

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM IN OPPOSITION
TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

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JULY 30, 2021

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM IN OPPOSITION
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The Public Utilities Commission of Ohio (“Commission”) issued an Opinion and Order (“Order”)¹ approving a Stipulation between the Dayton Power and Light Company (“DP&L”), Staff, Industrial Energy Users-Ohio (“IEU-Ohio”), and 17 other signatory parties. The Commission found that the bargained-for exchange reflected in the Stipulation passed the 3-part test used to review settlements and is reasonable. Order at ¶ 97. The Office of the Ohio Consumers’ Counsel (“OCC”) opposed the Stipulation and filed an Application for Rehearing (“OCC Application for Rehearing”)². IEU-Ohio responds to OCC’s second, third, and fourth assignments of error.³

OCC’s second assignment of error argues that the Commission modified ESP I in approving the Stipulation. OCC Application for Rehearing at 8. Specifically, OCC argues that the Commission, in approving the Stipulation, modified ESP I to “add economic development (and other cash benefits) to signatory parties.” OCC Application for Rehearing at 10. This argument is meritless. The Stipulation resolves four consolidated cases that permitted all parties (except OCC) to put down their litigation positions, gaining a firm commitment to end the cycle of non-cost-based nonbypassable charges, limiting the duration of ESP I by requiring a date certain by which an application to establish ESP IV must be filed, reducing the cost to all customers of the smart grid plan, and obtaining shareholder funded economic development support for a broad array of customer groups. Moreover, shareholder funded economic development is something that DP&L could do without Commission approval. That such economic development incentives are part of

¹ Opinion and Order (June 16, 2021).

² OCC Application for Rehearing (July 16, 2021).

³ Although this memorandum addresses only OCC’s second, third, and fourth assignments of error, the failure to respond to OCC’s other assignments of error does not indicate support for them.

the settlement of multiple complex cases does not manifest into a modification of DP&L's ESP I. OCC misapprehends the difference between economic development incentives funded by shareholders and those funded by costs allocated to customers. However, even had the economic development programs been funded through DP&L's Economic Development Rider, they would not have required a modification to ESP I. The Commission should not grant rehearing based on OCC's second assignment of error.

In its third assignment of error, OCC alleges that the Commission violated R.C. 4903.09 because it did not adequately explain its reasoning, ignored OCC's arguments, and issued an opinion without record support. OCC Application for Rehearing at 14. Specifically, OCC claims that the Commission only spent three sentences discussing the second prong of the 3-part test. OCC Application for Rehearing at 14-15. Contrary to OCC's allegations, the Commission explained why it thought the record evidence supported the Stipulation and why it dismissed OCC's evidence. The Commission cited DP&L witness Sharon Schroder's testimony, which "enumerated nine areas in which the settlement, as a package, benefits DP&L's customers and is in the public interest[.]" Order ¶ 48 (citing DP&L Ex. 4 at 15-32). The Commission considered, and appropriately rejected, OCC's arguments to the contrary. Order ¶ 49. The Commission should not grant rehearing based on OCC's third assignment of error.

OCC claims that the Commission's settlement process is unfair and inequitable and that, on rehearing, the Commission "should nullify the settlement process as being void as against public policy[.]" OCC Application for Rehearing at 2. In its fourth assignment of error, OCC broadly alleges that the settlement is the product of a "redistributive coalition" and does not, therefore, benefit all customers and is not in the

public interest. OCC Application for Rehearing at 25. However, OCC narrows its argument from its introduction to the assignment of error and then to the supporting memorandum. The argument in the supporting memorandum is that the Commission lacked record support for its finding that “many of the negotiated concessions contained in the Stipulation benefit all customer classes such that claims of bias or lack of protection as to residential customers are simply inaccurate.” OCC Application for Rehearing at 25-26 (citing Order ¶ 72). There was ample record evidence for the Commission’s finding. See e.g. Order ¶ 48 (citing DP&L Ex. 4 at 15-32). Moreover, contrary to OCC’s claims, the Commission did identify the negotiated concessions benefitting all customer classes. See Order ¶ 71. The Commission should not grant rehearing based on OCC’s fourth assignment of error.

I. ARGUMENT

A. The Economic Development Provisions in the Settlement were not a modification of ESP I.

OCC claims that the economic development benefits of the Stipulation are the same as ESP III, and, therefore, that the Commission must have modified ESP I to add them. OCC Application for Rehearing at 10. OCC is wrong, as it demonstrated in a separate filing filed with the Commission the day before this document was filed.

There was no modification of ESP I, nor was there a need to do so. DP&L can carry out shareholder funded economic development activities without any need for Commission approval. OCC agrees. In a filing dated July 29, 2021 (the day before this document was filed) OCC presented arguments to the Commission regarding operation of R.C. 4928.661 as it pertains to low-income energy efficiency programs. Case No. 16-743-EL-POR, OCC Objections at 2 (July 29, 2021). In that document OCC asserted that

a statute did not authorize FirstEnergy to continue operating certain ratepayer funded programs, but noted that FirstEnergy was generally free to do so with shareholder funds regardless of any statutory requirements:

The law does not allow FirstEnergy to continue charging consumers for its Community Connections programs simply because that program was part of its ESP IV case. To the contrary, charges for consumers must end after December 31, 2021. Of course, if FirstEnergy wants to continue offering the Community Connections program after that date using its own money, instead of consumers' money, it is free to do so.

Id. (emphasis added).

Moreover, the ESP I Stipulation (that OCC joined) authorized a placeholder economic development rider for purposes of potentially recovering delta revenue associated with DP&L's future economic development activities that would possibly occur outside of the ESP I case. OCC Ex. 8 at ¶ 10 (DP&L ESP I Stipulation).

DP&L will implement an Economic Development Rider on April 1, 2009 that will initially be set at zero. Recovery (if any) of delta revenues associated with economic development contracts and other reasonable or unique arrangements will be subject to Commission rules.

Id. Thus, even if Commission approval had been needed for the economic development provisions discussed in the Stipulation, it would have been consistent with the terms and conditions of ESP I and would not require any Commission modification to the terms of ESP I as OCC claims.

OCC is wrong that the shareholder funded economic development programs were a modification of ESP I and therefore the Commission should not grant rehearing as to OCC's second assignment of error.

B. The Commission correctly found that the Stipulation met the second prong of the 3-part settlement test, and explained why it rejected OCC's arguments to the contrary.

In its third assignment of error, OCC alleges that the Commission violated R.C. 4903.09 because the Commission did not adequately explain its reasoning for why the Stipulation passed the second prong of the 3-part settlement test, ignored OCC's arguments, and issued an opinion without record support. OCC Application for Rehearing at 14. OCC's argument is without merit.

OCC claims that the Commission only spent three sentences discussing the second prong of the 3-part test and completely failed to respond to OCC's substantive arguments. OCC Application for Rehearing at 14-15 (citing Order ¶ 50). Setting up its strawman, OCC proceeds to knock it down by pointing out its perceived inadequacies as to each of the three sentences. OCC Application for Rehearing at 15-16. But the Order, previously and subsequently to these three sentences, explained why the Commission, with citation to record evidence, believed the Stipulation to be substantively reasonable, including 15 pages specifically responding to OCC's legal arguments.

In support of its conclusion that the Stipulation passed prong 2 of the 3-part stipulation test, the Commission cited DP&L witness Sharon Schroder's testimony, which "enumerated nine areas in which the settlement, as a package, benefits DP&L's customers and is in the public interest[.]" Order ¶ 48 (citing DP&L Ex. 4 at 15-32). The settlement benefits identified by the Commission at this portion of the Order stretch nearly two pages in length and were accompanied with citation to the record.

In addition to the record evidence cited, there were other evidence in the record regarding how the Stipulation benefitted ratepayers. Elsewhere in DP&L witness Schroder's testimony she further elaborated on why the Stipulation is substantively just and reasonable, and, therefore, passes the second and third prongs of the 3-part test

used to evaluate stipulations. DP&L Ex. 4 at 32-38. There were additional benefits, in the record, that support the Commission's finding. See *e.g.*, Mission: data Ex. 1 at 8-16 (outlining benefits of data portability and customer direct access to historical usage and billing information).

The Commission also considered OCC's substantive arguments to the contrary regarding the second prong of the 3-part stipulation test. Order ¶ 49. In the paragraph prior to OCC's "3-sentence" claim, the Commission categorized OCC's arguments against the second prong as falling into 6 substantive categories. *Id.* In the same paragraph as OCC's "3-sentence" claim, the Commission stated: "[a]s more fully described below, we reject the individual arguments raised by OCC regarding the ratepayer and public benefits of the settlement." *Id.* at ¶ 50. In the order, the Commission spent 15 pages responding to OCC's substantive legal arguments. *Id.* at ¶ 54-81. These 15 pages are replete with citations to record evidence. OCC's claim that the Commission failed to respond to OCC's arguments regarding the second prong is demonstrably incorrect.

Considering the settlement as a package, the Commission appropriately concluded that the settlement benefits ratepayers and the public interest and rejected the counter arguments raised by OCC. Order ¶ 49-50, 54-81.

C. The record supports the Commission's finding that DP&L's next ESP will not include rate stability charges.

OCC incorrectly asserts that the Stipulation's prohibition on additional non-cost-based nonbypassable charges in the next ESP is an illusory benefit. In support of the argument OCC claims that the Stipulation "only" prevents DP&L from seeking such a charge in its next ESP application, so there is nothing stopping it from seeking such a

charge in a future settlement. OCC Application for Rehearing at 22. There is no evidence in the record to support OCC's theory that the very parties that negotiated the provision at issue would then turn around in the next case, and through procedural maneuvering, support in settlement what they required DP&L to forgo. The Commission correctly recognized that the next ESP will "terminate all rate stability charges," expanding further, that it "will be devoid of credit-related and POLR charges." Order ¶ 50, 79.

OCC also argues that the Stipulation "only" requires DP&L to file an ESP application by 2023, but no requirement that it "actually pursue that application to completion." OCC Application for Rehearing at 23. Without record support, OCC implies that DP&L will act in bad faith. In any event, the Stipulation compels DP&L to "support the Stipulation." Stipulation at 51. All customers will receive the benefit of the next ESP being devoid of charges like the rate stability charge.

D. The Commission correctly concluded that the settlement process in this case was lawful and reasonable.

The Commission correctly rejected OCC's arguments against the settlement process. As to protecting residential customers, the Commission found "that residential customers were represented in negotiations through the participation of OPAE, the City of Dayton, and Staff." *Id.* There is ample record evidence for that conclusion.

Specifically, the Commission found "that 21 of the 24 parties in the case supported the Stipulation, only one party opposed the Stipulation, and that the parties to the case represented a wide range of interests[.]" Order ¶ 47 (citing DP&L Ex. 4 at 12-13). In addition to the Commission Staff and DP&L, the Stipulation is supported by:

the largest municipality in DP&L's service territory (which represents itself and its residents), a representative of residential low-income customers, three state-wide organizations of large industrial customers, one large

industrial customer, one of the largest supermarket chains in the country, a state-wide organization representing hospitals in DP&L's service territory, a large, local university, four environmental groups, a provider of competitive retail electric service, and four other parties that do business and represent interests in the smart grid field.

DP&L Ex. 4 at 12-13; see *also* Stipulation.

Moreover, OCC takes issues with any settlement benefit that does not uniquely flow to all customers, claiming that such an outcome prevents a settlement from benefitting the public interest. See OCC Application for Rehearing at 25-27. Initially, OCC ignores the hard work the Signatory Parties undertook to achieve benefits for all customers including:

(1) the negotiated conclusion of the RSC; (2) SGP spending reductions from \$642 million to \$267 million, as well as requiring smaller implementation phases and interim oversight of the plan over its 20-year period; (3) requiring DP&L to invest in its CIS without immediate cost recoupment, and subject to a cap of \$8.8 million; (4) obtaining shareholder-funded investments in residential consumer-beneficial programs; and (5) obtaining shareholder-funded investments in various economic development programs.

Order ¶ 71 (citing DP&L Ex. 4 at 15-32).

Further, OCC's insistence on brief that all settlement outcomes benefit all customers equally is contradicted by its advocacy in this case and others. Specifically, in OCC Witness Alvarez's testimony he suggests the Commission could have adopted a different cost allocation for the 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). OCC Ex. 7 at page 6-7, n. 6. 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. Case No. 13-1939-EL-RDR, Opinion and Order at

6-7 (Feb. 1, 2017). OCC's advocacy in this proceeding, and the prior settlement it cites, is the exact same thing it calls a redistributive coalition and is against the public interest. The Stipulation is in the public interest because it provides significant benefits to all customers, and the other shareholder funded items enumerated in the Settlement do nothing to diminish the benefits to all customers.

II. CONCLUSION

The parties to this proceeding worked hard over many months to chart a substantively lawful and reasonable path forward for DP&L. The culmination of that hard work yielded agreement by 21 parties in this proceeding resolving DP&L's proposed smart grid plan, multiple reviews under the significantly excessive earnings test, and the first ever prospective SEET and prospective ESP v. MRO reviews for any electric distribution utility in the state. While one party, OCC, challenged the comprehensive and broadly supported settlement, the Commission correctly held that record evidence demonstrated that the settlement was substantively lawful and reasonable and satisfied the Commission's 3-part test for evaluating settlements. OCC's challenge on rehearing is meritless and the Commission should not upset the many months of hard work that culminated in the broadly supported settlement.

Respectfully submitted,

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JULY 30, 2021

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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 *Industrial Energy Users-Ohio's Memorandum Contra the Office of the Ohio Consumers' Counsel's Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 30th day of July 2021, via electronic transmission.

/s/ Matthew R. Pritchard

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Case No(s). 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM, 19-1121-EL-UNC, 20-1041-EL-UNC

Summary: Memorandum Industrial Energy Users-Ohio's Memorandum Contra the Office of the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio