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**
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**
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**
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**
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 MORE FAVORABLE IN THE AGGREGATE TEST IN R.C. 4928.143(E).	**CASE NO. 20-680-EL-UNC**
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**

SECOND ENTRY ON REHEARING

Entered in the Journal on October 6, 2021

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Commission (1) grants, in part, and denies, in part, the application for rehearing filed by the Ohio Consumers' Counsel, and (2) denies the application for rehearing filed by the Dayton Power and Light Company.

II. PROCEDURAL HISTORY

A. General Procedural History

{¶ 2} The Dayton Power and Light Company (DP&L, Company, or AES Ohio) is an electric distribution utility (EDU), an electric light company, and a public utility as defined in R.C. 4928.01(A)(6), R.C. 4905.03(C), and R.C. 4905.02, respectively. As such, DP&L is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation service. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} Pursuant to R.C. 4928.143(F), following the end of each annual period of an approved ESP, the Commission is required to evaluate if any adjustments resulted in significantly excessive earnings for the electric utility. This determination is measured by whether the earned return on common equity of the utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies (including other utilities) that face comparable business and financial risk, with adjustments for capital structure as may be appropriate.

{¶ 5} Pursuant to R.C. 4928.143(E), if a Commission-approved ESP has a term that exceeds three years from the effective date of the plan, the Commission must test the plan in the fourth year to determine whether the ESP, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals,

continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under R.C. 4928.142, i.e., under an MRO. The Commission must also determine the prospective effect of the ESP to determine if that effect is substantially likely to provide the EDU with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with adjustments for capital structure as may be appropriate. The administration of these two tests—the more favorable in the aggregate test (MFA test) and the significantly excessive earnings test (SEET)—is referred to herein as the quadrennial review.

{¶ 6} On October 20, 2017, the Commission approved, with modifications, DP&L's application for its third ESP (ESP III) under R.C. 4928.143. *In re the Application of Dayton Power and Light Co. to Establish a Std. Serv. Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017).

{¶ 7} On November 26, 2019, DP&L filed a notice of withdrawal of its application for ESP III under R.C. 4928.143(C)(2)(a). *ESP III Case*, Notice of Withdrawal (Nov. 26, 2019). Additionally, citing to R.C. 4928.143(C)(2)(b), DP&L filed proposed revised tariffs seeking to implement its most recent SSO, which was its first ESP (ESP I). *In re Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO (*ESP I Case*), Proposed Revised Tariffs (Nov. 26, 2019). On December 18, 2019, the Commission issued a Finding and Order approving DP&L's withdrawal of its application, thereby terminating ESP III. *ESP III Case*, Finding and Order (Dec. 18, 2019).

{¶ 8} On December 18, 2019, the Commission also issued a Second Finding and Order approving, with modifications, DP&L's proposed revised tariffs to continue the provisions, terms, and conditions of ESP I. *ESP I Case*, Second Finding and Order (Dec. 18, 2019). In addition to restoring ESP I, the Commission acknowledged that the term of ESP I

had cumulatively exceeded three years and was thus subject to mandatory review under R.C. 4928.143(E). Accordingly, the Commission directed DP&L to open a docket by April 1, 2020, in which the Commission would conduct the quadrennial review detailed in R.C. 4928.143(E). *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 41.

B. Relevant Proceedings

{¶ 9} On December 21, 2018, the Company filed an application for approval of its plan to modernize its distribution grid together with a request for a limited waiver of Ohio Adm.Code 4901:1-18-06(A)(2) and for approval of certain accounting methods necessary to implement its plan. *In re Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid,* Case No. 18-1875-EL-GRD; *In re 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; *In re Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods,* Case No. 18-1877-EL-AAM (combined, *Smart Grid Case*).

{¶ 10} On May 15, 2019, DP&L filed an application and supporting documents for the administration of the SEET for calendar year 2018. *In re 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 (*2018 SEET Case*).

{¶ 11} On April 1, 2020, pursuant to the Commission's Second Finding and Order in the ESP I Case, DP&L filed an application for a finding that its current ESP passes the administration of the quadrennial review for the forecast period of 2020-2023. *In re Application of The Dayton Power and Light Company for a Finding that Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E),* Case No. 20-680-EL-UNC (*Quadrennial Review Case*).

{¶ 12} On May 15, 2020, in Case No. 20-1041-EL-UNC, DP&L filed an application and supporting documents for the administration of the SEET for calendar year 2019. *In re*

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 R.C. 4901:1-35-10 for 2019, Case No. 20-1041-EL-UNC (*2019 SEET Case*).

{¶ 13} Throughout the procedural history of these cases, the following entities have sought and been granted intervention in the *2018 SEET Case*, *2019 SEET Case*, and/or the *Quadrennial Review Case*: the City of Dayton; Honda of America Mfg., Inc.; Industrial Energy Users-Ohio (IEU-Ohio); Interstate Gas Supply, Inc. and IGS Solar, LLC (IGS); Kroger Co.; Ohio Consumers' Counsel (OCC); Ohio Energy Group; Ohio Hospital Association; Ohio Manufacturers' Association Energy Group; and University of Dayton. Further, pursuant to the attorney examiner entry issued on October 27, 2020, the following additional entities were granted intervention in the *Smart Grid Case*: Armada Power, LLC; ChargePoint, Inc.; Direct Energy Services, LLC and Direct Energy Businesses, LLC (together, Direct Energy); Environmental Law & Policy Center; IGS Solar, LLC; Mission:data Coalition; Natural Resources Defense Council; Ohio Environmental Council; Ohio Partners for Affordable Energy; Sierra Club; and The Smart Thermostat Coalition.

{¶ 14} On October 23, 2020, DP&L filed a stipulation and recommendation (Stipulation) executed by the Company, Staff, and 19 intervening parties that purports to resolve all issues raised in the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case*.[1]

{¶ 15} By Entry dated October 27, 2020, the attorney examiner consolidated the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case* for purposes of considering the Stipulation and established a procedural schedule, which included deadlines for filing testimony regarding the Stipulation.

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[1] There are 24 parties involved in these consolidated cases: DP&L, Staff, and 22 intervenors. Of these parties, only Direct Energy and OCC are not signatory parties to the Stipulation.

{¶ 16} On December 1, 2020, the Supreme Court of Ohio issued an opinion in an appeal taken from the Commission's determination that Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, FirstEnergy) did not have significantly excessive earnings under its ESP for calendar year 2017. *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan for Ohio Edison Co.*, 162 Ohio St.3d 651, 166 N.E.3d 1191, 2020-Ohio-5450. In its decision, the Court determined that the Commission erred in excluding revenue resulting from FirstEnergy's Distribution Modernization Rider (DMR) in determining the company's SEET earnings. As a result, the Court reversed the Commission's orders and remanded the case for further review, instructing the Commission to "conduct a new SEET proceeding in which it includes the DMR revenue in the analysis, determines the SEET threshold, considers whether any adjustments under R.C. 4928.143(F) are appropriate, and makes any other determinations that are necessary to resolve [the] matter" on remand. *In re Ohio Edison* at ¶ 65.

{¶ 17} On December 4, 2020, in recognition of the application of the Supreme Court of Ohio's decision in *In re Ohio Edison* to the determination of both the *2018 SEET Case* and the *2019 SEET Case*, the attorney examiner modified the procedural schedule in the case, determining that the parties were permitted to submit separate, supplemental testimony regarding how the SEET test should be conducted.

{¶ 18} Following the evidentiary hearing that commenced on January 11, 2021, the Commission adopted the Stipulation, which resolved all issues raised in the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case*. Opinion and Order (June 16, 2021).

{¶ 19} On July 16, 2021, applications for rehearing were filed separately by OCC and DP&L.

{¶ 20} On July 19, 2021, DP&L filed a motion for extension of time to file memoranda in opposition to applications for rehearing. On July 21, 2021, OCC filed a memorandum

contra DP&L's motion for extension of time to file memoranda in opposition to applications for rehearing. On July 22, 2021, the attorney examiner granted the motion for extension of time to file memoranda contra applications for rehearing, extending the time for filing memoranda contra as to both applications for rehearing until July 30, 2021.

{¶ 21} On July 30, 2021, memoranda in opposition to OCC's application for rehearing were filed by IEU-Ohio, IGS, and DP&L. Also on July 30, 2021, OCC filed a memorandum contra DP&L's application for rehearing.

{¶ 22} On August 11, 2021, the Commission granted the applications for rehearing filed by OCC and DP&L for the purpose of further consideration of the matters raised in the applications for rehearing.

III. DISCUSSION

A. Consideration of OCC's Assignments of Error

1. OCC'S FIRST ASSIGNMENT OF ERROR

{¶ 23} In its first assignment of error, OCC claims that the Commission erred when it upheld the legality of the rate stabilization charge (RSC) as part of the settlement of this case. OCC asserts that (1) the Commission's reliance, even in part, on DP&L's provider of last resort (POLR) obligations in upholding the RSC was in error, and (2) the Ohio Supreme Court has invalidated the charge as a financial integrity charge (FIC). *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In relation to its POLR argument, OCC maintains that the Supreme Court of Ohio requires that POLR charges must be correlated to cost estimates, and that the Commission must describe its cost-based rationale for adopting POLR obligations. In relation to its argument that the RSC is an unlawful FIC, OCC maintains that the RSC is invalid because it imposes customer charges that are not tied to specific distribution service.

{¶ 24} In its memorandum contra OCC's application for rehearing, DP&L counters OCC's arguments based on claims that (1) the legality of the RSC is not at issue in this case,

(2) the Commission was required to implement the RSC when DP&L terminated ESP III and returned to ESP I, (3) OCC's opposition to the RSC is barred by res judicata and collateral estoppel, (4) the Supreme Court of Ohio has twice previously upheld the RSC, (5) the RSC is a lawful POLR charge, and (6) the RSC is not a FIC.

{¶ 25} The Commission finds that OCC's first assignment of error is not well-taken. We note that the legality of the RSC, including OCC's claimed errors in this case, has been extensively considered in the *ESP I Case*. In the *ESP I Case*, we addressed multiple challenges to the RSC that were filed in connection with DP&L's withdrawal of ESP III, which reinstated ESP I. Parties to that case contested the RSC claiming that it was unlawful because (1) it was an impermissible stability charge, (2) it could not be defended on the basis of POLR obligations, and (3) it was not authorized by ESP I after December 31, 2012. In rejecting those claims and upholding the RSC, we emphasized that (1) the RSC was originally created in ESP I pursuant to uncontested Stipulation such that later legal challenges to it based on public interest or important regulatory principles are meritless, (2) the doctrines of res judicata and collateral estoppel prohibit parties from relitigating the RSC, (3) the RSC was previously determined to relate to DP&L's commitment to POLR obligations, and that determination was not appealed, and (4) the Supreme Court of Ohio upheld the RSC in 2007. *ESP I Case*, Third Entry on Rehearing (Dec. 14, 2016) at 9-13. Moreover, we have addressed further collateral attacks as to the validity of the RSC in subsequent applications for rehearing relative to the *ESP I Case*, each time concluding that the RSC remains valid. *See, ESP I*, Fifth Entry on Rehearing (June 16, 2021); *ESP I,* Sixth Entry on Rehearing (Aug. 11, 2021). We find that OCC's application for rehearing in this case raises no legal issues that have not been considered and rejected in the *ESP I Case*. Therefore, consistent with our prior decisions, we continue to reject OCC's legal claims against the validity of the RSC, including its continuing operation as part of the Stipulation in this case.

2. OCC'S SECOND ASSIGNMENT OF ERROR

{¶ 26} In its second assignment of error, OCC argues that the Commission erred in approving the Stipulation because it authorizes impermissible economic development and

other payments to signatory parties. OCC claims that DP&L is estopped from making these payments because the payments are only possible as part of the company's operation pursuant to ESP I, which does not provide for the payments. Further, OCC contends that authorization for the payments can occur only if ESP I is modified, which is beyond the Commission's authority as described in R.C. 4921.143(C)(2)(b).

{¶ 27} DP&L is joined by IEU-Ohio in countering OCC's claims as to the alleged assignment of error, noting that (1) the payments at issue will be paid by AES Ohio outside of customer charges such that OCC lacks standing to oppose them, (2) the payments are not authorized by or in any way contingent on the Company's continuing operation pursuant to ESP I, (3) the payments relate to economic development and job retention programs that are expressly authorized by R.C. 4905.31(C), and (4) to the extent OCC is correct in arguing that the payments are conditioned on ESP I authorization, ESP I provides for the payments pursuant to its Economic Development Rider provision.

{¶ 28} We reject OCC's arguments contra the authority to approve the economic development and other payments to signatory parties as part of the Stipulation. Contrary to OCC's claim, the payments at issue are permissible under multiple theories. As DP&L and IEU-Ohio note, there is no basis for OCC's claim that the payments can only occur if the Commission illegally modifies ESP I. DP&L is expressly authorized by statute to consider these economic development payments and this authority extends to allowing the company to make these payments without pursuing cost-recovery from its customers. R.C. 4905.31(E). Further, the payments occur independent of customer charges such that they are not subject to ESP I operating limitations. In reaching this determination, we reject OCC's argument that the payments are tied to ESP I. Accordingly, we need not address whether the Economic Development Rider provision in ESP I authorizes the payments.

3. OCC'S THIRD ASSIGNMENT OF ERROR

{¶ 29} In its third assignment of error, OCC asserts that the Commission failed to adequately explain its reasoning and wholly ignored OCC's arguments that (1) the Smart

Grid Plan (SGP) agreement would not be cost-beneficial to consumers, and (2) the settlement's numerous consumer harms outweigh any small consumer benefits. As to its claim that the Commission's decision is legally deficient, OCC claims that the decision does not (1) contain sufficient detail in order to determine the fact basis and reasoning for the decision, (2) address parties' arguments and explain why the Commission accepted a party's arguments over those of another party, and (3) align with the record in the case. R.C. 4903.09; *In re Commission Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607, 60 N.E.3d 1121, ¶ 53, 57; *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425, ¶ 19. Citing to a portion of Paragraph 50 of the Opinion and Order, OCC characterizes the Commission's consideration of its arguments concerning the weight of consumer benefits from the settlement as limited to a mere three-sentence discussion. OCC maintains that such limited analysis is deficient, citing to the breadth of the five-day hearing in the case, and the fact that OCC dedicated 25 pages of post-hearing briefing toward its ten assertions that the settlement's harms outweighed its customer benefits. OCC further critiques four of the Commission's stated reasons in favor of the customer benefits of the settlement: (1) AES's $300 million contribution to the operations of AES Ohio; (2) the cost-benefits of implementing the SGP; (3) the finding that the Infrastructure Investment Rider (IIR) in ESP I authorized the implementation of the SGP; and (4) the finding that DP&L's obligation to file a new ESP application by 2023 that does not provide for any financial integrity charges. Relative to the $300 million contribution, OCC claims that AES is not bound by the payment obligation because it is not a signatory party to the settlement, and that the entire investment cannot be considered as a customer benefit because one-half of the amount was invested on June 26, 2020, which was prior to the effective date of the settlement. Relative to the benefits of the SGP, OCC claims that the testimony of its expert witness, Dr. Alvarez, was wrongfully rejected. Relative to the IIR as a means to implement the SGP, OCC claims that the IIR that was implemented under ESP I was voided by the company's withdrawal of the IIR on October 19, 2010, such that it cannot serve as the SGP funding mechanism. Relative to the finding of customer benefit associated with requiring the filing of a new ESP application

that does not provide for any FIC, OCC claims that the language of the settlement is limited such that the charges in question could still be later implemented in spite of the prohibition against including them as a proposal in the upcoming ESP IV application.

{¶ 30} DP&L and IEU-Ohio contend that (1) OCC mischaracterizes the Commission's consideration and analysis as to the settlement's benefits, and (2) that the benefits of the approved Stipulation are supported by the record. DP&L cites to five paragraphs (¶57, 58, 64, 75, and 79) within the June 16, 2021 Opinion and Order where the Commission described its consideration of the additional consumer benefits provided by the Stipulation. Moreover, DP&L cites to portions of the Opinion and Order that provide record support for our conclusion regarding the benefits of the settlement. Specifically, DP&L notes that the Stipulation (1) secured AES's planned investment of $150 million in AES Ohio in 2021, (2) implemented the SGP, (3) affirmed the application of the IIR that was established in ESP I, and (4) limited the company's ability to seek future stability charges beyond 2023. Relative to the binding effect of the AES investment, DP&L observes that the planned investment of $150 million in 2021 is recited in the Stipulation, which was explained on the record by DP&L's Chief Financial Officer, and adopted by our Opinion and Order. (AES Ohio Ex. 6A; Opinion and Order ¶97, 99.) Relative to the benefits of the SGP, DP&L emphasizes the extensive testimony that it presented in favor of the Stipulation, including the detailed schedules that supported the testimony (AES Ohio Ex. 4, 5). Relative to the legal validity of the IIR used to implement the SGP, DP&L argues that (1) OCC conflates the fact that DP&L did not file a prior IIR placeholder tariff with an argument that the IIR provision is a nullity, (2) OCC waived any right to contest the IIR when the Commission restored ESP I in December 2019, and (3) the timing of the withdrawal from ESP III and return to ESP I does not invalidate the Commission's authority to consider the SGP pursuant to the resuscitated ESP I, as the Company's filing in 18-1875-EL-GRD contained the necessary business case elements for approval of the SGP pursuant to the IIR. Relative to the customer benefits from the limitations associated with the required filing of an application for ESP IV that is exclusive of any FIC, DP&L emphasizes that the concession is significant in spite of OCC's

point that it does not necessarily preclude such charges in so far as they might arise outside of the company's ESP IV application.

{¶ 31} We reject OCC's arguments regarding the legal validity of our Opinion and Order. Contrary to OCC's claim that our decision was improper in summarily addressing customer cost-benefit analysis, we emphasize that our decision in this case provided substantial detail as to the customer benefits derived from the Stipulation. While OCC is frustrated that its arguments as to this issue were rejected, we take exception to its efforts at mischaracterizing the analysis that we provided as to the customer benefits at issue. Specifically, Paragraph 50 of our Opinion and Order referenced further recitations of customer benefits, which were outlined in later Paragraphs 57, 58, 64, 75, and 79. Moreover, we adopted the entirety of the Stipulation based on the testimony of witness Shroder, who further described the benefits of the Stipulation (AES Ohio Ex. 4 at 15-32). Thus, OCC's strawman approach to limiting the scope of our analysis for purposes of arguing that the reasoning of our decision was inadequate are specifically rejected. Moreover, we also reject OCC claims contra our conclusions that (1) the $300 million investment by AES Ohio is a customer benefit, (2) the SGP is properly subject to implementation pursuant to the IIR that was established in ESP I, and (3) the RSC limitations contemplated by the ESP IV filing requirement are customer beneficial. We note that AES Ohio's remaining planned investment is limited to $150 million as a result of the fact that the company made a prior investment of a like amount in 2020. Nevertheless, we conclude that the remaining investment is incorporated into the Stipulation and the record in this case such that it is properly deemed to be a customer benefit for purposes of considering the totality of the settlement's benefits. Further, we reiterate our prior determination that the IIR that was established in ESP I remains viable to support the SGP, as the IIR was never invalidated, and DP&L's determination not to file a prior tariff as to its implementation does not serve to void its authorization. Further, we find that the concessions associated with the required filing of the ESP IV by 2023 are valid customer benefits in spite of OCC's disappointment in their breadth.

4. OCC'S FOURTH ASSIGNMENT OF ERROR

{¶ 32} In its fourth assignment of error, OCC asserts Commission error as to approving the Stipulation in spite of OCC's claim for rejection based on its redistributive coalition theory. As with its third assignment of error, OCC claims that there is no record evidence to support the Commission's finding of customer benefits and that the evidence that OCC proffered in the case should be controlling. OCC maintains that the entire Stipulation is tainted by the negotiated payments that are directed as part of the agreement. OCC further claims that there is no basis for our rejection of its expert, Dr. Hill, who testified as to the alleged ill-effects of his described redistributive coalition.

{¶ 33} DP&L and IEU-Ohio counter OCC's claims that customers fail to benefit by the Stipulation. DP&L cites to 28 specific customer benefits that are derived from the settlement. Examples of the cited benefits include: significant impacts across all customer classes in regard to implementing the SGP, which has been limited in scope and subject to significant audit procedures; benefits from maintaining ESP I operations, which ensure the company's ability to maintain safe, reliable service; commitments from the company to fund energy efficiency and low-income weatherization programs using shareholder, rather than ratepayer, funds; and, requiring the filing of ESP IV, which will not include any FIC, by 2023. Further, DP&L notes that OCC's broad, theoretical attack against settlements based on the redistributive coalition theory presented in this case has been previously rejected by the Commission in two recent cases. See, *In re Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016); *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, Opinion and Order (Mar. 31, 2016). IEU-Ohio further rebuts OCC's claims by citing to our Opinion and Order for support as to our determination that many of the negotiated concessions within the settlement benefit all customer classes. Opinion and Order at ¶48, 71.

{¶ 34} We reject OCC's claim that our finding of customer benefits from the Stipulation lacks record support. As outlined earlier herein and in our Opinion and Order, there are numerous customer benefits contained within the Stipulation that apply broadly to all customers. Accordingly, we reject OCC's arguments that contest both the

determination that customer benefits support the settlement adoption and that our prior decision was legally inadequate in explaining the basis for our decision. Further, we affirm our prior determinations that settlements in these types of cases, where many parties participate as to a wide range of complex issues, are not disfavored simply because they may involve some degree of financial benefits to some of the participants in a case. As we have previously described, there are ample customer protections in place to ensure that redistributive coalition concerns do not erode confidence in our ability to consider and approve settlements in these cases. These include: Staff's participation, the right of any person to participate in these cases, the fact that the cases are conducted publicly, the competing interests and substantial investment of resources of the participating parties that negotiate these complex settlements, and the fact that the settlements are, ultimately, independently reviewed and considered by the Commission on their individual merits. For these reasons, we reject OCC's claims that our prior determination was invalid due to alleged flaws attributable to a redistribution coalition theory.

5. OCC'S FIFTH ASSIGNMENT OF ERROR

{¶ 35} In its fifth assignment of error, OCC claims that the Commission erred in approving the Stipulation because it did not provide for consumer refunds of $61 million pursuant to the SEET determinations for the rate years 2018 and 2019. OCC contests the manner in which the Commission calculated the SEET amounts, arguing that, according to Commission precedent, DP&L's future capital commitment can only be considered to determine (slightly increase) the proper SEET threshold. *In re the Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011). Moreover, OCC claims that the Commission's determination to offset SEET amounts against DP&L's future capital commitments is unlawful and unreasonable because the Commission's rationale will always result in an electric utility using the commitment of future capital investments as a basis for avoiding customer refunds of SEET amounts. Further, OCC claims that the Commission's

authority pursuant to R.C. 4928.143(F) does not include the ability to offset excess earnings against pledged capital investments.

{¶ 36} DP&L asserts numerous claims as to why it maintains that it did not have any significantly excessive earnings. In addition to making these claims, the Company refutes OCC's claims that the Commission wrongfully offset SEET amounts against future capital commitments. Relying on R.C. 4928.143(F), DP&L argues that the Commission is required to consider the company's future capital commitments and that the Commission has broad discretion under the statute as to how the commitments should be considered. In addition to arguing that the Commission's offset decision is legally proper, DP&L also claims that the decision is supported by the fact that the offset facilitates the Company's capital investments necessary to implement the SGP and effectuate the other service enhancements outlined in the settlement.

{¶ 37} We reject OCC's legal claim contra our decision as to the calculation and manner of offsetting SEET amounts. Initially, we disagree with OCC as to the manner in which DP&L's future capital contributions can be considered. R.C. 4928.143(F) does not limit our consideration of DP&L's future capital investments in the manner that OCC advocates—there is no legislative direction that requires that the consideration be limited to creating a slight adjustment in the SEET calculation. Instead, the statute provides the Commission broad discretion as to the manner in which it considers future capital commitments. As we previously described, allowing the offset of excessive earnings against future capital commitments in this case encourages innovation and market access for cost-effective supply and demand-side-management programs and infrastructure. Accordingly, we reaffirm that the offset of excess earnings against future capital commitments is consistent with the discretion provided in the statute, rejecting OCC's claim that the statute must be interpreted more narrowly such that future capital commitments can only serve to slightly increase excess earnings calculations.

6. OCC'S SIXTH ASSIGNMENT OF ERROR

{¶ 38} In its sixth assignment of error, OCC claims that the Commission erred in approving the Stipulation that provided for the offset of smart grid charges in lieu of significantly excessive earnings refunds because the decision undermines consumer protections and allows DP&L to profit, on an accelerated basis, through its IIR. In addition to restating its claim that the excess earnings must be returned as customer refunds, rather than considered as potential offsets against future capital commitments, OCC also claims that our prior decision fails to adequately address the manner in which the earnings are to be offset. OCC seeks clarification concerning whether the combined $61.1 million will be considered as to a potential reduction of DP&L's IIR recovery of the $249 million SGP capital commitment.

{¶ 39} DP&L continues to argue in favor of the SEET offsets described in the Opinion and Order. The Company claims that the Commission has broad discretion concerning its treatment of the significant excess earnings such that the offset that we ordered is proper. Further, the Company argues that there is no controlling precedent as to the manner in which future capital commitments must be offset and that its financial circumstance warrants the offset at issue.

{¶ 40} We find that OCC's request for clarification as to this issue is reasonable. As described earlier herein, we reject OCC's legal claim contra our decision to offset excess earnings based on future capital commitments. In affirming the offset, we clarify that the $61.1 million in offset amounts shall not be considered in reducing the Company's right to pursue recovery of its $249 million SGP investment through its IIR, nor otherwise considered as a future limitation toward the Company's right to pursue recovery of SGP costs. In support of this finding, we stress that the consideration of SEET amount offsets is unique to each EDU. As such, we reject OCC's argument that our prior ruling in *In re the Application of Columbus Southern Power for Administration of the Significantly Excessive Earnings Test,* Case No. 10-1261-EL-UNC, controls our assessment of DP&L's circumstance in this case. As DP&L points out, its financial condition is such that ordering refunds of excess

earnings would not only preclude the future grid modernization that we approved, but it would also strain the Company's ability to maintain its distribution and transmission systems. This circumstance is unique to our consideration of the SEET offset issue impacting DP&L, and we rely on it in support of our decision contra the refunds that OCC seeks. Further, we also reject OCC's claim that the offset amounts should be used to reduce the Company's right to recover the full amount ($249 million) of its SGP investment through its IIR. As we previously described, R.C. 4928.143(F) provides broad discretion concerning how we are to consider a company's future committed investments. DP&L's commitment to implementing the SGP as part of the negotiated settlement in this case is highly beneficial to its customers. Achieving these benefits is fostered by authorizing DP&L to pursue the full recovery for its SGP capital investment through its IIR without requiring any reductions as a result of the SEET. Stated another way, requiring any reduction in capital investments as a result of the SEET would have a chilling effect on the Company's future committed investment, which is inconsistent with the public policy benefits that are provided for in R.C. 4928.143(F).

7. OCC'S SEVENTH ASSIGNMENT OF ERROR

{¶ 41} In its seventh assignment of error, OCC claims that the Commission erred in approving the Stipulation because it permitted DP&L to charge consumers through the IIR, which OCC claims is not a provision, term, or condition of DP&L's most recent SSO. OCC's claims here relate to (1) whether DP&L has an existing IIR tariff in ESP I that can be used to support SGP cost recovery, and (2) whether the fact that the company can advance the SGP in spite of the fact that the SGP filing occurred prior to the company's withdrawal from ESP III. In short, OCC claims that there is no legal mechanism for the Commission to implement the IIR recovery associated with DP&L's SGP implementation.

{¶ 42} DP&L is joined by IGS in refuting OCC's claims that the IIR from ESP I is no longer in effect. The Company and IGS acknowledge that DP&L did not file a tariff to implement any cost recovery using the IIR after its creation in 2009. *ESP I Case*, Stipulation and Recommendation (Feb. 24, 2009) at 5. Nevertheless, they maintain that the absence of

such a filing does not serve to invalidate the IIR. As a result, the IIR remains in effect and can serve as a funding mechanism for implementing the SGP in this case.

{¶ 43} We reject OCC's argument contra the effectiveness of the ESP I IIR as a mechanism for implementing cost recovery of the SGP approved in this case. DP&L is currently operating pursuant to ESP I pursuant to our approval. *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 29-35. Pursuant to ESP I, DP&L's current tariffs contain an IIR that was approved in the ESP I case. *ESP I Case*, Stipulation and Recommendation (Feb. 24, 2009) at 5. While the tariff has yet to be funded, there is no evidence that it ceases to exist. As a result, we affirm that DP&L's return to and current operation under ESP I includes the IIR that authorizes the recovery of SGP amounts that were approved via the Stipulation in this case.

B. Consideration of DP&L's Assignments of Error

{¶ 44} DP&L seeks rehearing in order to preserve additional arguments that it claims are supportive of its positions in the case as to (1) its claim that the Company did not have significantly excessive earnings, and (2) the RSC remains lawful. Relative to the legality of our SEET determination, DP&L claims that the Commission erred in calculating earnings by (1) not excluding the DMR revenue for retrospective SEET determinations, (2) refusing to make tax adjustments to reduce 2019 earnings by $18 million, and (3) refusing to exclude amounts that DP&L would have recovered pursuant to the reinstated RSC. Further, the Company argues that we understated its equity balance by (1) refusing to include the Company's pre-2018 asset impairments of over $1 billion to increase the Company's equity balance, and (2) refusing to include the $300 million equity investment of DP&L's parent, AES, in DP&L's equity balance.

{¶ 45} Specific to its claims that the DMR was wrongfully included in the SEET determination, the Company claims that the DMR was either (1) not an "earned return" such that it should be excluded as a capital charge, or (2) subject to exclusion as an extraordinary and one-time item. The Company claims that the DMR's restricted

authorization, which only allowed its use in servicing debt, merits a finding that its proceeds should be excluded from operating revenues. In the alternative, the Company claims that the DMR revenues were non-recurring such that they should be excluded from earnings as extraordinary items.

{¶ 46} Specific to its claims that its equity balance is understated, which resulted in an increased percentage of earnings calculation, the Company argues for inclusion of both (1) the $1 billion write-down of its assets between 2012-2016, and (2) the combined $300 million in capital investments by DP&L's parent company, AES, in DP&L during the years 2020 and 2021.

{¶ 47} Specific to supplementing its argument that the RSC remains lawful, DP&L claims that the RSC must be maintained because, as it was a term of the ESP I SSO that was in effect when the Commission approved ESP III, it is automatically reinstated by the withdrawal from ESP III and return to ESP I.

{¶ 48} OCC argues against DP&L's application for rehearing. As to DP&L's claim that there are additional grounds that support the finding that the company did not have significantly excessive earnings in 2018 and 2019, OCC stresses that our decision adopted Staff's recommendations regarding these issues and that Staff was unaccepting of the additional arguments that the Company raises (Staff Ex. 1; Opinion and Order at ¶64-69). As to the Company's claim that the RSC remains lawful for an additional reason (application of R.C. 4928.143(C)), OCC claims that (1) the statute is not applicable to the case, and (2) even if the statute were applicable, the RSC remains unlawful for other reasons.

{¶ 49} We reject the Company's application for rehearing. Initially, we emphasize our prior determination that the DMR recoveries of DP&L and First Energy are substantially similar. *ESP III Case*, Supplemental Opinion and Order ¶ 94 (Nov. 21, 2019). Accordingly, the treatment of DP&L's DMR recoveries should, consistent with the Supreme Court of Ohio's determination in *In re Ohio Edison*, be considered as earnings for SEET purposes. We reject DP&L's argument for distinguishing treatment based on claims that (1) the DMR was

not an "earned return," and, (2) the DMR was an extraordinary item that should be excluded from the SEET. We disagree with the Company's claim that the DMR proceeds were distinct from its remaining operating revenues such that their required use in debt payments entitles them to be removed from excess earnings calculations, as well as the Company's claim for exclusion as an extraordinary and one-time item. As OCC notes in its brief, all ESP charges count toward a utility's overall earnings and are temporal, existing only as long as the applicable ESP. In spite of the Company's claims, we conclude that its DMR revenues are earnings, subject to inclusion for SEET calculation purposes.

{¶ 50} Further, we reject the Company's claim that its equity balance should be increased in a manner that alters its SEET calculations based on (1) the $1 billion in asset impairments between 2012-2016, and (2) the $300 million investment of its parent company in 2020-2021. We stress that, in accordance with its past practices, Staff developed a hypothetical capital structure in its review of the Company's balance sheet for SEET purposes. Opinion and Order at ¶ 61, 62, 64, 66. Accordingly, we reject DP&L's claims for further balance sheet adjustments to account for changes in asset valuation, including prior write-downs, in setting the appropriate SEET thresholds. Likewise, we find no error as to our treatment of the $300 million in capital contribution from DP&L's parent company in 2020-2021. Our determination to offset, rather than require customer refunds, excess earnings of $61.1 million considered the overall benefits of the additional capital investment at issue, including the importance of the investment in fostering DP&L's ability to implement the SGP. Accordingly, we reject the Company's argument for alternate, balance sheet recognition of these amounts. In doing so, we also note that the contributions occur in 2020-2021, which is after the SEET calculation periods at issue in this case.

{¶ 51} We also reject the Company's claimed right to an $18 million earnings adjustment to account for tax law changes that were realized in 2019, finding that the tax law changes are not an extraordinary event that warrants the income adjustment being requested. Further, we reject the Company's claims that the DMR amounts that are included as income for SEET purposes should be offset by RSC amounts that the Company would

have received pursuant to its return to ESP I. In upholding this determination, we stress that (1) nearly all of the amounts at issue were not recovered as RSC amounts and we decline to reclassify them for SEET purposes[2], and (2) even assuming arguendo that such a reclassification is appropriate, the RSC revenues are still properly considered to be earnings for SEET purposes.

{¶ 52} We also reject the Company's request for additional clarification regarding our decision to uphold the lawfulness of the RSC. We note that our prior decision addressed the legality of the RSC in light of the historical consideration of the charges by both the Supreme Court of Ohio and the Commission. Opinion and Order at ¶ 57. We find no reason to add the additional clarification that DP&L seeks on rehearing, noting that we have thoroughly considered this issue in *ESP I*. Sixth Entry on Rehearing at ¶ 22, citing Second Finding and Order at ¶ 27, 31.

IV. ORDER

{¶ 53} It is, therefore,

{¶ 54} ORDERED, That the application for rehearing filed by OCC be granted, in part, as described in Paragraph 40. It is, further,

{¶ 55} ORDERED, That DP&L's application for rehearing be denied. It is, further,

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2 We recognize that there were negligible RSC recoveries after December 19, 2019, which was the date of DP&L's return to operations pursuant to ESP I.

{¶ 56} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Dennis P. Deters

MLW/hac

Case No(s). 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM, 19-1121-EL-UNC, 20-0680-EL-UNC

Summary: Entry on Rehearing granting, in part, and denying, in part, the application for rehearing filed by the Ohio Consumers' Counsel; and denying the application for rehearing filed by the Dayton Power and Light Company. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio