service, that would be a redistribution."²⁰ OCC Witness Hill further testified in this case that this would hold true even if OCC was the party advocating to assign costs not connected to a cost of service study.²¹ This Stipulation proposes to allocate the smart

¹⁷ OCC Initial Brief at 41.

¹⁸ OCC Ex. 7 at page 6-7, n. 6, (Dec. 23, 2020).

¹⁹ Case No. 13-1939-EL-RDR, Opinion and Order at 6-7 (Feb. 1, 2017).

²⁰ Tr. Vol. 4 at 598.

²¹ *Id.*

grid plan costs based on the current cost of distribution service reflected in current rates.²² OCC's suggestion that the Commission could shift costs away from the cost of service study and onto nonresidential customers not participating in this case is the very thing it complains of under its redistribution theory.

However, the notion that OCC and other parties should not advocate for their own interests is absurd. And, the Commission already rejected this underpinning of the redistribution theory concept in FirstEnergy's ESP IV Case stating that:

With respect to the claims that the Stipulations represent mere "favor trading" and a lack of serious bargaining among the parties, the Commission notes that, while many signatory parties receive benefits under the Stipulations, we will not conclude that these benefits are the sole motivation of any party in supporting the Stipulations. We expect that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. Further, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs.²³

Each party brings its unique perspective and interests to a proceeding, and the settlement process often allows these diverse interests to coalesce into a reasonable compromise package. This collaboration among sophisticated, knowledgeable, and capable parties can produce significant benefits over an alternative that promotes each party remaining in its litigation corner and requiring the Commission to resolve all issues large and small through lengthy hearings and the inevitable rehearing and appeals.

Simply put, OCC's redistribution theory was already properly rejected by the Commission because it is fundamentally flawed. Here, the theory is also based on incorrect facts. The theory further contradicts OCC's own advocacy in this case and prior cases. The flawed theory has no practical application that could improve the outcome of

²² Stipulation at 4.

²³ FirstEnergy ESP IV, Opinion and Order at 44 (Mar. 31, 2016).

Commission proceedings. The cross-examination of OCC Witness Hill made these flaws clear.

Although OCC bases its assault on the settlement process in this case on the testimony of OCC Witness Hill, he admitted that he did not actually participate in the settlement negotiations in this case.²⁴ In fact, he admitted he has not participated in the settlement process before any utility regulator anywhere and is not even generally aware of how the settlement process occurs before utility commissions.²⁵ OCC Witness Hill also conceded that he was not actually offering up any suggestions on how to improve the settlement process at the Commission.²⁶

OCC Witness Hill further conceded that the Commission has no authority to force anyone to participate in the case to resolve his concerns about nonparticipating customers, and he had no idea whether any other nonresidential customers would even be interested in participating.²⁷ OCC Witness Hill also recognized the near impossibility of finding an entity that would satisfy the concerns of his redistribution coalition theory, indicating that the ideal party needed to be “a self-interested benevolent group” representing the broad interests of all nonresidential customers that is not troubled by any “free rider” problems and that would be statutorily funded in the same way that OCC receives funding.²⁸ Ignoring the logistical nightmares of one entity trying to represent the interests of every business in the state, the Commission has no authority to consider or implement such a concept. And without the implementation of this non-jurisdictional

²⁴ Tr. Vol. 4 at 651.

²⁵ Tr. Vol. 4 at 595.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 598-99.

concept, settlement in a vast majority of Commission proceedings would be all but impossible under the theory.

The easy solution in response to OCC's redistribution theory is for the Commission to simply follow its statutory mandate. The Commission is tasked with operating under its limited jurisdiction and that statutory authority generally commands the Commission to promote the public interest and ensure that rates are just and reasonable. There could perhaps be many outcomes to any given proceeding that produce just and reasonable rates while promoting the public interest, and the Commission's 3-part Stipulation test reviews whether a stipulation falls within this range of lawfulness and reasonableness. OCC has not presented any reasonable basis to modify the 3-part Stipulation test to incorporate OCC's redistribution theory concept, nor would any such adoption of the theory by the Commission be lawful or reasonable.

B. There is no Record Support for Rejecting the Stipulation's Proposal to Allocate the Costs of the Smart Grid Plan in Accordance with DP&L's Most Recently Approved Cost of Distribution Service

As noted above, the Stipulation sets forth that the costs of the smart grid plan will be assigning based on a percentage of distribution charges, *i.e.*, they will follow the most recently approved distribution cost of service study. In reliance on the testimony of OCC Witness Alvarez, OCC suggests that the allocation in the Stipulation is unreasonable. There is no record support for this conclusion.

At hearing OCC Witness Alvarez testified that he was not a cost-of-service expert.²⁹ OCC Witness Alvarez testified that he did not conduct a cost-of-service study.³⁰ OCC Witness Alvarez testified that he was not recommending any specific cost

²⁹ Tr. Vol. 3 at 537 (Jan. 27, 2021).

³⁰ *Id.* at 486, 537.

allocations regarding the smart grid plan.³¹ OCC had an opportunity to present an alternative allocation methodology but did not. There is only one allocation methodology in the record, and it is based on the cost allocations authorized by the Commission in DP&L's last rate-case. This cost allocation is reasonable and has already been approved by the Commission.

Moreover, OCC's entire cost allocation argument rests on a study OCC claims was fundamentally flawed to begin with. OCC Witness Alvarez's critique of the cost allocation was based on a cost-benefit analysis prepared by DP&L to support the smart grid plan. That analysis was conducted using a tool prepared by the Department of Energy ("DOE") that generally measures benefits of utility investments that improve reliability.³² OCC claims DP&L's cost-benefit analysis based on the DOE's tool is "fundamentally flawed." Yet this is the same analysis OCC points to, to suggest there could be a basis to deviate from allocating smart grid costs based on DP&L's most recently authorized distribution cost of service.³³ Of course, on cross-examination OCC Witness Alvarez testified that this cost/benefit analysis was not intended to be a cost-of-service study.³⁴ The cost-benefit analysis does not provide any basis to conclude that using the most recently approved cost-of-service is unreasonable.

Moreover, when looking at the smart grid plan costs, it is readily apparent that utilizing the current distribution cost of service is reasonable and that there is no basis to OCC's suggestion that 96% of the costs are attributable to, and 96% of the benefits flow

³¹ *Id.* at 537.

³² See OCC Initial Brief at 51-52, Tr. Vol. 3 at 512-513; DP&L. Ex. 10 (Jan. 27, 2021).

³³ OCC Initial Brief at 50.

³⁴ Tr. Vol. 3 at 537.

to, nonresidential customers.³⁵ For example, over 30% of the plan's capital costs is related to rolling out smart meters, which OCC Witness Alvarez testifies were going to primarily benefit residential customers because commercial and industrial customers already have smart meters.³⁶ None of the capital or O&M projects in the smart grid plan are primarily for the benefit of nonresidential customers as the other major capital expenditure items like distribution automation advanced distribution management system, conservation voltage reduction and volt/var optimization, telecommunications provide support for all distribution customers. And many of the components of the smart grid plan will not directly benefit nonresidential customers served at transmission voltage.

OCC has failed to demonstrate on the record that allocating the costs of the smart grid plan based on the current distribution cost allocations is unreasonable. OCC has likewise failed to present any alternative cost allocation on the record in this case. The Commission should deny OCC's request that the Commission consider allocation costs of the smart grid plan on some undefined, unsupported, allocation methodology.

II. CONCLUSION

The Commission has a long-standing 3-part test to consider whether a stipulation and recommendation is lawful and reasonable and should be approved. OCC challenges the 3-part test in a manner that, again, would require the Stipulation in this case to be supported by OCC before it could be considered reasonable. The Commission has repeatedly rejected the notion that OCC or any other party can veto a settlement. Because OCC has failed to demonstrate that the 3-part test should be modified or that the Stipulation fails the test, the Commission should approve the Stipulation.

³⁵ See OCC Initial Brief at 51-52.

³⁶ Tr. Vol. 3 at 529.

Respectfully submitted:

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Notice of Reply Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 5th day of March 2021, via electronic transmission.

/s/ Matt Pritchard

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Summary: Brief Reply Brief of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio