FILE

IN THE SUPREME COURT OF OHIO

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. 2021-1473
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.	Appeal from the Public Utilities Commission of Ohio
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).	Pub. Util. Comm. Nos. 19-1121-EL-UNC, 20-1041-EL-UNC, 20-680-EL-UNC, 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid.	
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).	
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods	

NOTICE OF APPEAL
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("PUCO") of this appeal. This appeal is taken to protect approximately 465,000 residential consumers from continuing to pay rates to the Dayton Power and Light Company ("DP&L") that include charges for so-called "stability," which this Court has consistently struck down. *See In re Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179; *In re Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734. The charge at issue is DP&L's "Rate Stabilization Charge." Unfortunately for consumers, relief from paying this unlawful charge has been substantially delayed by the PUCO's inaction, where it waited 16 months to issue a final appealable order ruling on OCC's application for rehearing regarding this charge in a different case. That case is also on appeal to this Court. *Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.*, S. Ct. No. 2021-1068.

This appeal also seeks to protect residential consumers who were unlawfully denied refunds. Residential consumers are entitled to refunds for DP&L's significantly excessive earnings (profits) under R.C. 4928.143(F).

The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on June 16, 2021 (Attachment A), the PUCO's Second Entry on Rehearing entered in its Journal on October 6, 2021 (Attachment B), and the PUCO's Third Entry on Rehearing entered in its Journal on December 1, 2021 (Attachment C). Also attached are OCC's July 16, 2021 First Application for Rehearing (Attachment D) and OCC's November 5, 2021 Third Application for Rehearing (Attachment E).

The PUCO's orders are unlawful and unreasonable in the following respects, all of which were raised in OCC's Application for Rehearing as noted:

1. The PUCO erred in ruling that DP&L's Rate Stabilization Charge is lawful, which contradicts R.C. 4928.143, R.C. 4903.09, and Ohio Supreme Court precedent. (First Application for Rehearing at 3-8, Assignment of Error 1).

2. The PUCO violated R.C. 4928.143(F) by denying consumers refunds under the significantly excessive earnings test despite finding that DP&L's profits were significantly excessive—in the amount of $61 million. The PUCO unlawfully denied residential consumers the refunds they are entitled to with a phantom "offset" based on DP&L's future capital investments. (First Application for Rehearing at 27-33, Assignments of Error 5 and 6; Third Application for Rehearing at 2-6, Assignment of Error 1).

The PUCO's June 16, 2021 Opinion and Order, October 6, 2021 Second Entry on Rehearing, and December 1, 2021 Third Entry on Rehearing are unreasonable and unlawful. OCC respectfully requests that the Court reverse the PUCO's Opinion and Order, Second Entry on Rehearing, and Third Entry on Rehearing and remand the case to the PUCO with a directive that the PUCO (i) order DP&L to immediately terminate the Rate Stabilization Charge for residential customers, (ii) order DP&L to refund all Rate Stabilization Charges paid by residential consumers on and after June 16, 2021, which is the date that the PUCO ordered DP&L to add refund language to the Rate Stabilization Charge tariff in Pub. Util. Comm. No. 08-1094-EL-SSO, and (iii) require DP&L to provide refunds to customers in the amount of $61 million for DP&L's 2018 and 2019 significantly excessive earnings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 6th day of December 2021.

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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

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IN THE SUPREME COURT OF OHIO

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. 2021-1473
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ATTACHMENTS OF PUCO ORDERS AND DECISIONS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

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

OPINION AND ORDER

Entered in the Journal on June 2, 2021

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I. SUMMARY

{¶ 1} The Commission finds that the Stipulation between the Dayton Power and Light Company, Staff, and the other signatory parties regarding the issues raised in these consolidated cases meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

II. PROCEDURAL HISTORY

A. *General Procedural History*

{¶ 2} The Dayton Power and Light Company (DP&L or Company) 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.

{¶ 9} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The Department of Health is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

B. Relevant Proceedings

{¶ 10} On December 21, 2018, the Company filed an application for approval if 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*).

{¶ 11} 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*).

{¶ 12} 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*).

{¶ 13} 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*).

{¶ 14} 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 (Dayton); Honda of America Mfg., Inc. (Honda); Industrial Energy Users-Ohio (IEU-Ohio); Interstate Gas Supply, Inc.; Kroger Co. (Kroger); Ohio Consumers' Counsel (OCC); Ohio Energy Group (OEG); Ohio Hospital Association (OHA); Ohio Manufacturers' Association Energy Group (OMAEG); and University of Dayton (UD). 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 (Armada); ChargePoint, Inc. (ChargePoint); Direct Energy Services, LLC and Direct Energy Businesses, LLC (together, Direct Energy); Environmental Law & Policy Center (ELPC); IGS Solar, LLC; Mission:data Coalition (Mission:data); Natural Resources Defense Council (NRDC); Ohio Environmental Council (OEC); Ohio Partners for Affordable Energy (OPAE); Sierra Club; and The Smart Thermostat Coalition (STC).

{¶ 15} 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]

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} 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,

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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.

determining that the parties were permitted to submit separate, supplemental testimony regarding how the SEET test should be conducted.

{¶ 19} Prior to the evidentiary hearing, DP&L, Staff, and OCC timely filed testimony.

{¶ 20} The evidentiary hearing commenced, as scheduled, on January 11, 2021. During the hearing, the attorney examiners admitted into the record the Stipulation, as well as the testimony of witnesses: Sharon Schroder, Gustavo Garavaglia, and R. Jeffrey Malinak on behalf of DP&L; Joseph Buckley on behalf of Staff; Michael Murray on behalf of Mission:data; and Matthew Kahal, Pat Alvarez, Dr. Edward Hill, James Williams and Dr. Daniel Duann on behalf of OCC.

{¶ 21} At the conclusion of the hearing, the parties agreed that initial and reply briefs would be submitted by February 12, 2021, and March 5, 2021, respectively. Initial briefs were timely filed by Staff, Mission:data, OPAE, Interstate Gas Supply, Inc. and IGS Solar, LLC (together, IGS), OEG, ELPC, OCC, DP&L, Kroger, Armada, IEU-Ohio, OHA, OMAEG, and Sierra Club. Reply briefs were timely filed by IEU-Ohio, ChargePoint, Staff, IGS, OEG, ELPC, OHA, Sierra Club, Kroger, DP&L, OMAEG, and OCC.

III. Discussion

A. *Summary of the Cases*

1. Smart Grid Case

a. Applicable Law

{¶ 22} R.C. 4928.02 declares that the policy of the state of Ohio regarding competitive electric retail service includes the following goals:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service, including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encouraging cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution of transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs or alternative energy resources in their businesses; and

(N) Facilitate the state's effectiveness in the global economy.[2]

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[2] For purposes of evaluating the *Smart Grid Case*, the Commission applies the version of R.C. 4928.02 as amended by Senate Bill 315 because that was the version that was in effect when the application was filed in that case.

{¶ 23} In carrying out this policy, the legislation directs the Commission to consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state. R.C. 4928.02

{¶ 24} As stated above, R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a SSO of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either an MRO in accordance with R.C. 4928.142 or an ESP in accordance with R.C. 4928.143.

b. Summary of the Application

{¶ 25} As indicated above, on December 21, 2018, the Company filed its *Smart Grid Case*. In its application, the Company outlined the six primary customer benefits that were expected from the proposed investment of $866.9 million over the 20-year Smart Grid Plan (SGP):

(1) Personalized customer engagements, including optionality, at the customer's convenience.

(2) Differentiated reliability to meet individual customer energy needs.

(3) Seamless integration of Distributed Energy Resources onto the grid.

(4) An increase in Electric Vehicles (EVs) for public and private use

(5) Open access to the grid and grid data, including for third parties

(6) Open markets to navigate the rapidly evolving set of energy choices and solutions.

(*Smart Grid Case*, Application at 3.)

c. *Summary of the Stipulation in Regard to Smart Grid Case Considerations*

{¶ 26} The Stipulation recommends approval of the SGP, but with significant cost reductions and implementation limitations to the plan that DP&L originally proposed. Customer benefits outlined in the negotiated Stipulation include (1) reducing the cost of the overall, 20-year plan, from $866.9 million to $387.9 million, (2) reducing the cost of capital investments and associated operation and maintenance expenses from $642 million to $267 million, (3) shortening the first phase of the SGP from ten years to four years, (4) limiting the initial approval of the SGP to only Phase 1, (5) subjecting Phase 1 implementation to annual audits, (6) limiting approval of cost recovery through the Infrastructure Investment Rider (IIR) in the event that DP&L does not file a new distribution rate case by January 1, 2025, and (7) requiring that DP&L file further applications for approval of additional phases, which shall be subject to opposition or objection. (Stipulating Parties Ex. 1.)

{¶ 27} Regardless of the negotiated SGP reductions, the stipulating parties maintain that the principle components of the proposed SGP are preserved by the Stipulation, including:

(1) Smart Meters – the Company will invest $77.6 million in the installation of smart meters, also known as Advanced Metering Infrastructure (AMI), such that nearly every customer will have an advanced meter.

(2) Self-Healing Grid – the Company will invest $109 million in self-healing grid technologies, including, but not limited to distribution automation, substation automation, advanced distribution management system, and conservation voltage reduction and Volt/Var Optimization.

(3) Customer Engagement – the Company's SGP Phase I will enable its customers to interact with the utility and the grid in new and improved ways and provide education regarding all of its SGP components.

(4) Telecommunications – Expansion of the Company's telecommunications capabilities will ensure reliable and robust communication with all of the field devices that are proposed as part of SGP Phase I.

(5) Cyber Security – Implementing and improving cybersecurity will ensure the appropriate security measures and upgrades necessary to protect customer data.

(6) Governance and analytics – Rigorous systems and integration and testing that links the various systems and software that will be necessary for successful execution of the SGP.

(DP&L Ex. 4 at 15-16.)

2. 2018 SEET CASE AND 2019 SEET CASE

a. Applicable Law

{¶ 28} Pursuant to R.C. 4928.141, electric utilities are required to provide consumers with a standard service offer, consisting of either an MRO or an ESP.

{¶ 29} Pursuant to R.C. 4928.143(F),[3] the Commission is required to consider annually whether an ESP resulted in "significantly excessive earnings" compared to companies facing "comparable" risk. With regard to the provisions that are included in an ESP under this section, the Commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the EDU is significantly in excess of the return on common equity that was earned during the same period by publicly traded

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[3] For purposes of evaluating the *2018 SEET Case*, the Commission applies the version of R.C. 4928.143(F) as amended by 2011 Am.Sub.H.B. No. 364 because that was the version that was in effect when the SEET application was filed in that case. For purposes of evaluating the *2019 SEET Case*, the Commission applies the version of R.C. 4928.143(F) as amended by 2019 Am.Sub.H.B. 166 because that was the version in effect when the SEET application was filed in that case.

companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state.

{¶ 30} R.C. 4928.143(F) further provides that, in determining an electric utility's SEET, the utility bears the burden of proof for demonstrating that significantly excessive earnings did not occur, and if the Commission finds that such adjustments referring to provisions in the electric security plan in the aggregate, did result in significantly excessive earnings, it shall require the EDU to return to customers the amount of the excess by prospective adjustments.

{¶ 31} In 2010, the Commission issued a Finding and Order that established the policy and SEET filing directives for electric utilities under our jurisdiction. *In re Significantly Excessive Earnings Test*, Case No. 09-786-EL-UNC (*SEET Test Case*), Finding and Order (June 30, 2010).

{¶ 32} On December 1, 2020, the Supreme Court of Ohio issued its opinion in *In re 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 an electric utility's DMR in determining the electric utility'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.

b. Summary of the Applications

{¶ 33} DP&L filed the *2018 SEET Case* on May 15, 2019, which was prior to filing its withdrawal from its ESP III on November 26, 2019. Accordingly, DP&L's *2018 SEET Case* application was based on the terms that existed in its ESP III case at the time of the application's filing. Based on the criteria in effect at the time of filing that application, DP&L asserted that the SEET threshold for 2018 was 12 percent, as established pursuant to a Commission-approved stipulation in the *ESP III Case*. *ESP III Case*, Opinion and Order (Oct. 20, 2017) at ¶ 14. Further, DP&L sought a determination that its return on equity (ROE) was 3.5 percent. Among the adjustments to the calculation of its return on equity, DP&L proposed that revenue derived from its DMR should be excluded, which was consistent with the Commission's treatment of DMR revenues for SEET calculation purposes at that time. *2018 SEET Case* Application at 1; *ESP III Case* at ¶ 124-126.

{¶ 34} DP&L filed the *2019 SEET Case* on May 15, 2020. As part of this filing, the Company noted that 2019 revenues were collected in a combination of rates established in both the *ESP I Case* and the *ESP III Case* due to the Commission-approved withdrawal of ESP III on December 18, 2019. DP&L asserted that its 2019 ROE was 11.6 percent. Further, the Company asserted that its ROE was below the SEET threshold amount without identifying that threshold amount or providing any explanation as to its assertion that the threshold was in excess of 11.6 percent. Further, as in the *2018 SEET Case*, the Company proposed that revenue derived from its DMR should be excluded for ROE calculation purposes. *2019 SEET Case* Application at 1.

c. *Summary of the Stipulation in Regard to the 2018 SEET Case and 2019 SEET Case*

{¶ 35} The stipulating parties recommend that the Commission approve DP&L's applications in the *2018 SEET Case* and the *2019 SEET Case* in consideration of the Stipulation as a package (Stipulating Parties Ex. 1 at 45).

3. QUADRENNIAL REVIEW CASE

a. *Applicable Law*

{¶ 36} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a 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 an MRO in accordance with R.C. 4928.142 or an ESP in accordance with R.C. 4928.143.

{¶ 37} 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 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 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. These two tests are referred to separately as the MFA test and the SEET, respectively, and collectively herein as the quadrennial review.

b. Summary of the Application

{¶ 38} On April 1, 2020, DP&L filed an application for a finding that its current ESP passes the administration of the quadrennial review, as required by R.C. 4928.143(E), for the forecast period of 2020-2023.

{¶ 39} DP&L claims that its current ESP, ESP I, passes the prospective SEET for the forecast period of 2020-2023. In support of the application, DP&L filed contemporaneous testimony of Gustavo Garavaglia and R. Jeffrey Malinak. Witness Garavaglia testified that the applicable prospective SEET threshold is 16.6 percent (DP&L Ex. 1A at 85, DP&L Ex. 6A at 3-8). Witness Malinak testified that the Company's projected average and projected highest ROE during the forecast period are all below (1) the SEET threshold of 13.1 to 15.6 percent, and (2) the "safe harbor" threshold of 11.8 to 12.4 percent (DP&L Ex. 1B at 16, 17, 88).

{¶ 40} DP&L further claims that it passes the MFA test because ESP I is more beneficial to customers than a comparative MRO. In support of this claim, the Company highlights both quantifiable and non-quantifiable benefits of the ESP I. Quantifiable benefits include (1) the fact that DP&L's continuing recovery of rate stabilization charge (RSC) amounts under the ESP are below the amounts the Company would receive via a financial integrity charge (FIC) if it operated under an MRO, and (2) the MRO would provide for customer recovery of certain environmental cleanup costs that are not provided for in the ESP. Non-quantifiable benefits of the ESP identified by the Company include (1) customer protections against significantly excessive earnings through the availability of refunds, and (2) avoiding the irreversible conversion to an MRO, which has limitations in terms of price instability and fairly distributing financial integrity charges (DP&L Br. at 58-60).

c. Summary of the Stipulation in Regard to the Quadrennial Review Case

{¶ 41} The stipulating parties recommend that the Stipulation be found to satisfy the requirements of R.C. 4928.143(E), arguing for a determination that ESP I as currently implemented passes the MFA test and the prospective SEET. In the alternative, if the Commission finds that DP&L fails either the MFA test or prospective SEET, the Signatory Parties urge the Commission to provide for DP&L's conversion to ESP IV, which the Company is required to file by October 1, 2023. (Stipulating Parties Ex. 1 at 42-45.)

B. Summary of the Stipulation

{¶ 42} The Stipulation filed on October 23, 2020, was executed by the Company, Staff, Dayton, IEU-Ohio, IGS, OEG, OHA, OMAEG, Kroger, Honda, OPAE, UD, Mission:data, STC, ELPC, Sierra Club, NRDC, OEC, ChargePoint, and Armada (Signatory Parties) with the intent to resolve all issues in these combined proceedings. Within the introductory paragraphs, the Signatory Parties state their belief that the Stipulation is the product of lengthy, serious, arm's-length bargaining involving negotiations open to all parties; is supported by adequate data and information; as a package, benefits customers and the public interest; and violates no regulatory principle or precedent.[4] The following is a summary of—and is not intended to supersede or replace—the terms of the Stipulation.[5]

1. Plan approval: DP&L's Smart Grid Plan (SGP) shall be the application, testimony and schedules as filed in *the Smart Grid Case*, except as modified in this Stipulation. The SGP will be approved, and DP&L will be authorized to implement the plan.

2. Phases and Cap: DP&L's SGP shall be divided into phases. SGP Phase 1 will be four years from the date of the Commission's Order approving the Stipulation and be limited to the projects listed in Exhibit 1. The total amount DP&L may spend on SGP Phase 1 capital investments and operational and maintenance expenses, collectively, is capped at $267,600,000. The Company shall deploy the quantities of each technology as described below. Any return on and of those actual capital expenditures and recovery of O&M expenditures shall be through the IIR, with recovery commencing after the date of the Commission's Order approving this Stipulation. Individual components may cost more or less than estimated, but the overall spend shall be capped. DP&L plans to pursue subsequent phases of comprehensive grid modernization and may file an application for a second phase (SGP Phase 2) on or before three years from the date of the Commission's Order approving the Stipulation. However, nothing in this Stipulation precludes the Signatory Parties from opposing any future DP&L SGP application or future proposals contemplated but not authorized by this Stipulation.

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4 The Signatory Parties also make the following representation, among others, in preamble to the Stipulation's provisions: The AES Corporation, which is the ultimate parent of DP&L, provided a capital contribution of $150 million to DP&L on June 26, 2020 to enable DP&L to improve its infrastructure and modernize its grid while maintaining liquidity; additionally, AES has provided a statement of intent to contribute an additional $150 million to DPL or DP&L in 2021 to enable smart grid investment.

5 The Commission's summary incorporates the organizational structure of the Stipulation as agreed to by the Stipulating Parties.

The Stipulation does not preclude DP&L from seeking a return on and of any capital or O&M expenditures through base distribution rates.

3. <u>Cost Recovery</u>:

a. DP&L may seek to recover a return on and of its prudently incurred SGP Phase 1 capital investments and its associated operation and maintenance expenses through the IIR.

b. DP&L's recovery of its capital investments and expenses through the IIR shall be offset by the estimated operational benefits that the parties agree DP&L will realize as a result of DP&L's SGP Phase 1 expenditures.

c. If DP&L does not file a distribution rate case by January 1, 2025, then the recovery of the costs associated with this Stipulation shall cease and the IIR will be set at zero.

d. Although DP&L reserves the right to raise the issue in the upcoming rate case, the earnings-based portion of incentive compensation for the costs associated with the provisions of this Stipulation shall not be recoverable.

e. Meters.

i. Capital costs associated with AMI meters will be recovered over a depreciable life of 15 years, with all other investments being recovered pursuant to the depreciation rates authorized in Case No. 15-1830-EL-AIR, *et al* (*2015 Rate Case*).

ii. The net book value of the retired meters and capacitors will be subtracted from the gross plant additions in each year of SGP

Phase 1 so that the value is not double counted in rate recovery. The gross plant offset will occur through the IIR as the meters and capacitor banks are retired.

iii. Costs for AMI meters purchased but not installed within 90 days shall not be recoverable for the period the AMI meters remain uninstalled in excess of 90 days.

f. DP&L may make SGP Phase 1 investments before the Commission has approved this Stipulation and include recovery of those investments in the IIR upon approval, if those cost were incurred after December 21, 2018, or included as part of the Grid Mod R&D Asset deferral, which shall be subject to audit through the IIR and the expenditure gap set forth in Paragraph 2.

4. Ratemaking: The revenue requirement for SGP Phase 1 shall be calculated as shown on Exhibit 2. The cost allocation and rate design of SGP Phase 1 shall be as proposed in the SGP, allocated and charged as a percentage of base distribution charges.

5. Commission Oversite and Information Sharing:

a. Audit: DP&L's SGP Phase 1 investments and expenses and the IIR (or replacement rider) shall be subject to annual audits. The audit shall either be conducted by Staff or by a third party under the direction of Staff with such costs recoverable through the IIR and not subject to the cap. Annual audits will include, but not be limited to, the following:

i. On-site inspections of new capital assets;

ii. Tracking capital expenses from continuing property records, invoices, and other supporting documentation to the used and useful assets, as well as tracking used and useful assets to continuing property records, invoices, and other supporting documentation;

iii. Verification of proper accounting and computation of annual property tax expense;

iv. Verification of proper accounting and computation of state, local, and federal income tax expense, as well as taxes other than income;

v. Verification of proper accounting and computation of annual depreciation expense;

vi. Verification that incremental labor O&M expense included for recovery in the IIR is only associated with employees dedicated to SGP Phase 1 and in roles not already recovered in current base distribution rates. For employees whose compensation is currently recovered in base distribution rates but are in new roles fully dedicated to the Company's SGP, DP&L will provide verification that their previous positions have been backfilled so as to prevent double recovery of an individual's compensation. Annual audits will require review of timesheets, employee position numbers, position description, and organizational charts;

vii. Verification that non-labor O&M expenses are incremental. Annual audits will require review of any applicable allocations; justifications for allocation percentages;

supporting invoices and other documentation; contracts; Requests for Proposals; listings of applicable transactions in Excel and journal entry reports; and

viii. Verification of proper accounting for IIR revenues.

b. Non-Financial Metrics: DP&L will provide annual reporting for the metrics contained in Exhibit 3 as part of the annual audit filing each year.

c. Grid Mod Implementation Update Group: DP&L will facilitate a Grid Mod Implementation Update Group (Update Group) with interested Signatory Parties.

i. The Update Group will meet at least quarterly to:

(1) Update stakeholders on the status of the project throughout implementation of SGP Phase 1 and to provide for customer input and advice.

(2) Update stakeholders on the progress toward data access for Competitive Retail Electric Service (CRES) provider product billing purposes.

(3) Gather stakeholder input associated with data access systems and processes.

(4) Share an updated map of where AMI is being deployed with dates of deployment and an AMI tag on the Customer Information List provided to CRES providers to indicate active meters.

ii. AMI Distributed Intelligence Capabilities

(1) An AMI meter with "Distributed Intelligence Capabilities" is a meter that has an onboard computer with the capability to download and execute software applications written by DP&L or third parties. Distributed Intelligence Capabilities do not refer to firmware that is loaded on an AMI meter for basic operations.

(2) DP&L will notify the Update Group if the Company develops any plan to procure and deploy AMI meters with Distributed Intelligence Capabilities during SGP Phase 1.

(3) At least 180 days before utilizing Distributed Intelligence Capabilities of AMI meters during SGP Phase 1, DP&L will file a description of its planned utilization in the docket for this proceeding to allow for public comment on that plan by interested stakeholders. DP&L's filing will, at a minimum, describe: (1) how third parties may be able to utilize the AMI meter's Distributed Intelligence Capabilities with appropriate customer consent, and under what terms and conditions; (2) what customer services or offerings DP&L may provide through the Distributed Intelligence Capabilities of its AMI meters; and (3) a description of what software applications have been, or are planned to be, installed onto AMI meters.

6. Additional Provisions: DP&L will:

   a. Reduce AMI investment to be recovered in the IIR during SGP Phase 1 from the proposed 100 percent of meters to 95 percent, as reflected in Exhibit 1.

   b. Reduce the Distribution Automation investment to be recovered in the IIR during SGP Phase 1 from the proposed 47 percent of circuits to approximately 20 percent (88) of DP&L's circuits, as reflected in Exhibit 1.

   c. Reduce the Substation Automation investment to be recovered in the IIR during SGP Phase 1 from the proposed 97 substations to approximately 30 substations, as reflected in Exhibit 1.

   d. Accelerate VVO/CVR implementation installing the necessary hardware and software on approximately 30 percent (132) of DP&L's circuits, specifically targeting those circuits that serve hospitals.

   e. Propose time-of-use (TOU) rates and implementation plan through an EL-ATA case on a pilot basis during SGP Phase 1. Any TOU rates that are offered through DP&L's SSO shall be offered only on an "opt-in" basis. The generation related costs of any TOU proposal shall remain fully bypassable, including costs associated with the implementation, administration, or marketing of the Company's TOU offering as set forth in Workpaper 3.3, which shall be deferred for future recovery through SSO rates upon Commission approval. Once DP&L is notified that there are at least three different suppliers offering time-varying products using AMI data, then

DP&L (with Commission approval) will request to withdraw its SSO TOU rate offering.

f. Implement an EV rebate program, as described in Paragraph 8 below.

g. Implement a Smart Thermostat rebate program, as described in Paragraph 9 below.

h. Implement a new Customer Information System, as described in Paragraph 10 below.

i. Provide for customer, CRES, and third-party access to customer data, as described in Paragraph 11 below.

j. Implement additional residential customer benefits, as described in Paragraph 12 below.

k. Implement additional benefits for the City of Dayton, as described in Paragraph 13 below.

l. Implement additional Commercial & Industrial (C&I) benefits, including several pilot programs, as described in Paragraph 14 below.

7. Regarding the request for limited waiver of Ohio Adm.Code 4901:1-18-06(A)(2), within six months of an Order adopting the Stipulation, DP&L will file a supplemental application for waiver and memorandum of support including but not limited to proposed alternative methods of notification, protections in place to ensure the safety of vulnerable customers, and if approved, the means by which customers will be advised of the change in procedure.

8. EV Rebate Program: DP&L will implement an EV program consisting of rebates for Electric Vehicle Supply Equipment (EVSE) for both Level 2 and Direct Current Fast (DCF) chargers, education, and marketing, as well as a future intelligent charging incentive. The total EV program will be capped at $5.1 million.

   a. EVSE Rebate: The Signatory Parties agree to the following program, which will include rebates to cover the costs of up to $5.1 million to install Level 2 and DCF chargers, including customer out-of-pocket installation costs:

      i. The program will consist of EVSE rebates split 70/30 percent between Level 2 and DCF chargers and is further described below:

         (1) For the Level 2 chargers, 100 percent of EVSE and customer out-of-pocket installation costs will be eligible for rebates, capped at $10,000/station. The Level 2 chargers that will be eligible for rebates will be as follows:

            (a) 30 percent available to the public, which includes persons who provide transportation to the public such as mass transit, school buses, shuttle buses, taxis, and other public-serving transportation;

            (b) 50 percent available to workplaces, which are not required to be publicly available;

            (c) 20 percent available to multi-unit dwellings, which are not required to be publicly available.

(2) For the DCF chargers, 100 percent of EVSE and customer out-of-pocket installation costs will be eligible to rebates, capped at $75,000/station. The DCF chargers that will be eligible for rebates will be 100 percent available to the public, which includes customers who provide transportation to the public such as mass transit, school buses, shuttle buses, taxis, and other public-serving transportation. At least 30 percent of the funds for the DCF Chargers shall be used for the establishment of "corridor ready" alternative fuel corridors for EVs, as defined by the U.S. Department of Transportation's Federal Highway Administration.

(3) Other Program Terms and Limitations

(a) Rebates will be awarded on a first-come, first-served basis.

(b) A customer (or its affiliates) shall not receive more than 7 percent of all the rebates available.

(c) All charging infrastructure shall be networked charging infrastructure (i.e., able to communicate with a network management system), be demand-response capable, include software and network services capable of capturing data and metrics described in the "Data" subparagraph below, and support open charging standards or protocols. An EV charging station that is part of the rebate program and requires payment of a fee shall allow a person desiring to use the station to pay via credit card, mobile technology, or both. A site host participating in the rebate program that takes service under DP&L's SSO will be charged for their usage and service requirements as a DP&L retail customer, including usage delivered to EV charging systems on the site host's premises, based on applicable tariffs. This provision does not preclude a site host from shopping for their generation supply.

(4) Data

(a) The site host and/or charging station provider will have flexibility to set pricing to EV drivers, subject to any applicable laws or regulations. DP&L will require reporting of prices charged to EV drivers at all charging stations in a manner and form established by DP&L, including, but not limited to, reporting of intended prices as a precondition on receipt of rebates. As part of the rebate process, DP&L will inform site hosts about its available tariffs and rates, including TOU rates, to better inform site hosts about their options to effectively manage charging load and to provide the opportunity to maximize cost savings.

(b) DP&L will be authorized to access or receive data from charging stations installed through the Rebate Program, including but not limited to: usage, data regarding grid reliability, load growth, the potential for demand response load profiles, prices paid by EV drivers and site host pricing models/strategies, equipment provider selected, installation costs by equipment provider, and outage incidents by equipment provider. DP&L shall report on this information at the Update Group meetings.

(5) Reporting: Company shall file two reports associated with the EVSE Rebate program: one midway through the program and a final report once the program is fully subscribed. The report shall include an overview of the program, including but not limited to: the location of rebate recipients and the category of site hosts who receive rebates; EVSE funded through the program; charging network and service providers included in the program; cost of the EVSE and installation relative to the EV rebates, broken out by technology type; usage and load profiles of EVSE; impacts of site host pricing on charging behavior; and impacts of the EVSE on the distribution system.

b. No administrative fees will be assessed for this program. DP&L will not own or receive a return on charging stations in this program. All customer funds recovered through the IIR related to the EV program shall be either distributed as rebates pursuant to this provision or refunded to customers through the IIR. The Stipulation does not prevent DP&L from seeking approval for a utility ownership model or recovery of any additional charging station investments; the Signatory Parties remain free to challenge any such request by DP&L. If DP&L elects to file such request in the future, it shall be filed in a new application and requires Commission approval.

c. DP&L will continue to evaluate category funding and will seek input and advice from the Staff and Signatory Parties regarding reallocation of funds between program categories, Level 2 and DCF chargers, and annual spending. DP&L will provide Staff annual updates on the program. If DP&L plans to reallocate funds, it will provide notice within 90 days to Staff and Signatory Parties.

d. The costs of the EV Rebate Program will be recovered through the IIR.

9. Smart Thermostats: DP&L will provide a total of $450,000 annually, funded by DP&L with shareholder dollars and not recovered through the IIR or other rates, for four years to offer marketing, administration, and rebates/incentives for "smart thermostats," at least 75 percent of which will be reserved for customer rebates/incentives.

a. Customers will be able to purchase a smart thermostat and receive a rebate directly from DP&L, or an instant rebate through a third-party vendor or retail outlet that will be attributed to DP&L. Third-party vendors will commit to provide proof of sale to the Company that the eligible thermostat was sold to a DP&L customer.

b. The rebate will be initially set to encourage adoption of smart thermostats and maximize program effectiveness. For the term of SGP Phase 1, DP&L will hold quarterly meetings with interested parties and vendors to develop a program design that minimizes administrative/other non-rebate costs, and optimizes the incentive and marketing that will be offered to encourage customer adoption of smart thermostats, including the possibility of a demand response incentive. In the final 18 months of SGP Phase 1, meetings will be used to develop the Smart Thermostat Rebate Program as set forth in Paragraph 9(e) of the Stipulation. Meetings are to commence within 30 days of filing the Stipulation. DP&L agrees to provide third party vendors at least 30 days' advanced notice prior to initially setting or adjusting the rebate incentive amount.

c. DP&L will work with the local gas utility on bundling rebate opportunities for customers. DP&L will further commit to consider and evaluate, for implementation, smart thermostat marketing and educational opportunities presented by collaborative members.

d. Smart thermostats that are eligible for rebates must be certified under United States Environmental Protection Agency EnergyStar Connect Thermostat guidelines.

e. In the next rate case, SGP Phase 2 filing, or in a combination of the two, DP&L will propose in its initial application a budget for a Smart Thermostat Rebate Program that will incentivize deployment of smart thermostats to a total of 20 percent of DP&L's residential customers, focusing on customers with AMI meters, with a goal of maximizing residential customer benefits from managing peak demand in conjunction with time-varying rates. DP&L will propose recovery of costs exclusively allocated to residential customers for the Smart Thermostat Rebate Program through base rates, and/or the IIR, or, if the IIR is no longer in effect, through any rider authorized for recovery of costs for SGP Phase 2. In addition to this commitment, to the extent DP&L has not reached or been approved to implement smart thermostats at the aforementioned deployment percentage, DP&L will include a cost-effective smart thermostat program in any other filing proposing demand response or energy efficiency programs with cost recovery through any applicable rider. Nothing in this Stipulation precludes any Signatory Party from opposing any future requests for a Smart Thermostat Rebate Program set forth in this paragraph.

10. Customer Information System ("CIS"): No later than six months after a Commission Order approving the Stipulation in this case, DP&L will invest in the development of a new CIS that will perform core functionality, including at least the following:

    a. Meter to Case process and bill presentment shall comply with all applicable requirements of the Ohio Administrative Code and Ohio Revised Code;

    b. Integration of Integrated Voice Response, Customer Portal and Mobile App, Advanced Metering Infrastructure, Advanced Distribution Management System, Geographic Information System, Enterprise Resource Planning System, Meter Asset Management System, Meter Data Management System, and Mobile Workforce Management System;

    c. Customer Relationship Management (CRM) as a customer service and communication tool;

    d. Flexible pricing plans including CRES ability to bill for products that utilize AMI data;

    e. The system will allow for CRES Electronic Data Interchange (EDI) and data access for billing and time-of-use product offers which use

AMI within three years after approval of this Stipulation or in the timeline associated with the CIS, whichever occurs first;

f. Customer, CRES, and third-party data access set forth in Paragraph 11; and

g. DP&L will recover a return on and of its prudently incurred capital investment in the new CIS and its incremental operation and maintenance expenses associated with the new CIS through base distribution rates and not through the IIR. DP&L shall be entitled to defer operation and maintenance expenses, if applicable, associated with the implementation of the new CIS and recover that deferral either through base distribution rates or a future rider, subject to demonstration that the functionality detailed above is available. The amount of the deferral shall not exceed $8.8 million. The Signatory Parties acknowledge that the Company provided its best estimate of CIS-related costs as set forth in the Company's Application and Workpapers 1.2, 1.3, 1.4, 2.7, 3.2, 3.5, 3.6, 7.1, 7.3, and 7.4. The amount of CIS expenditures for future recovery is subject to a reasonableness and prudence review.

11. Customer, CRES, and Third-Party Data Access

a. Customer Data Access. In the timeline associated with the CIS, DP&L shall provide the Customer with access to the following:

i. At least 24 months of energy usage data in 5-minute, 15-minute, 30-minute, or 60-minuate intervals (whichever interval is collected by the meter) made available on a best efforts basis within 24 hours of performing industry-standard validation, estimation, and editing (VEE) processes and no later than 30 days after the end of each meter cycle.

ii. At least 24 months of detailed billing history data, including breakdown of all billing line item charges.

iii. At least 24 months of summary billing history data, including date of bill, usage, bill amount, and due date.

iv. Flexible views (for Customer with multiple accounts) with options to (a) select individual account, (b) group accounts by user-defined criteria, or (c) access full account list.

v. Tariff and rebate program information (if applicable).

vi. The foregoing data shall be able to be downloaded by the customer into either an .xlsx or .csv format.

vii. No additional fees shall be charged, directly or indirectly, to customers associated with accessing or requesting data.

b. CRES and Third-Party Data Access. As part of and in the timeline associated with the CIS, DP&L commits to the following:

i. The release of any customer's energy-usage data shall be in accordance with the applicable North American Energy Standards Board Energy Services Provider Interface standards and compliant with all Ohio Administrative Code and Ohio Revised Code.

ii. DP&L shall provide Green Button Connect My Data (GBC) for use by any authorized CRES or third party on a non-discriminatory basis to be completed as part of and in the timeline associated with the CIS. GBC shall be independently tested and certified as compliant with the latest standard as of time of release. DP&L is not prohibited from supplementing or replacing GBC with a new generally accepted industry standard Application Programming Interface after collaborating with Staff, CRES, customers, and third parties via the Update Group subject to a prudency review and the spending cap defined in Paragraph 2. The terms and conditions under which customer-authorized CRES providers and third-party access GBC or any other Application Programming Interface will be set forth in a DP&L tariff subject to Commission approval.

iii. At a minimum, DP&L's GBC will provide, with appropriate customer authorization, 24 months of historical usage data, ongoing usage data, account number(s), meter identifier(s), and customer billing determinants. For purposes of this provision, "billing determinants" means customer-specific information used to calculate a bill, including (if applicable to a given customer) kilowatt-hours, kVAR, peak demand, and billing schedule, not excluding non-customer-specific information contained in filed tariffs. If DP&L determines in the future that billing determinants are more expansive than this definition, DP&L will so inform the Update Group to discuss inclusion in Green Button Connect. As part of the Update Group, DP&L will work with Staff, CRES and third parties to further develop the types of data that may be shared through GBC as well as the timelines and frequency of transmission.

iv. DP&L shall allow CRES providers to access the most current data available for both prospective and existing customers through GBC, with customer authorization required. However, data for purposes of billing and scheduling shall be provided in either EDI or the current standard form.

v. DP&L shall provide documented processes for registering, troubleshooting, and providing access to CRES providers and third parties on a publicly available website. Any data from a customer who objected to sharing data on the pre-enrollment list shall not be provided without authorization.

vi. DP&L will make best efforts to: (i) operate the GBC platform with an uptime of at least 99 percent during business hours as determined by the Company and calculated on a monthly basis; (ii) respond promptly to questions, issues, or bugs raised by third parties and seek to promptly resolve technical issues with the GBC platform; and (iii) ensure that the data provided are accurate and up to date.

vii. Customer Experience. DP&L shall support the following processes:

(1) DP&L will develop a process for CRES and third parties to provide customer consent in accordance with Ohio Adm.Code 4901:1-10-24 or any subsequent rule to access data for prospective and existing customers. This process will include the ability for customers to authorize the release of energy usage data to CRES and third parties via the following methods:

(a) DP&L's website, which shall be optimized for the customer's screen size, or mobile app.

(b) Third-party website or mobile app (DP&L will not be responsible for costs associated with developing third-party websites or mobile apps.) In this case, DP&L will, for customers with a cellular telephone number on file, send a text message one-time passcode to the customer's cellular telephone to complete the authorization.

(2) At the time of the request, the customer is prompted to authenticate and authorize sharing of data and DP&L shall require no more information of the customer than DP&L requires for establishing an online account. Web-based authentication and authorization must adhere to OAuth2.0 or more recent industry-standard protocol as set forth at https://oauth.net/2/. CRES and third parties should have the option to determine the authorization term they require, i.e., 12 months, 24 months, or indefinite ("valid until rescinded"). DP&L will send notification to the customer's preferred communication channel that DP&L has received notification that the customer has authorized a third-party access to their customer energy usage data and/or account number and provide instructions on how to contact DP&L to cancel if they did not make such an authorization. Customers will be notified annually of all CRES and third parties that have current access to customer data and how to rescind such access.

(3) Once authorized, DP&L will promptly begin transmission of historical data within a timely manner to a CRES or third party. Subsequent to a successful customer authorization, when data is requested, the system will immediately or nearly immediately process and return the requested data.

(4) DP&L shall support the authorization methods without requiring the creation of an online account.

(5) DP&L shall provide a list of CRES and third parties that have accessed the customer's data within the last six months, which shall be prominently displayed and easily accessible on the customer's online account and/or customer portal.

c. Individual Wholesale Market Settlements: DP&L will facilitate wholesale market settlements as part of and in the timeline associated with the CIS, as follows:

i. DP&L will make the necessary upgrades to systems and processes for wholesale market settlements, i.e., calculating and settling individual total hourly energy obligation (THEO), peak load contribution (PLC), and network service peak load (NSPL) values for each customer, instead of relying on generic load profiles.

ii. DP&L shall transmit settlement data to PJM, at a minimum, in hourly intervals.

iii. DP&L shall make the THEO, PLC, and NSPL data available to authorized CRES providers, consistent with Ohio Adm.Code

4901:1-10-24 or any other subsequent rule, through the pre-enrollment list and EDI transactions, as applicable. Customers will also have access to this information.

iv. DP&L will begin using AMI data for calculation of individualized PLC when the necessary upgrades to systems have been made to utilize the VEE certified AMI data that has been read for any qualifying peak events. Until those upgrades have been completed and an AMI meter has been installed, the current method of using register reads and profiles will be used.

d. Neutral Platform: The AMI deployment will utilize necessary and generally accepted standards, e.g., technologies to implement a Home Area Network, so that customers can connect qualified devices (e.g., in-home displays, smart programmable thermostats) to their meter, or otherwise direct the meter to transmit usage data to any CRES or third party selected by the customer. The technical eligibility requirements for Home Area Network devices, if applicable, including those for security, will be developed through the Update Group. Qualified devices will not be limited to devices supplied only by the EDU or an affiliate.

e. Through the term of SGP Phase 1, DP&L will upgrades its G8 tariff such that no fees shall be charged by DP&L to CRES or third parties associated with accessing or requesting data, including but not limited to those set forth in Tariff Sheet G8 page 29 A.1. (manual historical customer energy usage) and A.2. (electronic interval meter data) (Waived Fees). DP&L further agrees to forego Waived Fees through the IIR or future rate case. DP&L will track the number of requests for the manual historical customer energy usage data and electronic interval meter data and will estimate any associated labor.

12. Additional Residential Customer Benefits

a. Due to current adverse economic conditions, DP&L shall contribute the following unrecoverable amounts to be paid for by DP&L with shareholder dollars and not recovered through the IIR or other rates. Within 30 days of an Order adopting this Stipulation, DP&L shall pay $450,000 in 2021 and $450,000 in 2022 directly to OPAE to provide weatherization and associated administrative costs for electric consumers at or below 200 percent of the federal poverty guidelines.

b. Additionally, for each year of the SGP Phase 1, $50,000 of the Customer Education expenditures will be applied toward marketing and education for residential customers about the Smart Thermostat Rebate Program in conjunction with its deployment of residential AMI meters. Specifically, DP&L will apply these Customer Education expenditures toward: (1) a public launch targeted for 90 days after approval of this stipulation, to highlight the benefits of smart thermostats and other free media events over the course of the program to gain as much attention as possible; (2) exploration of creative marketing strategies and creative financing strategies; and (3) bill inserts, social media and other low/no cost methods to promote smart thermostats as part of the program.

c. PIPP Weather Heater Controller Pilot Program – DP&L will issue a request for proposal (RFP) for a water heater controller Pilot within 60 days of installation of smart meters on at least 200 Percentage of

Income Payment Plan (PIPP) customer accounts within the Dayton city limits. The RFP will be for smart water heater controllers to be installed on PIPP customers' electric resistive water heaters to reduce their peak load contribution (PLC). The goal of the Pilot will be to determine whether reducing the PIPP customers' aggregate PLC will create a better load profile resulting in a better price for the PIPP auction. The water heater controllers will have two-way communication, a revenue grade metering chip, and two separate temperature probes to ensure accurate measurement and verification. The RFP will be for an initial 60-day Pilot to prove the concept of 200 water heater controllers with the potential to be expanded to all PIPP customers with an electric resistive water heater as smart meters are installed. DP&L or its consultant will oversee issuing the RFP but will consult with Staff, the City of Dayton, the Ohio Development Services Agency, and OPAE.

i. Those 200 PIPP customers will be in the initial Pilot. The 60-day Pilot will create a control group of 100 PIPP customers with devices that are connected and monitored but are not controlled for peak demand events. The second group of 100 customers will have multiple demand response events throughout the 60-day Pilot. The Pilot will evaluate cold water complaints, actual demand response reduction, general usability of the system, and any other metrics deemed relevant. All results of the Pilot will be shared with all Signatory Parties. The costs of the controller, enabling communication, maintenance, and administration fees prudently incurred will be capped at $48,400 and will be funded by DP&L with shareholder dollars and not recovered through the IIR or other rates.

ii. Specific PIP customer information shall not be provided to the third-party administrator or any other third part working on this Pilot. Only customer usage data and a unique identifier shall be part of this study, unless the customer provides authorization.

d. DP&L commits that it will not implement any form of prepay program as part of the SGP Phase 1.

e. DP&L shall not use its AMI to unlawfully limit the usage of residential customers. This Paragraph does not waive DP&L's right to disconnect customers in accordance with Ohio Adm.Code 4901:1-10-18.

13. Benefits for the City of Dayton

a. The provisions in this Paragraph shall expire when ESP I terminates.

i. While implementing the Smart Grid Plan, DP&L will prioritize installing equipment that will benefit residential customers in the Western and Northwestern areas of the City of Dayton.

ii. DP&L will explore a joint partnership with the City of Dayton and UD's Hanley Sustainability Institute for a program supporting mutual goals for all three of the organizations.

iii. DP&L will participate in the Property Assessed Clean Energy (PACE) program in partnership with the Montgomery County Port Authority for qualifying projects in the City of Dayton.

DP&L will contribute $100,000 annually to a fund to be used to pay up to 50 percent of a property owner's escrowed reserve requirement. DP&L will also contribute $50,000 annually to a revolving loan fund to support energy upgrades for small and micro businesses within the City that are not eligible for PACE funding. This $150,000 in annual spending will be funded by DP&L with shareholder dollars.

iv. All City of Dayton accounts that have redundant service at the time of the execution of this Stipulation are exempt from paying any redundant service charges that seek to recover the costs of providing standby or backup service.

v. DP&L will contribute $200,000 annually to assist the City of Dayton in providing economic development programs and providing essential city services to resident, including low-income residents. The $200,000 in annual spending shall be funded by DP&L with shareholder dollars.

14. Additional Commercial and Industrial Customer Benefits

a. In the Stipulation and Recommendation in DP&L's last distribution rate case (*2015 Rate Case*), DP&L agreed to waive the Contract Capacity Charge related to Redundant Service (aka Alternate Feed Service) for all OHA members until a final order is issued in DP&L's next base distribution rate case. In settlement of DP&L's *Smart Grid Case*, DP&L agrees to continue this Alternate Feed Service waiver for all OHA members: (1) for as long as DP&L continues to recover through the IIR or (2) until a final order is issued in DP&L's next base distribution rate case, whichever event occurs later. This Alternate Feed Service waiver shall be applied to all OHA members regardless of whether these members are currently paying Redundancy/Alternate Feed Service charges or whether these OHA members require Redundancy/Alternate Feed Service in the future.

b. From the date of approval of this Stipulation and continuing during DP&L's current standard offer as approved by the Commission in its December 18, 2019 Second Finding and Order in the *ESP I Case*, DP&L will re-open enrollment for the TCRR-N Opt-Out Pilot Program to Signatory Parties (including their members, affiliate members, customers, or members' customers) to pass through the market price, and peak hour billing, of the transmission system as described in DP&L's Seventeenth Revised Sheet No. T8, and DP&L will work collaboratively with manufacturing groups to target 50 manufacturers to participate. DP&L shall, at least, propose to continue the TCRR-N Pilot for Signatory Parties in DP&L's next ESP case. Prior to filing its next ESP, DP&L further agrees to discuss with interested parties potential opportunities to enhance the transmission pilot.

c. DP&L will direct a portion of the Customer Education expenditures identified on Exhibit 1 toward educating and benefitting hospitals, manufacturers, and residential customers about the benefits of SGP Phase 1 components. Each year of SGP Phase 1, $50,000 of the Customer Education funds will be paid to each of IEU, OHA, OMAEG, and the City of Dayton to educate and engage hospitals, manufacturers, and residents regarding the potential benefits of grid modernization, including but not limited to assisting with accessing and analyzing energy usage and rate information that will become available upon the installation of CIS.

d. In addition to the Customer Education expenditures identified in sub-paragraph (c) above, DP&L will pay $150,000 to OHA in 2023 and 2024 as an energy education grant. The costs of this grant will be funded by DP&L with shareholder dollars and not recovered through the IIR or other rates.

15. <u>Economic Development</u>: To assist Ohio businesses and healthcare providers with their expenses so that they are better able to respond to financial consequences of COVID-19 and restart Ohio's economy in DP&L's service area, and to further State policies and to enhance the State's competitiveness in the national and global economies, DP&L will offer several different economic development incentives and grants to large customers that are Signatory Parties, successors to Signatory Parties, and/or members of Signatory Parties and that qualify for the incentives. The costs of these incentives and grants will be funded by DP&L with shareholder dollars and not recovered through the IIR or other rates. The provisions in this Paragraph shall commence upon approval of this Stipulation and shall remain in effect while DP&L operates under the terms and conditions of ESP I.

a. Customers may receive only one of the following economic development incentives in this sub-paragraph, and incentives in this sub-paragraph may not be combined. The following economic development incentives will be equal to $0.004 per kWh for all kWh:

i. *Economic Improvement Incentive* available to single site customers with MW demand of 10 MW or greater with an average load factor of at least 80 percent. The Signatory Parties that qualify for the incentive are: one member of OEG and one member of IEU-Ohio.

ii. *Automaker Incentive* available to singe site customers with MW demand of 4MW or greater. The Signatory Parties that qualify for the incentive are: one member of OEG, Honda, and one other member of OMAEG.

iii. *Ohio Business Incentive* available to Honda, four other members of OMAEG, Kroger, and one member of IEU-Ohio.

iv. *Ohio Hospital Incentive* available to seven hospitals that are members of OHA and with MW demand of 2 MW or greater.

b. Additionally, within 30 days of a Commission order approving the Stipulation, DP&L will pay the economic development grant amounts listed below according to instructions for payment provided by the parties. Thereafter, DP&L will pay the same amounts listed on the annual anniversary date on which the first grant was awarded. In no event shall Honda, IEU, Kroger, OMAEG, OHA, UD, or any of their benefiting members, be obligated to return all or any portion of any incentive or grant payment made by DP&L:

i. $107,000 to Honda.

ii. $112,000 to IEU-Ohio, for the benefit of its members.

iii. $26,000 to Kroger.

iv. $260,000 to OMAEG, for the benefit of its members.

v. $35,000 to OHA.

vi. $210,000 to UD.

16. Energy Resiliency and Solar Energy Development

a. Energy Resiliency at Wright-Patterson Air Force Base.

i. Within 30 days after a Commission Order approving this Stipulation, DP&L will work with NRDC to evaluate and pursue project(s) to be located within the Wright-Patterson Air Force Base (WPAFB) property line and/or the communities surrounding WPAFB that increase energy resiliency (Resiliency Project(s)).

ii. DP&L commits to providing a shareholder contribution of $250,000, which shall not be recovered through the IIR or other rates, to provide technical support, marketing and education, or other efforts to aid in the evaluation and pursuit of Resiliency Project(s) (Resiliency Project(s) Grant). The Resiliency Project(s) Ground will be paid within 30 days after DP&L and NRDC identify and agree upon all grant recipients.

iii. DP&L and NRDC will:

(1) Coordinate with other planning efforts, including those designed to leverage federal funding for clean energy that would support the Resiliency Project(s);

(2) Evaluate and pursue federal funding that may be available, now or in the future to support the Resiliency Project(s); and

(3) Evaluate opportunities for Resiliency Project(s) using DP&L's existing General Services Administration area wide agreement; and

(4) Engage other public utilities that serve WPAFB and the surrounding communicates to identify potential energy resiliency investment partnerships.

iv. DP&L will file a status update in this docket on the progress of this joint effort no later than nine months after a Commission Order approving this Stipulation.

v. Resiliency Project(s) may include any or all of the following:

(1) Renewable energy, including distributed energy resources that are not dependent on the delivery of fuel;

(2) Energy Storage;

(3) Advanced control systems; and

(4) Reducing energy consumption, including through lighting and water upgrades, hearing, ventilation and air-conditioning and boiler-system improvements.

b. City of Dayton Solar Project: After a Commission Order approving this Stipulation, DP&L will begin working with the City of Dayton to evaluate and pursue two separate solar installation projects within the City of Dayton corporate limits as follows:

i. Provide the necessary non-financial technical support, including without limitation all studies required by Ohio Adm.Code 4901:1-22 such as the feasibility study, system impact study, and/or facility study, related to an interconnection of net metering systems at or contiguous to the City of Dayton Water Supply and Treatment facilities located at 3210 Chuck Wagner Lane, Dayton, OH 45414 (Water Solar Project) and at or contiguous to the City of Dayton Water Reclamation Facility located at 2800 Guthrie Road, Dayton, OH 45417 (Reclamation Solar Project).

ii. DP&L shall waive required fees or costs associated with studies set forth in paragraph (a)(1) for the Water Solar Project or the Reclamation Solar Project, which will not be recovered through the IIR or other rates.

iii. The City of Dayton and DP&L hereby acknowledge that the Water Solar Project and the Reclamation Solar Project each involves sophisticated issues associated with providing net metering to essential government services. Among other things, the unique nature of the City of Dayton services may require multiple metering points, meters, and backup service to ensure the public health. In recognition of these unique circumstances for essential government service, the City of Dayton in DP&L hereby agree that all accounts at 3210 Chuck Wagner Lane, Dayton, OH 45414 shall be net metered against the Water Solar Project. Similarly, all accounts at 2800 Guthrie Road, Dayton, OH 45417 shall be net metered against the Reclamation Solar Project.

iv. For the purposes of net metering, the City of Dayton and DP&L hereby agree that the energy projected by the Water Solar Project and the Reclamation Solar Project shall be posted to the City accounts referenced in paragraph iii above in the order selected annually by the City of Dayton.

v. DP&L and the City of Dayton will work collaboratively to most efficiently interconnect the Water Solar Facility and Reclamation Solar Facility to DP&L's system for purposes of net metering.

vi. To the extent any waivers of Commission rules are required by this paragraph 16(b), DP&L and the City of Dayton will jointly seek such a waiver. The Signatory Parties are not precluded or in any way limited in challenging such a waiver request.

c. Additional Solar Project: To encourage the further development of distributed and small generation facilities in accordance with R.C. 4928.02(C), after a Commission Order approving this Stipulation, DP&L and IGS agree to work together to identify, select, and implement solar project(s) that add up to at least 1.5 MW to be constructed in DP&L's service territory (the Solar Project(s)). Within 90 days after IGS Solar, LLC identifies the Solar Project(s)' location(s), DP&L will make a one-time contribution in the amount of $1 million, to be funded by shareholder dollars and not recovered through the IIR or other rates to IGS Solar, LLC (Solar Project Grant). IGS Solar, LLC will apply the Solar Project Grant toward design, construction, and deployment of the Solar Project(s), which IGS Solar, LLC shall own and operate. DP&L shall have no ownership interest in the Solar Project(s) and shall not be involved in operation. Within 12 months after the Solar Project(s) are operational, DP&L shall file a report in this docket describing any distribution and/or transmission costs saved or avoided as a result of the Solar Project(s).

17. Cost/Benefit Analysis: The Signatory Parties agree that DP&L's SGP Phase 1 produces a positive cost-benefit ratio for customers on a nominal and net-present-value basis, as shown on Exhibit 4.

a. Approximately 65 percent of the customer benefits detailed on Exhibit 4 represent system-wide reliability improvements of 15 percent for SAIFI (system average interruption frequency index) and 14 percent for SAIDI (system average interruption duration index) when compared to baseline data reported for 2015-2019. No later than 60 months following an Order in this case, DP&L shall file an application for revised standards that incorporate the proposed reliability improvement, unless otherwise ordered by the Commission.

18. Excused Compliance: DP&L shall not be in violation of this Stipulation or any Order approving it if complying with the terms set forth in Paragraphs 6(a), (b), (c), (d), (e), (h), and (i), 10, and 11 is made impracticable or impossible due to events beyond DP&L's reasonable control.

19. <u>SEET/MFA</u>:

    a. In consideration of this Stipulation as a package and only for that purpose, the Signatory Parties agree that this Stipulation satisfies the requirements of R.C. 4928.143(E) and recommend that the Commission find that R.C. 4928.143(E) is satisfied and that DP&L's ESP I as currently implemented passes the MFA test and the prospective SEET test in R.C. 4928.143(E). Alternatively, if the Commission finds that DP&L's ESP I fails to satisfy either prospective test, then the Commission has the authority to approve "the transition * * * to the more advantageous plan." This Stipulation provides for an orderly transition to such a plan, as DP&L has committed to filing a new ESP application (ESP IV) by October 1, 2023 that will not contain charges as identified in Paragraph 20(a) of this Stipulation. Moreover, DP&L has committed to partnering with and assisting low income customers, local government, manufacturers, and hospitals during the transition, and DP&L and the Signatory Parties have set forth a smart grid plan that reasonably pairs with this transition. All of these items provide for a reasonable and lawful transition to ESP IV that satisfy the requirements of R.C. 4928.143(E).

b. The Signatory Parties agree and recommend that DP&L's application, the prefiled testimony of Mr. Malinak, and the prefiled testimony of Mr. Garavaglia in the *Quadrennial Review Case* be admitted into the record without cross-examination by Signatory Parties and that no Signatory Party will introduce additional evidence in opposition to DP&L's filings.

c. Other Litigation

   i. During the 2020-2023 forecast period, the Signatory Parties agree not to challenge or otherwise advocate against DP&L's right to operate under its currently implemented ESP I and not to challenge or otherwise advocate against any provision of its current ESP I before the Commission, the Supreme Court of Ohio, or any other regulatory or judicial body.

   ii. Each Signatory Party shall withdraw any pending application for rehearing that it has filed in the *ESP I Case* and the *ESP III Case* and any appeals from such proceedings within seven business days of the Commission issuing a final appealable order in these dockets (i.e., seven business days after the last entry on rehearing) and without modification to the Stipulation. If the Commission modifies this Stipulation and Signatory Party does not withdraw from the Stipulation, then the Signatory Party shall withdraw the pending application(s) for rehearing within seven business days of the final appealable order. The Signatory Parties request that the Commission hold in abeyance any ruling on these pending applications for rehearing prior to the resolution of this proceeding. The Signatory Parties further agree to file a joint motion to stay in the *ESP I Case* and the *ESP III Case* dockets until a final appealable order is issued in these dockets.

iii. In consideration of this Stipulation as a package and only for that purpose, the Signatory Parties who have intervened or moved to intervene in the *2018 SEET Case* and the *2019 SEET Case* recommend that the Commission approve DP&L's applications in those cases conditioned on the Commission's approval of this Stipulation without modification. The Signatory Parties who have not intervened or moved to intervene in those cases shall not intervene or move to intervene in those cases and take no position on DP&L's applications in those cases.

20. ESP IV

a. DP&L shall file an application for an ESP (ESP IV) no later than October 1, 2023 to replace ESP I. DP&L's ESP IV application shall not seek to implement any nonbypassable charge to customers related to provider of last resort risks, stability, financial integrity, or any other charge that is substantially calculated based on the credit ratings, debt, or financial performance of any parent or affiliated company of DP&L. By way of example, the Signatory Parties agree that this limitation does not prevent DP&L from proposing riders that recover actual costs that DP&L has incurred or will incur, distribution- or transmission-related revenue that DP&L has foregone or will forego, or distribution- or transmission-related investments (including a return on and of the investments) that DP&L has made or will make. The Signatory Parties are not precluded or in any way limited in challenging any potential riders that DP&L may propose as a party of any future proceeding.

b. Effect of Stipulation Provisions upon Return to ESP I

i. If DP&L receives Commission approval for a new SSO but later returns to ESP I for any reason, then the provisions in Paragraphs 13(a)(ii), (iii), (iv), and (v); 14(b); and 15 will resume as of the date that DP&L returns to ESP I, and DP&L will provide $250,000 annually funded by shareholder dollars and not recovered through the IIR or other rates for further support of the Solar Project(s) developed by IGS Solar, LLC. This Paragraph survives and will be invoked during any number of returns to ESP I for any reason. Additionally, the Signatory Parties reserve their rights to challenge DP&L's return to ESP I and any charges implemented therewith. The commitments due under this Paragraph shall continue only for the duration that DP&L operates under ESP I.

ii. Upon returning to ESP I for any reason, DP&L shall make the funding payments to the Signatory Parties set forth in Paragraphs 13(a)(ii), (iii), (iv), and (v); 14(b); and 15, and the $250,000 annually funded by shareholder dollars for further support of the Solar Project(s) developed by IGS Solar, LLC. DP&L shall make such payments provided for in those paragraphs funded directly by DP&L with shareholder dollars and not recovered through the IIR or other rates. These conditional funding commitments are a contractual agreement between DP&L and applicable Signatory Parties, enforceable by the Franklin County Court of Common Pleas, and shall survive and be enforceable regardless of any potential future modifications to the language contained in this Stipulation. The Signatory Parties agree that there is independent consideration on both sides to create a binding agreement (subject to the specified conditions) at the time the Stipulation is filed, and that this consideration includes the funding commitments from DP&L and the applicable Signatory Parties' cessation of litigation in the dockets covered by this Stipulation. The commitments due under this Paragraph shall continue only for the duration that DP&L operates under ESP I.

iii. Upon DP&L returning to ESP I as set forth under Paragraph 20(b)(i) or (ii), DP&L shall:

(1) Reinstitute the monthly credits set forth in Paragraphs 13(a)(iv), 14(b), and 15(a) on the next bill cycle.

(2) Within 30 days, provide annual commitments set forth in Paragraphs 13(a)(iii) and (v); 15(b); and the $250,000 payment to IGS Solar, LLC set forth in Paragraph 20(b)(i) or (ii), which date shall serve as the new anniversary date for subsequent annual payments. If the initial payment date is less than 365 days since the prior anniversary upon which these annual payments were made, then the initial payment date and the new anniversary date shall be the

same as the prior anniversary date such that DP&L will only be required to make the annual payments once within a 12-month period.

c. If the Commission finds that DP&L passes the SEET/MFA or if the Commission does not materially modify ESP I to DP&L's detriment in its order approving the Stipulation such that DP&L withdraws from the Stipulation, the commitments made under Paragraphs 13(a)(iii), (iv), and (v); 14(a) and (b); and 15 shall be implemented withing 10 business days of the Commission's approval of this Stipulation. So long as neither the Commission nor the Supreme Court of Ohio make material modifications to ESP I, to DP&L's detriment such that DP&L withdraws from the Stipulation, future annual payments shall be due on or before the anniversary date of the Commission's approval of the Stipulation. DP&L shall not be entitled to any refund of these amounts. The Signatory Parties acknowledge that this paragraph is a contractual commitment enforceable by the Franklin County Court of Common Pleas. The Signatory Parties further agree that there is independent consideration on both sides to create a binding agreement at the time the Stipulation is filed (subject to the specified conditions), and this this consideration includes the funding commitments from DP&L and the Signatory Parties' cessation of litigation in the dockets covered by this Stipulation. The commitments due under this Paragraph shall continue only for the duration that DP&L operates under ESP I.

(Stipulating Parties Ex. 1 at 4-49.)[6]

C. *Consideration of the Stipulation*

{¶ 43} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 44} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the Signatory Parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

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6 At Paragraph 21, the Signatory Parties set forth "Other Provisions" of the Stipulation. These provisions contain the Signatory Parties' representation that the Stipulation contains the entire agreement between those parties, as well as their belief that the Stipulation is in the public interest and should be adopted, and set forth various evidentiary considerations, such as a correction to testimony and listing of testimony and exhibits that may be offered by DP&L to demonstrate the reasonableness and lawfulness of the Stipulation or in satisfaction of statutory requirements. Finally, the Signatory Parties outline available remedies in the event that the Commission rejects or materially modifies the Stipulation.

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

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

1. IS THE SETTLEMENT A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 45} DP&L offered the testimony of Sharon R. Schroder in support of the Stipulation. Ms. Schroder testified that all of the parties were invited to and had the opportunity to participate in settlement negotiations. According to Ms. Schroder, there were eight bargaining sessions, including one technical conference during which the Stipulation was explained, and parties were invited to make comments and ask questions about its terms. As a result of these sessions, Staff and other parties made extensive changes to DP&L's proposals, and all Signatory Parties agreed to compromises. Further, DP&L contacted parties individually outside of the larger bargaining sessions to discuss comments and revisions to the Stipulation. In addition to describing the commitment of resources to negotiations, Ms. Schroder also indicated that all of the parties were represented by counsel, and that most, if not all, of the attorneys have years of experience in regulatory matters before the Commission. Further, Ms. Schroder stated that all of the parties either employed or had access to technical experts with comparable experience in Commission proceedings. (DP&L Ex. 4 at 13-24.)

{¶ 46} OCC witness Hill testified that the settlement is not a product of serious bargaining among parties with diverse interests. Dr. Hill asserts that the Stipulation is the product of a "redistributive coalition," rather than serious bargaining among capable, knowledgeable parties. In his opinion, serious bargaining does not occur where the end result involves the agreement of a relatively small group that avails itself to a regulatory process to secure benefits that are not available in a competitive market. (OCC Ex. 3 at 6, 10.)

{¶ 47} The Commission finds that the Stipulation satisfies the first of the three-part test used to evaluate stipulations. We note that the Stipulation is the product of extensive negotiations during which all parties, who were each represented by competent counsel, were afforded the opportunity to participate. Further, we reject the notion that the Stipulation was not the result of compromise merely because of the number of participants in the case, or the fact that they negotiated matters in a manner favorable to their respective interests. In doing so, we note 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, including: the largest municipality in DP&L's service territory, a representative of residential low-income customers, three statewide organizations of large industrial customers, one large industrial customer, one large supermarket chain, a statewide hospital organization, a large local university, four environmental groups, a competitive retail electric service provider, and four other parties with interests in smart grid technology. (DP&L Ex. 4 at 12-13.) Finally, we note that the Stipulation resolves a variety of difficult, complicated issues that, absent the nearly unanimously supported stipulation, would have been subject to even more expensive, complex and protracted litigation (Stipulating Parties Ex. 1 at 49).

2. DOES THE SETTLEMENT, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 48} The Signatory Parties represent that the Stipulation includes numerous benefits for ratepayers and is in the public interest, stressing generally the importance of implementing the SGP, maintaining DP&L's financial integrity in order to ensure it has the ability to maintain safe and reliable service, and providing economic incentives in support of certain residential and business customers (DP&L Ex. 4 at 11). More specifically, DP&L

witness Sharon Schroder enumerated nine areas in which the settlement, as a package, benefits DP&L's customers and is in the public interest:

(1) the agreement provides for the elimination of the RSC, and any future credit-related charge, pursuant to the Company's commitment to file for ESP IV by 2023.

(2) the SGP plan was substantially modified to be more customer favorable, including:

(a) reducing the cost of the overall 20-year plan, from $866.9 million to $387.9 million.

(b) reducing the cost of capital investments and associated operation and maintenance expenses from $642 million to $267 million.

(c) shortening the first phase of the SGP from ten years to four years.

(d) limiting the initial approval of the SGP to only Phase 1.

(e) subjecting Phase 1 implementation to annual audits.

(f) limiting approval of cost recovery through the IIR in the event that DP&L does not file a new distribution rate case by January 1, 2025.

(g) requiring that DP&L file further applications for approval of additional phases, which shall be subject to opposition or objection.

(3) DP&L commits to investing in a new CIS, the funding of which will be capped at $8.8 million and is outside of the IIR.

(4) DP&L commits to implement a shareholder-funded smart thermostat program.

(5) DP&L will propose a time-of-use rate pilot program.

(6) DP&L will provide $900,000 in shareholder funds to OPAE to support low- and moderate-income weatherization efforts.

(7) DP&L will propose a shareholder funded pilot program to install smart water heater controllers to PIPP customers.

(8) DP&L will provide the City of Dayton with $200,000 in annual shareholder funds in support of economic development and residential essential services.

(9) DP&L will provide several other miscellaneous economic development incentives to qualifying healthcare and commercial and industrial customers.

(DP&L Ex. 4 at 15-32).

{¶ 49} OCC urges a finding that the settlement does not benefit ratepayers and the public interest, raising six contested issues:

(1) The reduced SGP spending plan is not cost-beneficial to customers.

(2) The settlement denies $150 million in customer refunds that OCC contends are due in the *2018 SEET Case* and the *2019 SEET Case.*

(3) The settlement improperly determines that DP&L passes the MFA and prospective SEET tests in the *Quadrennial Review Case* and maintains the RSC.

(4) The settlement does not contain any provision for customer refunds.

(5) The settlement allows DP&L to seek another financial integrity charge in its next ESP.

(6) The settlement unfairly distributes ratepayer resources to Signatory Parties.

{¶ 50} The Commission finds that the Stipulation satisfies the second of the three-part test used to evaluate stipulations. As more fully described below, we reject the individual arguments raised by OCC regarding the ratepayer and public benefits of the settlement. Moreover, we note that our consideration of the Stipulation requires merely a determination that the settlement as a whole, rather than each individual term, is beneficial to ratepayers and the public. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-126 (1992). Here, we reject OCC's individual claims contra the settlement benefits.

Further, we emphasize our determination that the major provisions of the settlement are overwhelmingly customer beneficial, including obtaining AES Corporation's commitment to provide $300 million in capital contribution to DP&L to improve its infrastructure and modernize its grid; approving the modified SGP; and requiring that DP&L must pursue its next ESP, which is expected to terminate all rate stability charges, by 2023. Accordingly, we conclude that even assuming arguendo that some of OCC's claims contra the settlement benefits are accepted, the settlement as a whole remains beneficial to ratepayers and the public based on its inclusion of these major commitments from the Company.

3. DOES THE SETTLEMENT PACKAGE VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE?

{¶ 51} The Signatory Parties maintain that the settlement does not violate any important regulatory principle or practice. They note that while the agreement is the result of the parties compromising their respective litigation positions, the net result of the agreement aligns with sound regulatory policy. That is, the agreement enables DP&L to recover just and reasonable rates, secure its financial condition in relation to its ability to provide safe and reliable service to its customers, and implement sound regulatory practices, including those relating to its SGP. (DP&L Ex. 4 at 32-38.)

{¶ 52} OCC argues that the settlement violates important regulatory principles and practices because: (1) it lacks equity as the product of a redistributive coalition; (2) the SGP, including its cost-recovery mechanism, violates ESP I; (3) it results in unreasonable rates that improperly subsidize DP&L's parent company, AES Corporation (AES); (4) it does not protect at-risk populations; and (5) it does not promote the state's economic effectiveness.

{¶ 53} We find that the Stipulation satisfies the third of the three-part test used to evaluate stipulations. As more fully described below, we find that the terms of the compromise are consistent with sound regulatory policy. We specifically conclude that the modified SGP, including its manner of funding, is consistent with ESP I and serves the public interest. Further, we find that the SEET and MFA test conclusions described in the

Stipulation are reasonable and consistent with DP&L's commitment to provide consumers with adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service.

D. *OCC's Legal Arguments*

{¶ 54} As described above, the Commission finds that the Stipulation, as a package, is reasonable and should be adopted. In reaching this determination, we considered and rejected numerous arguments raised by OCC regarding the validity of the Stipulation as a package. We also address the individual legal challenges raised by OCC in its opposition to the Stipulation, as well as its claim that DP&L waived trade secret protections.

1. DP&L's continuing operation pursuant to ESP I satisfies the MFA and prospective SEET determination such that the Company should be permitted to continue operating under an ESP, rather than being required to transition to an MRO.

{¶ 55} OCC urges the Commission to conclude that DP&L should be transitioned from an ESP to an MRO, arguing (1) that the Company is barred from operating pursuant to ESP I, (2) that the Company's continuing receipt of RSC amounts pursuant to ESP I is unlawful and results in customer charges that exceed what would occur in an MRO, and (3) that the Company is expected to have significantly excessive profits if it continues to operate under ESP I due to the continuing collection of RSC amounts. *Quadrennial Review Case.* OCC claims that the RSC is a FIC that does not provide for the recovery of identified, specific costs, and, as such, the continuing collection of the RSC is unlawful under R.C. 4928.143. *In re the Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. OCC rejects DP&L's assertion that the charge is distinguishable from DMR charges that have been invalidated by the Supreme Court of Ohio. OCC further maintains that DP&L's $79 million in annual RSC revenues create excess profits that must be avoided by forcing the Company's conversion from ESP I to an MRO. In making this claim, OCC rejects arguments that MRO costs would be higher than ESP I costs due to the possibility that MRO-based rates would include an amount for FIC that exceeds current RSC costs, as well as arguments that, under an MRO, DP&L's parent company, AES, would no longer contribute an additional $150 million in equity investment in 2021.

{¶ 56} DP&L argues that it is lawful to continue the interim RSC charges as described in the Stipulation such that (1) an MRO is not more favorable in the aggregate, and (2) the Company is not expected to receive excess profits during the remainder of the ESP I operational period.[7] The Company emphasizes that the RSC was established pursuant to a stipulation in ESP I, in which OCC was a signatory party; the Supreme Court of Ohio has twice upheld the RSC charges at issue; and the charge is distinguishable from DMR charges that have been invalidated in other cases. Initially, DP&L claims that its return to operations pursuant to ESP I restored the RSC that was established in that case. Assuming this argument to be true, the Company then argues against OCC's collateral attack to the RSC pursuant to ESP I, noting that OCC stipulated to the implementation of the RSC in ESP I, and failed to exercise any appeal rights in connection with the Company's return to ESP I such that its current position against the RSC is legally barred. *See ESP I Case*, Stipulation and Recommendation (Feb. 24, 2009) at 4, 21; *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 26, 29-35. Further, DP&L asserts that even if OCC is not precluded from asserting its legal claims contra the RSC, the RSC should not be invalidated because (1) the Supreme Court of Ohio has upheld the RSC in two prior cases, and (2) the RSC charges are distinct from DMR charges that have been judicially invalidated because they relate to the Company's provider-of-last-resort (POLR) risk and costs. See, *Constellation NewEnergy, Inc. v. PUC*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 at ¶ 39-40; *Ohio Consumers' Counsel v. PUC*, 114 Ohio St.3d 340, 2007-Ohio-4276, 827 N.E.2d 269 at ¶ 17-26; *ESP I Case*, Finding and Order (Aug.26, 2016) at ¶ 23.

{¶ 57} We accept DP&L's arguments in favor of the continuing application of the RSC as originally established in ESP I. Further, we conclude that the Company's continuing

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7 Pursuant to the terms of the Stipulation, DP&L must file for ESP IV by 2023, and that application will eliminate the RSC as well as any potential replacement charges. Stipulating Parties Ex. 1 at ¶ 20; Tr. IV at 630; Tr. V at 914.

operation pursuant to ESP I does not create the expectation of significantly excessive profits, nor the determination that an MRO is more favorable in the aggregate. Central to our determination is the conclusion that DP&L continues to legally collect RSC in contravention to OCC's arguments that the collections should be considered as excessive for purposes of applying the *Quadrennial Review Case*. We find that DP&L's continuing collection of RSC amounts is lawful, noting that OCC is legally barred from collaterally attacking the RSC as part of the *Quadrennial Review Case* because OCC previously stipulated to and did not timely appeal the *ESP I Case*. Moreover, we find that the RSC charge remains lawful. Unlike the DMR charges at issue in the cases OCC cites, DP&L's RSC has been upheld by the Supreme Court of Ohio on two prior occasions. Moreover, the RSC charge has applications beyond the Company's generic financial integrity in that it relates to the Company's continuing obligation to operate as a POLR, which imposes continuing risk on the Company.

{¶ 58} We further conclude that the continuing operation of ESP I is more favorable in the aggregate to an MRO. In making this determination, we are persuaded by, among other factors, AES's investment of $300 million in DP&L in 2020-2021, and DP&L's commitment to invest $267 million in SGP Phase 1 during the four-year period following approval of the Stipulation (Stipulating Parties Ex. 1 at 3-5). Further, in addition to the investments of DP&L and its parent company that result from remaining outside of the MRO, we note that, even under an MRO, DP&L would require a substantial FIC in order to maintain its operations. It is not as though OCC's intended outcome of invalidating the RSC in ESP I will alleviate DP&L's eligibility for an FIC under an MRO. Instead, as described by witness Malinak, the Company would be entitled to an FIC under the MRO that would enable it to make its planned infrastructure capital expenditures and service its debt payments in order to maintain safe and reliable service. (DP&L Ex. 1A at 53-57.) We reject OCC's claim that AES should add parent-company capital investment in order to alleviate DP&L's financial condition such that the required MRO FIC amount would be mitigated or eliminated. We find that AES has not acted unreasonably in the financial operation of its subsidiary during the period at issue. In fact, AES has paid nearly $400 million in DP&L's

debt, invested $150 million in 2020, and committed to invest an additional $150 million in 2021. (DP&L Ex. 6A at 22-25.) Further, AES has not received any dividend payments from DP&L since 2012. Given these factors, we are persuaded that, as a whole, DP&L's financial condition is fragile in spite of measures taken by its parent, AES, to add capital and avoid dividends. Given the totality of DP&L's overall financial condition, we agree with the Company that its FIC expectations in an MRO case would likely exceed the costs of the continuing RSC such that the MRO is not more favorable in the aggregate to ESP I. (DP&L Ex. 1A at 82; DP&L Ex. 6A at 28.)

{¶ 59} We also find that ESP I passes the prospective SEET. Initially, we conclude that the prospective SEET threshold in this case is 16.6 percent, rejecting OCC's claim that the prospective SEET threshold is 12 percent, as established in DP&L's ESP III. Our rationale is twofold: ESP III, including the stipulation that contained the 12 percent threshold, has been terminated; and R.C. 4928.143(E) requires a more robust analysis than that proposed by OCC in order to determine the comparative ROE of DP&L and similarly situated utility companies. We find that the rationale employed by DP&L Witness Malinak, who concludes that the prospective SEET threshold is 16.6 percent, is consistent with our past practice in this area and provides a reasonable calculation of the Company's ROE in comparison to its competitors, as required by the prospective SEET statute. *See In re Columbus Sothern Power*, Case No. 11-4571-EL-UNC, Opinion and Order (Oct. 23, 2013); *In re Ohio Power Company*, Case No. 17-1230-EL-UNC, Opinion and Order (Feb. 27, 2019); *In the Investigation into Development of SEET Test*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010); *In re Columbus Southern Power Co.*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011). Witness Malinak concludes that comparable utilities have an average ROE of 10.4 percent, which serves as the starting point for his calculation. He then applies a multiplier of 1.5, as the Commission has done on other SEET evaluations, to determine that the prospective SEET threshold, independent of further investment considerations and risk factors, is 15.6 percent. Finally, he calculates that an additional upward adjustment of 1 percent is warranted due to the capital investment history and impending capital expectations of DP&L and AES, as well as DP&L's extraordinary adverse credit rating and operational risks. (DP&L Ex. 1A 85, 88, 91.)

{¶ 60} Further, we accept the testimony of Witness Malinak, who testified that the Company's projected average and projected highest ROE during the prospective forecast period are below the SEET threshold of 15.6 percent. While we conclude that the 16.6 percent ROE is reasonable, we further note that the Company's expected future ROE falls well-below this threshold, and that the Company would pass the prospective SEET if that amount were set at 15.6 percent, which was the interim calculation prior to the additur attributable to the extraordinary capital and credit rating adjustments. Additionally, Witness Malinak testified that the Company's projected average and projected highest ROE during the prospective forecast period are below the "safe harbor" threshold of 12.4 percent (DP&L Ex. 1B at 16, 17, 88).

2. DP&L DID NOT HAVE SIGNIFICANTLY EXCESSIVE EARNINGS IN 2018 AND 2019.

{¶ 61} OCC argues that DP&L fails the retrospective SEET in 2018 and 2019. OCC Witness Duann testified that that the Company's ROE was 24.55 percent in 2018, and 26.67 percent in 2019. He further testified to his belief that the SEET threshold for each of these years was 12 percent. As a result, he maintained that DP&L received excessive ROEs of $62.8 million in 2018, and $87.7 million in 2019. Central to Dr. Duann's analysis were his (1) inclusion of DP&L's DMR revenues in his ROE calculations ($82.6 million in 2018, $70.6 million in 2019)[8], (2) use of a 12 percent ROE threshold, (3) rejection of the hypothetical capital structure proposed by Staff, (4) rejection of DP&L's attempt to increase its 2018 and 2019 equity balances by more than $1 billion in connection with the Company's write off of assets between 2012-2016, and (5) rejection of the determination that any excess ROE was ineligible for refund due to AES's (a) investment of $150 million in 2020, and (b) potential investment of $150 million in 2021. Relative to including DMR revenues, OCC argues that

8 These amounts were unanimously supported by witnesses on behalf of OCC, Staff, and DP&L. OCC Ex. 4 at 13, 18; DP&L Ex. 3 at Schedules 1 and 6; Staff Ex. 1 at 6.

the Supreme Court of Ohio has definitively ruled that DMR revenues cannot be excluded from a company's earnings in determining whether the utility had SEET. *In re Ohio Edison Co.*, 162 Ohio St.3d 651, 166 N.E.3d 1191, 2020-Ohio-5450. OCC points out that Staff agreed that DMR revenues cannot be excluded for purposes of applying the retrospective SEET determinations at issue. Staff Ex. 1 at 6. Relative to the 12 percent ROE threshold, OCC argues that the amount was approved by the Commission for both ESP I and ESP III, which were collectively in effect during 2018 and 2019. OCC claims that Staff's calculations of 15.73 percent for 2018 and 14.53 percent for 2019 are improper and inconsistent with prior Commission rulings. Relative to Staff's hypothetical capital structure proposal, wherein Staff retrospectively recognizes 2020 and 2021 AES capital contributions for purposes of determining 2018 and 2019 equity balances, OCC argues that Staff is without authority to make such adjustments because the retrospective SEET requires analysis of DP&L's equity balances at fixed points in time. OCC raises a similar timing argument in refuting DP&L's claim that its equity balances in 2018 and 2019 should be increased by more than $1 billion as a result of the Company's asset write offs between 2012-2016. Further, OCC argues that AES's commitment to capital increases in 2020 and 2021 cannot be used to deny the SEET refunds that it claims are owed.

{¶ 62} Staff agrees with OCC regarding the need to include DMR revenues for retrospective SEET purposes. But Staff makes several other recommendations contrary to OCC's position in the case. First, Staff concludes that DP&L's ROE should be calculated using a hypothetical capital structure, which it originally recommended in the Company's most recent rate case. (*2015 Rate Case*), Staff Report (Mar. 12, 2018). While Staff's recommendation is silent regarding the treatment of the Company's write-off of $1 billion of nonproductive assets between 2012-2016, it is clear that Staff believes that the Company's capital structure is inconsistent with what is expected for a similarly situated utility. Consistent with the authority in R.C. 4928.143(F) and public policy that favors a utility's capital structure management in a manner that disregards potential SEET considerations, Staff concluded that the hypothetical capital structure, which was identical to the adjustment used in DP&L's most recent rate case, was reasonable. Staff goes on to indicate that the ROE thresholds should not be set at a default 12 percent, as alleged by OCC. Staff notes that the 12 percent threshold existed pursuant to a stipulation in the *ESP III Case*. As ESP III was withdrawn, and the terms of the stipulation were based on DMR conclusions that no longer apply to the Company, Staff maintains that expected ROE thresholds must be established anew for 2018 and 2019.[9] Even though Staff disagrees with OCC regarding the SEET threshold, Staff's calculation of the SEET indicates that the Company produced excess earnings of $3.678 million in 2018 and $57.371 million in 2019. (Staff Ex. 1 at 2-7; Tr. Vol II at 378-381.) Staff disagrees with OCC regarding whether these excess earnings are subject to customer refund requirements, maintaining that the mere determination of the excess earnings is insufficient to determine customer refund eligibility. Instead, Staff claims that the Company's commitment to future capital contributions should be given consideration where excess earnings exist. In applying this consideration, Staff is persuaded that the Company's estimated capital expenditure of $621 million between 2020 through 2022 is significant and will provide numerous customer benefits such that prior SEET refund determinations are offset by these capital expenditures. (Staff Ex. 1 at 10.)

{¶ 63} DP&L argues both that its earnings were not excessive in 2018 and 2019, and that, if any finding of excess earnings is made, the Company's future committed capital is significant such that customer refunds should not be required. Initially, the Company disagrees with both OCC and Staff regarding whether DMR revenues should be included in determining its earnings. In arguing against inclusion of the DMR amounts, the Company claims that: (1) the DMR was not an "earned return" because its terms required that DMR revenues could be used only for debt management or in conjunction with future equity investment in grid modernization; (2) DMR amounts should be treated as extraordinary items because they are non-recurring; (3) DMR amounts were capital charges

9 Using practices developed in multiple prior SEET cases, Staff calculates that the 2018 SEET threshold should be 15.73 percent, and the 2019 SEET threshold should be 14.53 percent. Staff Ex. 1 at 8, Attach. 1 and 2.

that should not be treated as revenue; and (4) if DMR-equivalent amounts are included as earnings for SEET purposes, only the amount of DMR above what the Company would have received pursuant to its RSC in ESP I should be included in earnings calculations. (DP&L Ex. 2 at 11-13, 25-26; DP&L Ex. 7 at 7-13.) Beyond the issue of DMR treatment, DP&L agrees with Staff that the SEET threshold must be calculated—rather than assumed at 12 percent as claimed by OCC—because ESP III has been terminated and the 12 percent threshold agreed to in ESP III was upon based on an understanding that DMR amounts would be excluded from revenues. Further, DP&L agrees with Staff that, assuming arguendo that its earnings are deemed to be excessive, customer refunds are not reasonable based on both its planned capital investment and AES' actual and planned equity investments in DP&L. (DP&L Ex. 2 at 25-26; DP&L Ex. 7 at 8-9, 14-15.)

{¶ 64} We adopt Staff's recommendation that that DP&L did not have significantly excessive earnings in 2018 or 2019, noting that this determination requires more than a mere calculation of income amounts that exceed ROE thresholds.[10] In reaching this conclusion, we accept Staff's recommendations as to (1) including DP&L's DMR revenues for purposes of calculating its ROE, (2) use of SEET thresholds of 15.73 percent for 2018 and 14.53 percent for 2019, (3) application of a hypothetical capital structure for ROE calculation purposes, and (4) determination that earnings above SEET threshold amounts are not "excessive" based on AES' (a) investment of $150 million in 2020, and (b) investment commitment of $150 million in 2021.

{¶ 65} Initially, we reject DP&L's arguments against including DMR amounts as earnings for SEET calculation purposes, finding that the Company's DMR revenues are not legally distinct from those that have been invalidated by the Supreme Court of Ohio. *See In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3301, 129 N.E.3d 454, and

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10 As described herein, we accept Staff's preliminary calculations of the Company's excessive net income amounts of $3.7 million (2018) and $57.4 million (2019) (Staff Ex. 1 at 8-10).

reconsideration denied, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458; *ESP III Case*, Entry (July 2, 2019). As we previously ruled, DP&L's DMR is fundamentally similar to the nonbypassable rider that was invalidated by the Supreme Court of Ohio because the rider was not conditioned in a manner sufficient to protect ratepayers. *Ohio Edison*, at ¶¶ 14-19, 20-29; *ESP III Case*, Entry at ¶¶ 94, 107-108. We also reject DP&L's arguments that the invalidated DMR revenues are eligible for exclusion for purposes of calculating SEET ROEs. We find that the DMR amounts were "earned returns" such that they must be considered for SEET determination purposes. Further, we disagree with DP&L regarding claims that these "earned returns" should be excluded as extraordinary items or capital charges. As OCC argues, there is a strong presumption that all ESP charges are limited in duration to the length of the ESP. We find no merit to DP&L's argument that these DMR amounts are extraordinary, as they were clearly adopted pursuant to the terms of the ESP. Similarly, we reject DP&L's claim that the DMR charges should be excluded from earnings calculations because they were "capital charges." We find no basis for this distinctive treatment of these ESP revenue amounts.

{¶ 66} In spite of our disagreement with DP&L's arguments against including DMR amounts as earnings for SEET calculation purposes, we find that the Company passed the retrospective SEET for 2018 and 2019. Initially, we conclude that Staff's use of a hypothetical capital structure in analyzing ROE is proper, noting that Staff used the same hypothetical capital structure in the Company's most recent rate case (the *2015 Rate Case*) and the use of the hypothetical capital structure is provided for by R.C. 4928.143(F). Here, Staff determined that DP&L's equity structure was below that of its peers such that an adjustment was reasonable in order to effectively determine its ROE for SEET calculation purposes. We agree with Staff's adjustment, as we did when we reviewed the Company's most recent rate case, concluding that Staff's recommendation as to the hypothetical capital structure is reasonable and in accordance with its statutory obligation.

{¶ 67} We also agree with Staff as to the SEET thresholds of 15.73 percent (2018) and 14.53 percent (2019). Initially, we reject OCC's argument that the 12 percent threshold from

ESP III is controlling. As noted earlier, ESP III no longer exists such that any claim of legal estoppel to reviewing the merits of the 12 percent threshold amount is without merit. Moreover, the prior threshold is unreasonable because it was established pursuant to a stipulation where the criteria that previously supported it – most notably, excluding DMR revenues from earnings calculations – no longer exist. For these reasons, we find that Staff acted reasonably in calculating SEET thresholds for 2018 and 2019 using the Company's current, ESP I, financial data.

{¶ 68} Further, we agree with Staff as to the conclusion that customer refunds are not necessary (or appropriate), notwithstanding the earnings amounts above the SEET threshold calculations, due to DP&L's commitment to make substantial capital expenditures as part of its $267.6 million SGP Phase 1 expenditures over the next four years that are in addition to the AES capital commitments to DP&L in the combined amount of $300 million (Staff Ex. 1 at 10-11; Stipulating Parties Ex. 1, ¶ 2, 4). R.C. 4928.143(F) directs that consideration shall be given to the capital requirements of future committed investments in this state. With the approval of the Stipulation, DP&L is committing to a future committed investment of $267.6 million, the great majority of which ($249 million), are capital expenditures (Stipulating Parties Ex. 1 at 4-5, Ex. 1). R.C. 4928.143(F) does not specify a formula or the specific manner in which the Commission should consider future committed investments in this state. Given the magnitude of the committed investment, the Commission finds that it is appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment. Therefore, we will offset $3.7 million for 2018 and $57.4 million for 2019 for a total of $61.1 million of the capital expenditures included within the $267.6 million of SGP Phase 1 expenditures. We further find that offsetting future committed capital investments in grid modernization against excessive earnings is consistent with state policy to encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, smart grid programs, and implementation of advanced metering infrastructure. R.C. 4928.02(D).

{¶ 69} Moreover, we concur with DP&L's assertions that its infrastructure will benefit from AES' commitment to add capital in order to better leverage technologies, modernize and enhance grid sustainability, and enhance customer services and security. We also agree with Staff's conclusion that, independent of the offsets discussed above, no customer refunds of excessive earnings in 2018 ($3.7 million) and 2019 (57.4 million) are appropriate because of AES' provision of $150 million in capital contribution on June 26, 2020, and commitment to an additional $150 million capital contribution in 2021. In reaching this determination, we specifically reject OCC's claims that the capital contributions should not be considered, finding that OCC (1) ignores the requirement in R.C. 4928.143(F) to consider the effect of capital contributions, and (2) errs when arguing that (a) the contributions can only be considered in setting SEET thresholds, and (b) the additional capital contributions cannot be considered because they originate from DP&L's parent, AES.

3. THE STIPULATION DOES NOT VIOLATE IMPORTANT REGULATORY PRINCIPLES BASED ON OCC'S REDISTRIBUTIVE COALITION THEORY.

{¶ 70} OCC argues that the Stipulation violates public policy because the Signatory Parties participated as a redistributive coalition, which would violate, in some manner, each of the three criteria used to evaluate whether a proposed settlement is reasonable. OCC witness Dr. Edward Hill testified as to his opinion that the Signatory Parties acted as a relatively small group that used the regulatory process to negotiate self-gain, rather than negotiate for the betterment of the overall class of customers. OCC Ex. 3 at 6-7.

{¶ 71} The Signatory Parties refute OCC's claims regarding the existence of a redistributive coalition and the allegedly improper impact of the Signatory Parties on the negotiated settlement. The Signatory Parties stress that they are composed of a wide range of diverse interests, including Staff, the largest municipality in DP&L's service territory (City of Dayton), a representative of residential low-income customers (OPAE), three statewide organizations of large industrial customers, one large industrial customer, one large supermarket chain, a statewide organization representing hospitals in DP&L's service territory, a large university, four environmental groups, a competitive retail electric service provider, and four other parties that represent interests in the smart grid field. Based on their claim of representing a large, heterogenous group of customers across a wide range of customer classes, the Signatory Parties deny the existence of a redistributive coalition. Moreover, they assert that the wide range of concessions from DP&L reinforces that there was no improper influence by a redistributive coalition in the negotiated outcome of this case. Among the concessions, they highlight: (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. (DP&L Ex. 4, at 15-32; Stipulating Parties Ex. 1.)

{¶ 72} We find that the Stipulation does not violate important regulatory principles based on OCC's redistributive coalition theory. Contrary to OCC's claims, the Signatory Parties represent a diverse interest of DP&L's customers, as well as various public interest groups. We are persuaded that residential customers were represented in negotiations through the participation of OPAE, the City of Dayton, and Staff. Moreover, 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. Overall, the terms of the Stipulation demonstrate that participants in the case fairly represented all customer classes and achieved substantial negotiated benefits such that claims of unfair influence by a redistributive coalition are not substantiated.

4. DP&L'S SGP IMPLEMENTATION DOES NOT VIOLATE ESP I.

{¶ 73} OCC argues that DP&L's current operations, as governed by ESP I, are inconsistent with the Stipulation in regard to implementing the SGP. OCC witness Williams testified that ESP I does not provide DP&L with authority to (1) charge customers for SGP costs through the proposed IIR, (2) recover costs as to implementing its SGP prior to demonstrating the cost-benefits of an approved the plan, (3) recover costs that do not relate solely to AMI or Commission-approved SGP proposals, or (4) implement certain portions of the SGP, including those relating to EVs and smart thermostats. OCC asserts that DP&L improperly seeks to implement the IIR that was addressed in ESP I as a substitute for the Smart Grid Rider that ceased to exist when the Company withdrew ESP III. OCC claims that the IIR was not approved by the Commission in ESP I, and the Company cannot obtain that approval retroactively pursuant to the Stipulation in this case. Further, OCC claims that the settlement is improper to the extent it excuses performance demonstrations by DP&L as a precursor to obtaining approval to implement and seek cost-recovery for the SGP. (OCC Ex. 6 at 15-24.)

{¶ 74} DP&L claims that the agreement to allow for funding the SGP using the IIR is proper. The Company notes that the IIR was lawfully created pursuant to a stipulation that included OCC's approval under ESP I. *ESP I Case*, Opinion and Order (June 24, 2008) at 5, 13. While DP&L did not implement a placeholder tariff for the IIR following the approval of ESP I, the Company claims that this fact does not serve to invalidate the IIR, as it was not required to file a tariff for a rider that is set at zero. Further, DP&L asserts that OCC is estopped from opposing the IIR because OCC did not seek rehearing of the approval of the IIR tariff, which was approved by the Commission following the withdrawal of ESP III. *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 29-35. In addition to its claims that OCC is legally precluded from contesting the proposed application of the IIR, DP&L argues that the proposed use of the IIR to implement SGP cost recovery is consistent with ESP I. The company maintains that it complied with ESP I cost-benefit analysis filing requirements, that the proposed recovery of SGP remains subject to Commission approval in accordance with ESP I, and that investments subject to the IIR recovery are reasonable and consistent with ESP I. (DP&L Ex. 4.)

{¶ 75} We find that DP&L's SGP implementation as provided in the Stipulation is consistent with ESP I. Further, we conclude that the IIR investments included within the Stipulation are reasonable and should be authorized. We disagree with OCC's contention that DP&L has merely renamed the Smart Grid Rider to the IIR following the Company's withdrawal of ESP III. Instead, we accept the position of the Signatory Parties that the Company's SGP is eligible for revenue recovery on its own in accordance with the IIR that was established in ESP I. We note that OCC stipulated to the creation of the IIR. Further, we conclude that OCC failed to preserve any challenge to the reinstatement of the IIR when DP&L withdrew ESP III. We conclude that OCC's prior position regarding the IIR is determinative of its current right of contest. Moreover, we conclude that the items included in the SGP are reasonable and appropriate for IIR recovery. In reaching this determination, we stress the fact that the SGP is expected to provide $413 million in net customer benefits, including reductions in energy and utility costs, service reliability and cybersecurity improvements, reduced line losses, and improved safety. Accordingly, we accept that the Stipulation is reasonable regarding authorizing the implementation of the SGP, including providing for cost-recovery pursuant to the IIR.

5. DP&L'S RSC IS PERMISSIBLE AND DOES NOT LEAD TO UNREASONABLE RATES.

{¶ 76} OCC claims that the Stipulation violates public policy because it maintains the RSC, which results in the Company failing the MFA test. OCC contends that the RSC is essentially identical to DMR charges that have been invalidated by the Supreme Court of Ohio where the charges do not provide for the recovery of identified, specific costs. *See In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906. OCC rejects the following claims in support of maintaining the RSC: (1) the RSC is distinguishable from DMRs that have been invalidated; (2) the RSC would be replaced by a higher FIC if an MRO were implemented; (3) AES' $150 million equity contribution pursuant to the Stipulation more than offsets any savings that would result from an MRO conversion; (4) the Company's financial condition is uniquely dire such that the RSC is warranted; and (5) there are qualitative attributes to maintaining an ESP, rather than an MRO, that justify maintaining the RSC. (OCC Ex. 2; OCC Ex. 4.)

{¶ 77} DP&L argues that maintaining the RSC as provided in the Stipulation is proper. In terms of the history of OCC's involvement with the RSC, the Company notes that the RSC originated in 2009 pursuant to ESP I, which was implemented via a stipulation that included OCC's consent, and that OCC failed to preserve legal claims against the RSC when ESP I was reinstated in December 2019. Independent of these factors, DP&L argues that maintaining the RSC as part of the Stipulation is proper because (1) it is distinct from DMRs that have been invalidated, (2) the Company maintains POLR risks that support the RSC, (3) the MFA test requires consideration of the Company's financial condition in order to ascertain the net customer cost, or benefit, of the RSC as compared to a FIC that would exist under an MRO, and (4) AES' $150 million equity contribution pursuant to the Stipulation must be considered in determining the MFA test. Additionally, DP&L claims that its financial condition is uniquely dire, and that there are qualitative attributes to maintaining the ESP, including the disputed RSC.

{¶ 78} We find that maintaining the RSC as described in the Stipulation is reasonable and should be upheld. Initially, we note our disagreement with OCC's claim that the Stipulation is legally invalid due to its maintenance of the RSC during the closed period up to the new ESP filing that is required to occur by 2023. We reject OCC's claim that the RSC is void based on recent decisions that have invalidated DMRs because, unlike the DMR, RSC amounts have been upheld by the Supreme Court of Ohio and because DP&L's RSC includes amounts attributable to the POLR risks and costs incurred by the Company. *See Ohio Consumers' Counsel v. PUC*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269; *Constellation NewEnergy, Inc. v. PUC*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885. While we reject claims that OCC is estopped from arguing the legality of the RSC based on its prior acquiescence in the charge in 2009, and its failure to preserve its legal arguments when ESP I was reinstated in 2019, we do note OCC's prior acquiescence in the charge in regard to its current claim that the charge is legally invalid. Nonetheless, while rejecting the notion that the RSC is void ab initio, we do find that the amount of the RSC recovery remains an issue in terms of whether DP&L passes the quadrennial review and retrospective SEET tests. This is a distinct legal test that must be applied independent of any issue preclusion arguments against OCC as to its prior litigation conduct.

{¶ 79} Turning to the merits of the MFA test, including whether maintaining the RSC is proper, we conclude that the Stipulation is fiscally reasonable and should be upheld. Initially, we continue to stress that the Stipulation cannot be evaluated in a vacuum as to any of its particular provisions. Instead, it represents a global compromise as to many issues, including the scope of SGP, additional equity contributions from AES, and DP&L's commitment to pursue a new ESP that will be devoid of credit-related and POLR charges. In each of these areas, DP&L made concessions in order to achieve the Stipulation at issue.

{¶ 80} But independent of the global stipulation considerations, we conclude that DP&L passes the MFA test irrespective of OCC's contention otherwise. Initially, we emphasize the equity contribution from AES toward DP&L's overall financial condition. Contrary to OCC's claim, AES is not so well-funded that its contribution of an additional $150-$300 million should be disregarded. In addition to demonstrating AES' good faith commitment to DP&L's operations, the equity contribution supports the claims that DP&L's current financial condition is uniquely poor, which is a consideration that we must undertake in determining the MFA test. We accept the testimony of witnesses Malinak (DP&L) and Buckley (Staff) as to the Company's financial condition, including the likelihood that a FIC under an MRO would exceed the Company's cost of continuing to operate pursuant to ESP I.

{¶ 81} Further, we clarify our rejection of DP&L's arguments that the RSC must be maintained due to the Company's uniquely dire financial condition or because of qualitative attributes to maintaining the ESP. The MFA and prospective SEET tests are designed to objectively measure the consumer financial benefits of a utility's continued operation of an ESP as compared with an MRO. We conclude that this determination is objective and measured in economic terms, rejecting DP&L's claims otherwise. Our conclusion in upholding the RSC as part of the Stipulation results from applying the economic measures of these tests; we conclude that the ESP is economically more favorable in the aggregate to an MRO.

6. DP&L DID NOT WAIVE TRADE SECRET CLAIMS IN CONNECTION WITH THE TESTIMONY OF WITNESS MALINAK THAT DISCLOSED CONFIDENTIAL INFORMATION.

{¶ 82} During the hearing, DP&L witness Malinak inadvertently disclosed the hypothetical amount of the FIC that the Company would receive pursuant to an MRO. Tr. I at 51. Counsel for DP&L immediately recognized the improper testimony and asked for administrative intervention to maintain trade secret protection as to this information. The attorney examiner determined that the disclosure was inadvertent, ordered that the testimony be redacted from the public transcript, and admonished DP&L that any future disclosures of confidential information would not likely receive similar protected treatment.

{¶ 83} OCC maintains that DP&L waived trade secret status as to witness Malinak's inadvertent disclosure. OCC notes that Ohio law favors transparency as to information that the Commission receives and considers in deciding its cases, and that trade secret exceptions to public disclosure are contingent on a party's demonstration that it exercised reasonable care to maintain the secrecy of the information. R.C. 1333.61(D). DP&L argues that OCC's claimed waiver of confidentiality is contingent on a demonstration that the information was publicly disclosed.

{¶ 84} We find that the testimony at issue remains subject to trade secret confidentiality. In reaching this determination, we emphasize that the Company consistently acted to maintain the protection of the information in all regards except for the inadvertent disclosure, immediately recognized the disclosure, and requested relief in a timely manner. Based on these considerations, we conclude that the Company acted reasonably to maintain the protection of the information such that it should remain confidential. *See State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-3549, 832 N.E.2d 711; *State ex rel. Lucas County Board of Commissioners v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 724 N.E.2d 411 (2000).

IV. Findings of Fact and Conclusions of Law

{¶ 85} DP&L is an electric distribution utility, 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, the Company is subject to the jurisdiction of this Commission.

{¶ 86} On December 21, 2018, in the *Smart Grid Case*, 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.

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

{¶ 88} On April 1, 2020, in the *Quadrennial Review 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.

{¶ 89} On May 15, 2020, in the *2019 SEET Case*, DP&L filed an application and supporting documents for the administration of the SEET for calendar year 2019.

{¶ 90} The following parties were granted intervention in the *Smart Grid Case, 2018 SEET Case, 2019 SEET Case*, and/or the *Quadrennial Review Case*: Dayton; Honda; IEU-Ohio; IGS; Kroger; OCC; OEG; OHA; OMAEG; UD; Armada; ChargePoint; Direct Energy; ELPC; Mission:data; NRDC; OEC; OPAE; Sierra Club; and STC.

{¶ 91} On October 23, 2020, DP&L filed the Stipulation executed by the Signatory Parties to resolve all issues raised in the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case*.

{¶ 92} 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.

{¶ 93} On December 4, 2020, the attorney examiner modified the procedural schedule in the case to permit the parties to submit separate, supplemental testimony regarding how the SEET test should be conducted in recognition of the Supreme Court of Ohio's decision in *In re Ohio Edison Co.*, 162 Ohio St.3d 651, 166 N.E.3d 1191, 2020-Ohio-5450.

{¶ 94} DP&L, Staff, and OCC filed testimony for consideration at hearing.

{¶ 95} The evidentiary hearing was conducted over five consecutive days beginning on January 11, 2021, and concluding on January 15, 2021.

{¶ 96} In accordance with the briefing schedule established at the conclusion of the hearing, initial briefs were filed by Staff, Mission:data, OPAE, IGS, OEG, ELPC, OCC, DP&L, Kroger, Armada, IEU-Ohio, OHA, OMAEG, and Sierra Club. Reply briefs were filed by IEU-Ohio, ChargePoint, Staff, IGS, OEG, ELPC, OHA, Sierra Club, Kroger, DP&L, OMAEG, and OCC.

{¶ 97} The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

V. ORDER

{¶ 98} It is, therefore,

{¶ 99} ORDERED, That the Stipulation filed in this proceeding be approved and adopted. It is, further,

{¶ 100} ORDERED, That DP&L take all necessary steps to carry out the terms of the Stipulation. It is, further,

{¶ 101} ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission on any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 102} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

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

MLW/PAS/hac

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

CONCURRING OPINION OF COMMISSIONER CONWAY

Entered in the Journal on June 16, 2021

I am voting to approve, and am joining, the Opinion and Order adopting the stipulation and recommendation (Stipulation) in these cases. I am writing separately to further explain my views regarding Section 6.e. of the Stipulation. Pursuant to that provision, DP&L will propose Time-of-Use (TOU) rates for the standard service offer (SSO) and an implementation plan for them on a pilot basis during Phase 1 of its Smart Grid Plan. I strongly support this initiative, because I believe that we must take steps promptly to develop and trial rates that seek to take advantage of the Advanced Metering Infrastructure (AMI) technology in which we are approving substantial investments, investments for which our support has been based in large part on the efficiency improvements (and other added value) that the AMI enables on both the utility's and the customer's sides of the meter. I also believe that we must encourage and support the availability and realization of those benefits for all customers, including the SSO customers. I am skeptical, however, that access for SSO customers to TOU rates should be curtailed, and that type of rate should only be available to customers who take generation service from competitive retail electric service (CRES) providers, once some number of CRES providers offer a time-varying rate service. So, I write to make clear that my view of Section 6.e. is that, by adopting that provision, we are in no way prejudging the propriety of ending the SSO TOU rate once three CRES providers make a TVR offering and DP&L has made the obligatory request to withdraw its SSO TOU tariff in accordance with Section 6.e

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Daniel R. Conway

By: Daniel R. Conway
Commissioner

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 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
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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,

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

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

THIRD ENTRY ON REHEARING

Entered in the Journal on December 1, 2021

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL HISTORY

A. *General Procedural History*

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) 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; Interstate Gas Supply, Inc. and IGS Solar, LLC; 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.

{¶ 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

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.

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). In adopting the Stipulation, the Commission identified excessive earnings of $61.1 million. However, pursuant to R.C. 4928.143(F), we determined that the earnings were not significantly excessive based on our consideration of the Company's capital requirements of future committed investments in the state.

{¶ 19} On July 16, 2021, applications for rehearing were filed separately by OCC and DP&L. Among the arguments raised by OCC was a claim that the Commission erred in (1) not ordering that DP&L's excess earnings must be returned either as customer refunds or through the reduced recovery of future capital commitments and (2) failing to adequately explain how DP&L's excess earnings are to be offset against its future capital investments. More specifically, OCC sought to clarify whether the excess earnings would be considered as a potential reduction to DP&L's ability to recover its $249 million SGP capital commitment pursuant to its Infrastructure Investment Rider (IIR).

{¶ 20} 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.

{¶ 21} On September 10, 2021, OCC filed a second application for rehearing, in which it contested the Commission's decision to grant the first applications for rehearing for the purpose of further consideration of the rehearing issues.

{¶ 22} On October 6, 2021, the Commission issued a Second Entry on Rehearing wherein it denied various rehearing arguments raised by OCC and DP&L except with respect to providing clarification concerning the manner of offsetting excess earnings against DP&L's future capital commitments. In affirming the offset of excess earnings against future capital commitments, the Commission clarified "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 towards the Company's right to pursue recovery of SGP costs." Second Entry on Rehearing (Oct. 6, 2021) at ¶ 40.

{¶ 23} On November 5, 2021, OCC filed a third application for rehearing, wherein OCC asserts that the Commission erred by denying consumers $61.1 million in refunds of excess earnings by including an unlawful and unreasonable offset of refunds in violation of R.C. 4928.143(F).

III. DISCUSSION

{¶ 24} In its assignment of error, OCC claims that the Commission erred as to denying customer refunds of DP&L's excess earnings ($61.1 million), including by using an unlawful and unreasonable offset of the excess earnings in violation of R.C. 4928.143(F). OCC claims that the Commission must either issue refunds or reduce future consumer charges by the $61.1 million in order to allow for the customer recovery of the Company's excess earnings. OCC claims that the Commission's determination to offset the excess earnings against future committed capital investments, rather than ordering the return of the amounts to customers, effectively legislates the SEET out of existence, as every EDU will commit to future capital investments as a way to avoid customer refunds. Moreover, OCC claims 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 (*Columbus Southern Case*), Opinion and Order (Jan. 11, 2011).

{¶ 25} DP&L argues against the rehearing application, claiming procedurally that either (1) OCC's arguments should have been raised in its first rehearing application, or (2) the Commission legally addressed OCC's arguments in the Second Entry on Rehearing such that further consideration of the claimed errors is barred. In addition to its procedural arguments, the Company reasserts that it did not have any significantly excessive earnings, refuting OCC's claims that the Commission wrongfully offset excess earnings 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. Additionally, DP&L claims that the Commission's decision not to order customer refunds or reductions in future capital cost recoveries is supported by the Company's unique financial circumstance, which necessitates that the Company cannot financially support its planned capital investments if it is required to refund excess earnings or forego the future recovery of those costs through its IIR. Further, the Company maintains that the Commission's prior treatment of this issue in the *Columbus Southern Case* is not controlling here because the Commission's determination in this case was based on a unique determination that DP&L could not implement its capital investments if it was required to issue refunds, which was not a finding in *Columbus Southern Case*.

{¶ 26} We find that OCC's third application for rehearing is not well-taken. Initially, we find that OCC's claimed error was raised and rejected in regard to OCC's first application for rehearing. Second Entry on Rehearing (Oct. 6, 2021) at ¶¶ 35-40. As we described, DP&L's financial condition supported that excess earnings should be offset[2] against future capital expenditures, rather than returned as customer refunds or recovered via reducing future capital recoveries, in order to promote the Company's substantial further capital investments. Second Entry on Rehearing, at ¶ 40. As we indicated, the Company's future capital commitment is both highly beneficial to its customers and could not occur if the Company is required to forgo the full recovery of the investment through its IIR. Accordingly, we expressly determined, consistent with our **obligation** to consider the capital requirements of future committed investments in the state, as described in R.C. 4928.143(F), that the Company's capital investments should not be reduced as a result of the SEET. OCC's third application for rehearing does not describe any arguments that were not raised and addressed by the Commission in response to its first application for rehearing. Accordingly, we find that OCC's assignment of error is improper, as OCC seeks rehearing of a denial of rehearing on the same issue. As we have consistently held, R.C. 4903.10 does not allow persons who have entered appearances to file for rehearing upon the denial of rehearing on the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing

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2 OCC argues that our use of the term "offset" requires an outcome that bars DP&L's future capital recovery of the excess earnings amounts. We disagree, noting that R.C. 4928.143(F) requires only the "consideration" of future capital investments when determining whether excessive earnings are "significantly excessive" to the degree that customer refunds should occur. Our use of the term "offset" was intended to describe that the Company's future committed capital was much greater than the excess earnings that we deemed not to be "significantly excessive" for purposes of requiring customer refunds.

(Sept. 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 27} Moreover, we again stress our disagreement with OCC's claim that the Commission is mandated to return excess earnings to customers either via refunds or reductions in the recoveries of future capital expenses. As we previously indicated, the consideration of SEET amount offsets is unique to each EDU. In this case, DP&L's financial condition is such that ordering customer refunds or limiting the recovery of capital expenses would impair the Company's ability to fund its grid modernization project, as well as its ability to maintain its distribution and transmission systems. Second Entry on Rehearing, at ¶ 40. This circumstance is unique to DP&L, and the facts in this case are distinct from those in the *Columbus Southern Case*, where the EDU presented no evidence of impairment of its ability for future capital investments as associated with the treatment of its excess earnings.[3] Accordingly, based on our assessment of the financial circumstances unique to DP&L, we conclude that the Company's excess earnings are not subject to either customer refunds or any reduction in the Company's ability to recover the costs of its future capital improvements.

IV. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the third application for rehearing filed by OCC be denied. It is, further,

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3 For comparison purposes, in the *Columbus Southern Case*, the Commission required the EDU to commit to an additional capital investment of $20 million for a solar project that benefitted the state's energy efficiency and economic development policies. *Columbus Southern Case*, Opinion and Order (Jan. 11, 2011) at 26, 27, 31-33; Entry on Rehearing (Mar. 9, 2011) at ¶¶ 32-33. Whereas, the capital investment required of DP&L ($249 million) is substantially higher, especially given the relative sizes of these two EDUs.

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

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway

MLW/hac

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**APPLICATION FOR REHEARING
BY
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July 16, 2021

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APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

This case continues the trend of the PUCO's inequitable settlement process that favors utilities and special interests over consumers. As former PUCO Commissioner Roberto once wrote about a particular dysfunction in PUCO settlements, the "balance of power" in negotiations for electric security plans favors Ohio's utilities.[1] This results in parties negotiating not a just and reasonable settlement but rather "the best that they can hope to achieve"[2] when faced with the power of the utility to effectively veto[3] any successes that a party may achieve in the PUCO's order.

Good public policy demands that signatures on settlements not be exchanged for cash and cash equivalents. Yet these types of deals have once again found a home in this PUCO-approved settlement.

The settlement in this case also continues the trend that settlements put before the PUCO must include the utility. Broad-based consumer advocates like OCC are not deemed essential to the settlement process. That is evidenced by the PUCO's approval of the settlement over OCC's objections. Yet one would be hard-pressed to find an example of a PUCO-approved settlement that did not include the utility as a signatory party.

The settlement harms consumers by requiring them to pay another $300 million in subsidies to DP&L's shareholders, denying consumers $150 million in refunds after paying significantly excessive profits to DP&L, and imposing $100 million in new charges for a "smart grid" that is expected to provide precious few tangible benefits for consumers.

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[1] *See In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[2] *Id.*

[3] *See* R.C. 4928.143(C)(2)(a) (giving the utility the unilateral authority to veto a PUCO ruling amending the utility's electric security plan by withdrawing from the plan).

The PUCO's approval of the settlement was unlawful and unreasonable. It should be rejected on rehearing. Accordingly, the PUCO's June 16, 2021 Opinion and Order (the "Order") was unlawful, unreasonable, unjust, and unwarranted for the following reasons:

Assignment of Error 1. The PUCO erred in ruling that DP&L's Rate Stabilization Charge is lawful, which contradicts R.C. 4928.143 and Ohio Supreme Court precedent.

A. The PUCO violated Ohio Supreme Court precedent and R.C. 4903.09 by approving the Rate Stabilization Charge to consumers as a purported charge for provider of last resort obligations.

B. The PUCO violated Ohio Supreme Court precedent by approving the Rate Stabilization Charge, which is an unlawful financial integrity charge to consumers.

Assignment of Error 2. The PUCO erred by approving the Settlement, in which the PUCO modified ESP I, which the PUCO lacks authority to do under R.C. 4928.143.

Assignment of Error 3. The Order violates R.C. 4903.09 and Ohio Supreme Court precedent because the PUCO failed to adequately explain its reasoning and wholly ignored OCC's arguments, including arguments that DP&L's smart grid proposal would not be cost beneficial and arguments showing that the numerous harms to consumers in the Settlement were far greater than any small benefits to consumers.

Assignment of Error 4: The PUCO erred in denying OCC's claim for rejection of the Settlement based on DP&L's paying of cash and cash-equivalents to signatory parties (the "redistributive coalition"), given the PUCO's failure on this issue to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact" per R.C. 4903.09.

A. The PUCO's summary, three-sentence discussion of the alleged benefits to consumers under the Settlement is inadequate under R.C. 4903.09, particularly in a complex proceeding involving a 53-page settlement, five days of hearings, and more than 500 pages of briefing.

B. The PUCO's findings on the alleged benefits of the Settlement violate R.C. 4903.09 because they are without record support.

i. AES's payments to DP&L are not part of the Settlement, so they cannot be a benefit of the Settlement.

ii. The PUCO adopted the signatory parties' view that Smart Grid Plan 1 would be cost-beneficial to consumers instead of OCC witness Alvarez's contrary testimony that the plan would cost more than the potential benefits to consumers. But the PUCO made no effort whatsoever to explain why it rejected witness Alvarez's testimony.

iii. The PUCO failed to explain the rationale for its decision to allow DP&L to charge consumers for the SmartGrid Plan under the Infrastructure Investment Rider, which was never tariffed under DP&L's current electric security plan, ESP I.

iv. The record contradicts the PUCO's finding that DP&L filing its next electric security plan "is expected to terminate all rate stability charges."

C. In rejecting OCC's consumer protection arguments regarding the redistributive coalition, the PUCO cited no record evidence for its erroneous conclusion that "many of the negotiated concessions contained in the Stipulation benefit all customer classes." To the contrary, because the Settlement is the product of a redistributive coalition, the record does not support the PUCO's conclusion that it benefits customers and the public interest.

Assignment of Error 5. The Order violates R.C. 4928.143(F) because it denies consumers refunds under the Significantly Excessive Earnings Test despite a PUCO finding that DP&L's profits were significantly excessive as compared to comparable companies to the tune of $61 million.

Assignment of Error 6. The Order violates R.C. 4928.143(F) because it provides consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits, which undermines the consumer protection purpose of the statute and allows the utility to profit, on an accelerated basis, through its Infrastructure Investment Rider.

Assignment of Error 7: The PUCO's Order permitting DP&L to charge consumers through the Infrastructure Investment Rider violates R.C. 4928.143(C)(2)(b) because the rider was not a provision, term, or condition of DP&L's most recent standard service offer.

Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the PUCO should abrogate the Order. On rehearing, the PUCO should reject the October 23, 2020 Stipulation and Recommendation ("Settlement"), terminate the Rate Stabilization Charge ("RSC"), reject DP&L's proposed charges to consumers for smart grid investments, and order $61.1 million in prompt refunds to consumers resulting from DP&L's significantly excessive profits.

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

This case continues the trend of the PUCO's inequitable settlement process that favors utilities and special interests over consumers. As former PUCO Commissioner Roberto once wrote about a particular dysfunction in PUCO settlements, the "balance of power" in negotiations for electric security plans favors Ohio's utilities.[4] This results in parties negotiating not a just and reasonable settlement but rather "the best that they can hope to achieve"[5] when faced with the power of the utility to effectively veto[6] any successes that a party may achieve in the PUCO's order.

Moreover, ingrained in the settlement process is the notion that there can't be a settlement without the utility participating as a signatory party. That also provides unfair bargaining power for the utility. In this settlement, like so many others, the PUCO Staff (who are employees of the judge) have signed the stipulation. Many other signatories agreed to accept cash and cash-equivalent payments in exchange for their sign-off on the deal. The deal will cost all consumers, residences, and businesses (most of whom are not favored by DP&L's handing out of cash) hundreds of millions of dollars. All these ingredients are baked into a Settlement that the PUCO approved as a "package." The PUCO's settlement approach protects utilities and special interests by enabling certain settlement terms that otherwise would be objectionable (even unlawful) if reviewed on a stand-alone basis. And indeed, they are highly objectionable even in the context of the larger Settlement.

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[4] *See In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[5] *Id.*

[6] R.C. 4928.143(C)(2)(a) (giving the utility the unilateral authority to veto a PUCO ruling amending the utility's electric security plan by withdrawing from the plan).

The PUCO, in its Order, approved the Settlement. In doing so, it approved four more years of charges to consumers under DP&L's unlawful Rate Stabilization Charge—projected to be more than $300 million. It also denied consumers refunds for DP&L's significantly excessive profits. And it required consumers to pay for DP&L's smart grid investments with virtually no accountability required by DP&L for delivering consumer benefits. These rulings were unlawful and unreasonable.

Virtually everything in the Settlement benefits the utility or the special interests of the limited parties who signed the Settlement to the detriment of DP&L's consumers. All consumers are left to pay the bill.

On rehearing, the PUCO should abrogate the Order. It should reject the Settlement. It should eliminate the unlawful Rate Stabilization Charge. It should order DP&L to refund its significantly excessive profits to consumers. It should nullify the settlement process as being void as against public policy, where DP&L pays cash to parties that sign its settlement. And it should protect consumers from paying for DP&L's flawed smart grid plan.

II. STANDARD OF REVIEW

After an order is entered, an intervenor in a PUCO proceeding has a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[7] An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[8]

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO

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[7] R.C. 4903.10.

[8] R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[9]

III. ASSIGNMENTS OF ERROR

Assignment of Error 1. The PUCO erred in ruling that DP&L's Rate Stabilization Charge is lawful, which contradicts R.C. 4928.143 and Ohio Supreme Court precedent.

By approving the Settlement, the PUCO allowed DP&L to charge consumers $79 million per year under the Rate Stabilization Charge ("RSC"). In doing so, the PUCO rejected OCC's arguments that continuing the RSC is unlawful. Instead, the PUCO ruled, "we find that the RSC charge remains lawful."[10] In particular, the PUCO ruled that the RSC is lawful because it "includes amounts attributable to the POLR risks and costs incurred by the Company."[11] The PUCO's ruling that the RSC is lawful violates binding Ohio Supreme Court precedent.

A. The PUCO violated Ohio Supreme Court precedent and R.C. 4903.09 by approving the Rate Stabilization Charge to consumers as a purported charge for provider of last resort obligations.

Under binding Ohio Supreme Court precedent, the PUCO cannot approve a provider of last resort ("POLR") charge to consumers as a cost-based charge where there is no evidence of the actual POLR costs incurred by the utility.

In *In re Columbus Southern Power Co.*,[12] the PUCO had approved $500 million in POLR charges to AEP consumers.[13] The PUCO ruled that these charges were "based on the cost" to the

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[9] R.C. 4903.10(B).

[10] Order ¶ 57.

[11] Order ¶ 78. *See also* Order ¶ 57 ("the RSC charge has applications beyond the Company's generic financial integrity in that it relates to the Company's continuing obligation to operate as a POLR, which imposes continuing risk on the Company").

[12] 2011-Ohio-1788.

[13] 2011-Ohio-1788, ¶¶ 22, 24.

utility of being the provider of last resort.[14] The Court ruled, however, that there was no support for the PUCO's conclusion that AEP would incur $500 million in costs as the provider of last resort.[15] As the Court stated, "we can find no evidence suggesting that AEP's POLR charge is related to any costs it will incur."[16] Likewise, the Court concluded that "the manifest weight of the evidence contradicts the commission's conclusion that the POLR charge is based on cost."[17] The PUCO had erred because the Court has previously ruled that the PUCO must "'carefully consider what costs it is attributing' to 'POLR obligations.'"[18] Thus, the Court found that the PUCO abused its discretion and reversed.[19]

On remand, the PUCO rejected AEP's non-cost-based justification for POLR charges to consumers.[20] The PUCO found that AEP's use of a financial model was insufficient to justify charges to consumers for alleged POLR costs because it "fails to provide a reasonable measure of the Companies' POLR costs."[21] Here, with respect to DP&L, neither DP&L nor any of the other signatory parties made any attempt to justify the amount of the RSC on any basis, whether it be based on actual costs or a financial model that sets a non-cost based value for POLR. The record contains no evidence whatsoever justifying the PUCO's approval of the $79 million amount of the RSC. To the contrary, the amount of the RSC is based on an arbitrary historical amount equal to 11% of DP&L's 2004 tariffed generation rates, which have no bearing on

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[14] 2011-Ohio-1788, ¶ 24.

[15] 2011-Ohio-1788, ¶¶ 24-29.

[16] 2011-Ohio-1788, ¶ 25.

[17] 2011-Ohio-1788, ¶ 29.

[18] 2011-Ohio-1788, ¶ 29.

[19] 2011-Ohio-1788, ¶ 29 ("Ruling on an issue without record support is an abuse of discretion and reversible error. Therefore, we reverse the provisions of the order authorizing the POLR charge.").

[20] *In re the Ohio Power Company*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011).

[21] *Id.*

DP&L's current costs.[22] DP&L has no current generation costs and lacks a tariffed generation rate.

The Order, by approving continued charges under the RSC, contradicts this precedent. Just as the PUCO did in *Columbus Southern*, the PUCO has approved charges to consumers—about $314 million[23]—for purported POLR obligations. But there is no evidence in the record demonstrating that DP&L will incur anywhere near $314 million as provider of last resort. To the contrary, DP&L offered no evidence that it will spend even a single dollar for out-of-pocket costs associated with being the provider of last resort. This makes sense because when a supplier defaults and a consumer needs default generation service, that service is provided by marketers—not DP&L—through the standard service offer.[24] Indeed, despite the PUCO's statement that the RSC "includes amounts attributable to the POLR risks and costs incurred by the Company," it cited no record evidence of any such costs.[25] Accordingly, just as the Court ruled in *Columbus Southern*, the PUCO erred by approving more than $314 million in charges to consumers for the RSC.

For similar reasons, this ruling violates R.C. 4903.09. R.C 4903.09 requires the PUCO to create a "complete record of all of the proceedings" and to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has interpreted this to mean that

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[22] *See In re Application of the Dayton Power & Light Co. for the Creation of a Rate Stabilization Surcharge Rider & Distribution Rate Increase*. Case No. 05-276-EL-AIR, Opinion & Order at 3 (Dec. 28, 2005) ("DP&L will implement an unavoidable RSS equal to 11 percent of DP&L's January 1, 2004, tariffed generation rates."); *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Opinion & Order (June 24, 2009) (continuing the RSS but changing the name to RSC).

[23] OCC Ex. 2 (Kahal Supplemental Testimony) at 10.

[24] OCC Ex. 2 (Kahal Supplemental Testimony) at 24 ("POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L's customers").

[25] Order ¶ 78.

the PUCO abuses its discretion when it "renders an opinion on an issue without record support and a supporting rationale."[26] The PUCO approved a $79 million per year charge to consumers under the Rate Stabilization Charge. But there is no record support for such a charge in the amount of $79 million (or any other amount).

As explained, the amount of the charge to consumers under the RSC is based on DP&L's long-defunct generation rates. Given that DP&L is now a distribution-only utility, it has no generation rates on which to base the RSC. The PUCO's ruling, which approves continuation of the RSC based on non-existent generation rates, lacks record support and thus violates R.C. 4903.09.

B. The PUCO violated Ohio Supreme Court precedent by approving the Rate Stabilization Charge, which is an unlawful financial integrity charge to consumers.

The PUCO also erred by approving the Rate Stabilization Charge because it is an unlawful financial integrity charge to consumers that is not tied to any costs that DP&L incurs. The Ohio Supreme Court has consistently rejected attempts by the PUCO to approve charges to consumers that are not tied to specific costs.

In its most recent ruling in *In re Ohio Edison Co.*,[27] the Ohio Supreme Court overturned the PUCO's approval of FirstEnergy's distribution modernization rider ("DMR"). There, the PUCO had approved a DMR for FirstEnergy "to provide credit support" for FirstEnergy.[28] Despite being called a "distribution modernization rider," the Court found that none of the DMR funds were required to be used for distribution modernization. To the contrary, the utility would

[26] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19 (citation omitted).

[27] 2019-Ohio-2401.

[28] 2019-Ohio-2401, ¶ 18.

separately recover all distribution modernization costs through another rider, Rider AMI.[29] Thus, the DMR charges to consumers were not in any way related to any costs that FirstEnergy incurred. The Court reversed the PUCO and remanded with an order requiring the PUCO to remove the DMR from FirstEnergy's electric security plan.[30]

The PUCO recognized this precedent in a recent ruling regarding DP&L's third electric security plan:

> The line of cases from *Columbus S. Power Co.*, 2011-Ohio-1788, to *Ohio Edison* demonstrates that nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans.[31]

Following *Ohio Edison* and similar Supreme Court rulings,[32] the PUCO ordered DP&L to remove its own DMR from its electric security plan because DP&L's DMR was substantially the same as FirstEnergy's.[33] That is, in charging consumers under its DMR, DP&L was not collecting any costs that it incurred to provide distribution service.

The Rate Stabilization Charge is no different. As explained above, DP&L has identified no costs that it incurs related to the Rate Stabilization Charge (POLR costs or otherwise), and the PUCO has cited no evidence of any such costs. There are no such costs anymore. The RSC is a relic, last approved by the PUCO in 2009 at a time when DP&L owned generation and incurred costs that might have justified the annual RSC charge.

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[29] 2019-Ohio-2401, ¶ 18.

[30] 2019-Ohio-2401, ¶ 2 (the Court remands "with instruction to remove the DMR from FirstEnergy's ESP").

[31] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 108 (Nov. 21, 2019).

[32] *See In re Columbus S. Power Co.*, 2011-Ohio-1788; *In re Columbus S. Power Co.*, 2016-Ohio-1608; *In re Dayton Power & Light Co.*, 2016-Ohio-3490.

[33] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶¶ 102-110 (Nov. 21, 2019).

But the question before the PUCO is not whether the RSC was justified in 2009. The question before the PUCO is whether it should approve the RSC *now*, as part of a Settlement that asks the PUCO to continue the RSC for four more years until DP&L's next electric security plan is approved. By approving the Settlement, the PUCO approved $314 million in charges to consumers under the RSC. That was unlawful because DP&L will not incur $314 million—or any amount at all—for POLR obligations or anything else related to the RSC. And there is nothing in the record to support any non-cost-based charge for POLR.

Assignment of Error 2. The PUCO erred by approving the Settlement, in which the PUCO modified ESP I, which the PUCO lacks authority to do under R.C. 4928.143.

It has long been established that the PUCO is a "creature of statute" that "may act only under the authority conferred on it by the General Assembly."[34] Thus, a PUCO ruling is unlawful in the absence of a statute authorizing such ruling. Here, the PUCO exceeded its statutory authority by approving the Settlement because the Settlement modifies DP&L's ESP I, in violation of R.C. 4928.143.

Under R.C. 4928.143(C)(2), a utility is allowed to terminate its electric security plan if the PUCO modifies it.[35] Upon such termination, the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer ... until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code."[36] DP&L withdrew from its ESP III in another case, thereby reverting to ESP I, which the PUCO approved, over OCC objections.[37]

[34] *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 (citing *Tongren v. PUCO*, 1999-Ohio-206).

[35] R.C. 4928.143(C)(2)(a) ("If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it...").

[36] R.C. 4928.143(C)(2)(b).

[37] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Second Finding & Order (Dec. 18, 2019).

In that case, parties raised various issues about the manner in which DP&L could revert to ESP I. Despite terminating ESP III and reverting to ESP I, DP&L sought to continue charging consumers under various riders that were created in ESP III.[38] Other parties also sought to continue selected parts of ESP III (that worked to their advantage). Industrial Energy Users-Ohio ("IEU"), the City of Dayton, and Honda all proposed that they continue to receive the benefits of certain "economic development" provisions that were approved in the ESP III case.[39] These included (i) an "economic improvement incentive" available to one member of each of Ohio Energy Group ("OEG"), IEU, and Ohio Hospital Association ("OHA"), (ii) an "automaker incentive" available to one member of OEG, one member of Ohio Manufacturers' Association Energy Group ("OMAEG"), and Honda, (iii) an "Ohio business incentive" available to Honda, two members of OMAEG, Kroger, and one member of IEU, (iv) $2 million in economic development grants for Adams and Brown Counties, (v) an annual $1 million economic development grant, (vi) $145,000 in cash annually to IEU, (vii) $18,000 in cash annually to OMAEG, and (viii) $160,000 in cash annually to Kroger.[40]

In rejecting DP&L's request to keep charging consumers under various ESP III riders, as well as rejecting intervenors' requests to continue receiving monetary benefits under the ESP III settlement, the PUCO noted that it was "bound by the plain language of R.C. 4928.143(C)(2)(b)."[41] The plain language of R.C. 4928.143(C)(2)(b) states that the PUCO "shall issue such order as is necessary to continue the provision, terms, and conditions of the utility's

[38] *Id.* ¶ 37.

[39] *Id.* ¶ 13 ("IEU-Ohio and Dayton/Honda contend that the economic development provisions in ESP III must be continued if the RSC is approved.").

[40] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 14 (Oct. 20, 2017).

[41] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Second Finding & Order ¶ 26 (Dec. 18, 2019).

most recent standard service offer." Accordingly, the PUCO ruled that under this plain language, it "must restore the provision, terms and conditions of ESP I which were in effect prior to the effective date of ESP III."[42] Thus, the PUCO rejected DP&L's request to continue charges under riders created in ESP III.[43] And the PUCO ruled that the economic development provisions were part of ESP III and were thus required to be terminated when DP&L withdrew from ESP III and reverted to ESP I.[44]

Yet now, through the Settlement, the PUCO has done precisely what it said it lacked authority to do in DP&L's ESP withdrawal case: modified ESP I to add economic development (and other cash benefits) to signatory parties. This was unlawful.

As OCC explained in its testimony and briefs, the Settlement includes numerous cash handouts to signatory parties.[45] *Every single party* that lost out on its economic development payments when DP&L withdrew from ESP III signed the Settlement in this case and received new cash or cash equivalent payments in exchange for their signatures.[46] The PUCO has modified ESP I to insert the economic development payments that the signatory parties lost when ESP III was withdrawn. But the PUCO lacks authority to modify ESP I in that regard. As the

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[42] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Second Finding & Order ¶ 27 (Dec. 18, 2019). Note that OCC does not necessarily agree with the PUCO's ruling in this regard and reserves the right to continue to challenge it in Case No. 08-1094-EL-SSO, any appeals of that case, or otherwise.

[43] *Id.* ¶¶ 36-38 (ordering DP&L to file new tariffs eliminating the decoupling rider, uncollectible rider, distribution investment rider, and regulatory compliance rider).

[44] *Id.* ¶ 40 ("the Commission finds that the economic development provisions contained in the amended stipulation are provisions of ESP III and should be terminated with the withdrawal of ESP III").

[45] OCC Initial Brief at 2, 42-43.

[46] *See* Settlement at 33, 35, 36, 37, 41-42 (cash or cash equivalents paid to City of Dayton, OHA, Honda, IEU, Kroger, OMAEG, University of Dayton, Ohio Energy Group, and IGS under the Settlement).

PUCO itself recognized in its prior ruling, the plain language of R.C. 4928.143(C) requires the PUCO to revert to the utility's prior standard service offer—without modification.[47]

The PUCO or opposing parties might respond that the cash handouts under the Settlement are not part of ESP I. These arguments fail for several reasons.

First, many of the economic development payments are explicitly tied to ESP I. For example, the Settlement provides that signatory parties (or their members) OEG, IEU, Honda, OMAEG, Kroger, and OHA will receive credits of $0.004 per kWh "while DP&L operates under the terms and conditions of ESP I."[48] The Settlement provides various benefits to the City of Dayton, including $350,000 in annual cash payments, and those payments "shall expire when ESP I terminates."[49] These are quite obviously replacements for the payments that these parties lost out on when DPL withdrew from ESP III.

Second, parties might claim that the payments are made by shareholders and thus are not part of ESP I. But it is only through sleight-of-hand that DP&L claims that shareholders are funding these payments. As OCC explained in its briefs, DP&L estimates that these alleged shareholder payments will total around $30 million, whereas the new charges to consumers under the RSC are expected to total more than $300 million over the same period.[50] The $300 million in charges under the RSC are not related to any costs that DP&L will incur, so that money goes directly to shareholders. Under the Settlement, shareholders then turn around and

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[47] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Second Finding & Order ¶ 26 (Dec. 18, 2019). Again, OCC disputes the PUCO's interpretation of "standard service offer" and does not concede that an electric security plan *is* a standard service offer; rather, a standard service offer is *part of* an electric security plan. OCC reserves all rights on this issue in Case No. 08-1094-EL-SSO or otherwise.

[48] Settlement at 36.

[49] Settlement at 32-33.

[50] OCC Initial Brief at 74.

immediately pay $30 million to various signatory parties. The Settlement is a single transaction where (i) A pays $300 million to B, and then (ii) B pays $30 million to C. It is nonsense to claim that consumers (A) are not paying $30 million to signatory parties (C).

After all, the centerpiece of DP&L's case is that DP&L is allegedly in a precarious financial condition and needs a bailout from consumers to pay its debts.[51] How, then, can its shareholders afford $30 million in handouts to signatory parties, if not for the $300 million RSC? DP&L's own witness admitted on cross examination that the $30 million in "shareholder" payments was an explicit quid pro quo for the $300 million in charges to consumers under the RSC:

> Q. Will DP&L's shareholders still make this $30 million in payments if the RSC is eliminated?
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> A. [I]f the RSC is eliminated, there is no Stipulation, right? And there is no $30 million.[52]

Claims that shareholders are paying the cash handouts to signatory parties are spurious.

Third, if these payments are not part of ESP I, then what are they? This proceeding is the combination of four cases: (i) the PUCO's quadrennial review of DP&L's electric security plan, (ii) DP&L's 2018 significantly excessive earnings test, (iii) DP&L's 2019 significantly excessive earnings test, and (iv) DP&L's smart grid case. The payments clearly are not part of the significantly excessive earnings test. Nor do they have anything to do with DP&L's smart grid plan. Thus, they must be part of the quadrennial review case, where the PUCO was required to assess whether DP&L could continue charging consumers under ESP I.

[51] *See* OCC Initial Brief at 7-8 (summarizing DP&L's testimony about its poor financial condition).

[52] Tr. Vol. II at 326 (Garavaglia).

By approving the Settlement, the PUCO allowed ESP I to continue but with new bells and whistles added to it for the benefit of signatory parties. As explained above, the cash handouts under the Settlement are plainly intended as replacements for the cash handouts that signatory parties lost when DP&L withdrew from ESP III. It is impossible, therefore, for the PUCO to escape the conclusion that the cash payments to signatories are modifications of ESP I, which is unlawful for the reasons explained above.

Assignment of Error 3. The Order violates R.C. 4903.09 and Ohio Supreme Court precedent because the PUCO failed to adequately explain its reasoning and wholly ignored OCC's arguments, including arguments that DP&L's smart grid proposal would not be cost beneficial and arguments showing that the numerous harms to consumers in the Settlement were far greater than any small benefits to consumers.

and

Assignment of Error 4: The PUCO erred in denying OCC's claim for rejection of the settlement based on DP&L's paying of cash and cash-equivalents to signatory parties (the "redistributive coalition"), given the PUCO's failure on this issue to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact" per R.C. 4903.09.

R.C. 4903.09 requires the PUCO to create "a complete record of all of the proceedings" and to "file, with the records of such cases, findings of fact and written opinions setting for the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has interpreted this law to impose three requirements on the PUCO.

First, a PUCO order "must contain sufficient detail for [the] court to determine the factual basis and reasoning relied on by the commission."[53] In other words, R.C. 4903.09 "prohibits summary rulings and conclusions that do not develop the supporting rationale or record."[54] If the order lacks sufficient detail for appellate review, then it violates R.C. 4903.09.

[53] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19.

[54] *In re Commission Review of the Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 53 (citation omitted).

Second, to comply with R.C. 4903.09, the PUCO must address parties' arguments and explain why it found one party's argument more compelling than another's. In *In re Capacity Charges of Ohio Power Co.*, the PUCO Staff offered expert testimony, which the utility challenged.[55] The PUCO adopted the Staff proposal without explanation and ignored the arguments underlying the utility's challenge.[56] The Court ruled that this violated R.C. 4903.09 and remanded to the PUCO with an instruction to "substantively address" the utility's arguments.[57] It is not enough for the PUCO to say that it finds one party's arguments compelling without explaining *why* that party's arguments are more compelling than competing arguments.

Third, to comply with R.C. 4903.09, the evidentiary record must actually support the PUCO's conclusions. Where the PUCO "renders an opinion on an issue without record support and a supporting rationale," it abuses its discretion.[58]

The PUCO violated R.C. 4903.09 because (i) its ruling approving the Settlement provides little or no insight regarding its reasoning for purposes of appellate review, (ii) it wholly ignored OCC's arguments and failed to explain why it did not adopt them, and (iii) the PUCO rendered an opinion without record support.

A. The PUCO's summary, three-sentence discussion of the alleged benefits to consumers under the Settlement is inadequate under R.C. 4903.09, particularly in a complex proceeding involving a 53-page settlement, five days of hearings, and more than 500 pages of briefing.

The second prong of the PUCO's settlement standard requires it to determine whether the Settlement, as a package, benefits consumers and the public interest. The following is the entirety of the PUCO's discussion regarding the second prong:

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[55] 2016-Ohio-1607.

[56] *Id.*

[57] *Id.* ¶ 57.

[58] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19 (citation omitted).

> Here, we reject OCC's individual claims contra the settlement benefits. Further, we emphasize our determination that the major provisions of the settlement are overwhelmingly customer beneficial, including obtaining AES Corporation's commitment to provide $300 million in capital contribution to DP&L to improve its infrastructure and modernize its grid; approving the modified SGP; and requiring that DP&L must pursue its next ESP, which is expected to terminate all rate stability charges, by 2023. Accordingly, we conclude that even assuming arguendo that some of OCC's claims contra the settlement benefits are accepted, the settlement as a whole remains beneficial to ratepayers and the public based on its inclusion of these major commitments from the Company.[59]

This three-sentence summary does not come close to meeting the requirements of R.C. 4903.09. In the first sentence, the PUCO says, without explanation, that it rejects OCC's individual claims regarding the alleged benefits of the Settlement. The PUCO then proceeds to state, without citing any record evidence, that the "major provisions" are "overwhelmingly customer beneficial." Despite this bold pronouncement, the PUCO identifies just three alleged benefits to customers under the Settlement: (i) AES's $300 million contribution to DP&L, (ii) the smart grid plan, and (iii) the commitment by DP&L to file another electric security plan by 2023 that is "expected to terminate all rate stability charges." The PUCO made no effort whatsoever to explain how these three benefits outweigh the numerous harms to consumers.

In its briefs, OCC spent 25 pages explaining why any alleged benefits to consumers under the Settlement are outweighed by numerous harms to consumers, including (i) harm to consumers from the smart grid charges, (ii) denying consumers the benefits of operation and maintenance costs, (iii) failing to provide adequate reliability benefits to consumers, (iv) requiring customers to bear all the risk of DP&L's smart grid investments, (v) allowing DP&L to charge consumers for a second phase of smart grid investments before showing that the

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[59] Order ¶ 50.

first phase was successful, (vi) denying consumers $150 million in refunds, (vii) allowing DP&L to continue charging consumers $79 million per year under the RSC, (viii) failing to make charges refundable, (ix) allowing DP&L to continue to seek financial integrity charges in its next electric security plan, and (x) providing cash or cash equivalents to signatory parties.[60] At no point did the PUCO explain why the three alleged benefits of the Settlement outweigh all of the various harms to consumers identified by OCC. But the PUCO was required to do this analysis under R.C. 4903.09 and the Supreme Court's ruling in *Ohio Power Co.*[61] Accordingly, the Order was unlawful.

B. The PUCO's findings on the alleged benefits of the Settlement violate R.C. 4903.09 because they are without record support.

As explained, in finding that the Settlement benefits consumers and the public interest, the PUCO cited just three alleged benefits: (i) AES's $300 million contribution to DP&L, (ii) the smart grid plan, and (iii) DP&L's commitment to file a new ESP by 2023 "which is expected to terminate all rate stability charges."[62] The record does not support the PUCO's conclusion that any of these three things is a benefit to consumers under the Settlement.

i. AES's payments to DP&L are not part of the Settlement, so they cannot be a benefit of the Settlement.

AES's $300 million contribution is not part of the Settlement. It is simply inaccurate for the PUCO to conclude that this is a benefit of the Settlement. Before the Settlement was even signed, AES had already made $150 million of the $300 million investment. AES made the

[60] *See* OCC Initial Brief at 49-75.

[61] 2016-Ohio-1607.

[62] Order ¶ 50.

initial $150 million investment on June 26, 2020[63] and the Settlement was signed October 23, 2020.[64] It is therefore logically impossible for that $150 million to be a benefit of the Settlement.

Further, nothing in the Settlement requires AES to pay a cent to DP&L. For one, AES is not a signatory party to the Settlement, so the Settlement does not legally bind AES to do anything, much less pay $150 million more to DP&L. Further, the only reference to the $300 million payments is found in the recitals of the Settlement.[65] But recitals provide background information and are not binding.[66]

Neither AES nor the $300 million is mentioned as a term of the Settlement itself. In other words, if AES were to simply refuse to provide the additional $150 million, it would have no bearing on the Settlement and neither the PUCO nor anyone else could compel AES to make the payment. Indeed, to date, it does not appear that AES has made the second $150 million payment to DP&L, even though the Settlement was approved a month ago.[67] The PUCO's conclusion that AES's $300 million contribution is a benefit to consumers under the Settlement contradicts the record and therefore violates R.C. 4903.09.

[63] PUCO Staff Ex. 1 (Buckley) at 10.

[64] Settlement at 53.

[65] Settlement at 3 ("WHEREAS, the ultimate parent of DP&L, The AES Corporation, provided a capital contribution of $150 million to DP&L, on June 26, 2020 to enable DP&L to improve its infrastructure and modernize its grid while maintaining liquidity. In addition, as more fully described in DP&L's June 17, 2020 8-K filing, AES has provided a statement of intent to contribute an additional $150 million to DPL or DP&L in 2021 to enable smart grid investment.").

[66] *United States v. Community Health Sys.*, 666 Fed. Appx. 410, 417 (6th Cir. 2016) ("recitals generally do not create binding obligations") (citation omitted).

[67] A review of AES's and DP&L's SEC filings reveals no report regarding a second $150 million investment in 2021.

ii. The PUCO adopted the signatory parties' view that Smart Grid Plan 1 would be cost-beneficial to consumers instead of OCC witness Alvarez's contrary testimony that the plan would cost more than the potential benefits to consumers. But the PUCO made no effort whatsoever to explain why it rejected witness Alvarez's testimony.

The PUCO's Order violates R.C. 4903.09 because it fails to explain why it rejected substantial evidence presented by OCC that the Settlement primarily benefits DP&L and the signatory parties, rather than consumers. In the Order, the PUCO found that the Settlement as a whole benefits consumers and the public interest.[68] But that conclusory finding does not negate the PUCO's obligation under R.C. 4903.09 to explain the rationale for its decision.[69] The PUCO should grant rehearing to properly address the evidence presented by OCC and provide the rationale for the PUCO's determination that the Settlement benefits consumers over the evidence presented by OCC.

OCC witness Mr. Alavarez presented extensive testimony demonstrating that DP&L's cost-benefit analysis for Smart Grid Plan 1 ("SGP 1") focuses on the benefits to DP&L, rather than the benefits to consumers who will be forced to pay.[70] Mr. Alvarez used DP&L's own data to analyze the costs and benefits of SGP 1 and concluded that the charges to consumers for SGP 1 will far exceed the benefits to consumers. Specifically, Mr. Alvarez testified that consumers will receive just $0.45 in benefits for every $1 they pay for SGP 1.[71] Mr. Alvarez also identified other defects with SGP 1 that are harmful to consumers including, but not limited to: foregone benefits due to DP&L's rate case timing; expiration of the benefit offset to capital expenditures

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[68] Order, at ¶50.

[69] *See e.g. Interstate Gas Supply Inc. v. PUC*, 148 Ohio St.3d 510, 2016-Ohio-7535, ¶¶ 16-23 (reversing a PUCO order for failure to explain sufficiently the PUCO's rationale for its determination).

[70] OCC Initial Brief at 52-53.

[71] *Id.*

after SGP 1 year 4; reliance on indirect benefits that do not justify direct costs; and the overstatement of benefits from anticipated SGP 1 reliability improvements.[72]

The Order ignores all this evidence. While the PUCO did acknowledge that OCC disputed DP&L's claims regarding SGP 1's purported benefits to consumers,[73] nowhere in the Order does the PUCO discuss Mr. Alvarez's testimony or explain why the PUCO rejected his recommendations. The PUCO's conclusory statements that the Settlement as a whole benefits consumers is not enough.[74] The PUCO must properly address the issues and provide a rationale for its decision under R.C. 4903.09. The PUCO should grant rehearing of the Order.

iii. The PUCO failed to explain the rationale for its decision to allow DP&L to charge consumers for the SmartGrid Plan under the Infrastructure Investment Rider, which was never tariffed under DP&L's current electric security plan, ESP I.

The PUCO's Order permits DP&L to charge consumers for SGP 1 through the IIR even though OCC presented unrefuted[75] evidence that DP&L never filed an IIR tariff as a part of ESP I[76] and despite the fact that DP&L withdrew its ESP I filing of AMI and Smart Grid business cases—which the PUCO accepted.[77] The PUCO also ignored evidence presented by OCC that DP&L misrepresented to the PUCO that a placeholder IIR tariff did in fact exist as a part of ESP I when DP&L filed its Notice of Filing Proposed Tariffs after withdrawing from ESP III.[78] The

[72] OCC Initial Brief. at 53-68.

[73] Order ¶ 49.

[74] *Interstate Gas Supply Inc. v. PUC*. 148 Ohio St.3d 510. 2016-Ohio-7535. ¶ 23 (When the PUCO fails to sufficiently explain the reasons for its decision to enable the reviewing court to determine how the decision was reached, the order must be set aside.).

[75] DP&L admitted in its post-hearing brief that there was no zero-placeholder IIR tariff filed after the ESP I Settlement was approved. *See* DP&L Initial Brief at 67.

[76] Order. at ¶75.

[77] *In re Application of the Dayton Power & Light Co. for approval of the Electric Security Plan*. Case No. 08-1094-EL-SSO. Entry ¶ 5-6 (Jan. 5. 2011).

[78] OCC Ex. 21 (DP&L Notice of Filing Proposed Tariffs. Nov. 25. 2019); OCC Initial Brief at 80.

PUCO's failure to explain the basis for its decision to permit charges to consumers through the IIR violates R.C. 4903.09. Consumers deserve transparency from the PUCO, and the PUCO should grant rehearing to explain the basis for its decision.

Further, the PUCO should explain how DP&L can now lawfully charge consumers under the IIR if that tariff did not exist under ESP I. Indeed, if there was no IIR tariff filed and approved in accordance with the ESP I settlement, DP&L cannot now, consistent with the filed-rate doctrine, charge consumers through the IIR.[79] DP&L chose to operate under ESP I, which means it must operate with no IIR cost recovery mechanism unless DP&L satisfies specific requirements set forth in the ESP I settlement.

Importantly, DP&L, in its October 19, 2010 filing in ESP I withdrew any IIR plans it had to comply with the ESP I stipulation. DP&L complained that were factors that caused it to withdraw plans for Smart Grid, including challenging economic conditions.[80] DP&L asked that the PUCO issue an order closing the ESP I proceeding. The PUCO accepted DP&L's withdrawal but noted that it expected DP&L to continue to explore the benefit of future investment in AMI and Smart Grid and expected that "DP&L will, when appropriate, file new AMI and/or Smart Grid proposals in a new docket."[81] That ended any DP&L proposal under ESP I to go forward with a Smart Grid plan.

[79] *See* R.C. 4905.32; *In Re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶ 15 (the filed-rate doctrine "provides that a utility may charge only the rates fixed by its current commission-approved tariff."); *see also Cleveland Electric Illuminating Co. v. Public Utilities Comm'n*, 46 Ohio St.2d 105, 116 (1976) ("The heart of this statutory plan is that the only proper rate is that set out in the approved rate schedule on file with the commission and open to public inspection, and that this schedule can be changed only by an order of the commission.").

[80] *In the Matter of the Application of the Dayton Power and Light Company for approval of the Electric Security Plan*, Case No. 08-1094-EL-SSO, Motion of the Dayton Power and Light Company to Withdraw its Revised Advanced Metering Infrastructure and Smart Grid Business Cases at 2 (Oct. 19, 2010).

[81] Case No. 08-1094-EL-SSO, Entry at 2 (Jan. 5, 2011).

It was DP&L that unilaterally decided to quash plans to go forward with its IIR as part of ESP I. And it was DP&L that chose to withdraw from its ESP III, where it had, consistent with the PUCO's expectations, filed a new AMI/Smart Grid proposal. Once it made the choice to withdraw from ESP III, it reverted, under Ohio law, to its most recent standard service offer. As a matter of law, DP&L cannot simply rename and use the rider that was approved as part of ESP III (the SmartGrid Rider) to charge consumers now that DP&L has chosen to operate under ESP I.

The PUCO ignores all of this, and instead criticizes OCC for failing to challenge "reinstatement" of the IIR (which never existed in the first place) after *DP&L itself misrepresented* to the PUCO and the public that the IIR tariff existed as part of ESP I.[82] It goes without saying that DP&L should not be rewarded by the PUCO for misrepresenting facts to the PUCO and the public. Regardless, whether OCC challenged "reinstatement" of the IIR or not is no justification for the PUCO's failure to support its decision to permit DP&L to charge consumers for SGP 1 through a rider that DP&L admits was *never* tariffed under ESP I. The PUCO also states that OCC agreed to the IIR as part of the settlement in ESP I.[83] That is beside the point, because OCC never agreed to the IIR as a cost recovery mechanism to charge consumers for DP&L's SmartGrid Plan that was filed while operating under ESP III.[84]

In short, the PUCO has an obligation under R.C. 4903.09 to sufficiently explain the rationale for its decisions based on the record evidence. The PUCO failed, and it should grant rehearing. The PUCO should issue an order that explains the basis for its decision to allow

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[82] Order ¶75.

[83] Order ¶ 75.

[84] OCC Reply Brief at 29-30.

DP&L to charge consumers millions of dollars through a tariff that was not filed and approved as a part of ESP I.

iv. The record contradicts the PUCO's finding that DP&L filing its next electric security plan "is expected to terminate all rate stability charges."

As explained, the PUCO found that one of the three benefits to consumers under the Settlement is that DP&L must file another electric security plan case by 2023, "which is expected to terminate all rate stability charges."[85] But the record provides no support for the PUCO's conclusion that the new electric security plan is "expected to terminate all rate stability charges." To the contrary, as OCC explained in its briefs, there are numerous ways for DP&L to continue charging consumers for rate stability charges in its next electric security plan.[86]

First, the Settlement only prohibits DP&L from seeking such a charge in its *application* in the next electric security plan case.[87] Nothing prevents DP&L from seeking such a charge through a settlement. So, three years from now, DP&L could comply with the Settlement by filing an application without a financial integrity charge and then immediately demanding such a charge in settlement negotiations. If even a single party agrees to this—as seems likely, given parties' willingness in this case to allow DP&L to continue the RSC—DP&L can sign a settlement with that party and then demand that the PUCO approve it. And if the PUCO does not approve it, DP&L can simply withdraw from ESP IV. In that situation, DP&L would—once again—revert to ESP I. And DP&L could—once again—charge consumers $79 million per year

[85] Order ¶ 50.

[86] OCC Initial Brief at 72-73.

[87] Settlement at 45 ("DP&L's *Application* shall not seek to implement any nonbypassable charge to customers related to provider of last resort risks, stability, financial integrity, or any other charge that is substantially calculated based on the credit ratings, debt, or financial performance of any parent or affiliated company of DP&L.").

under the RSC.[88] Contrary to the PUCO's finding that the next ESP is "expected to terminate all rate stability charges," there is a clear path for DP&L to continue charging consumers for rate stability charges in the next ESP. The Order ignored this reasoning and concluded, to the contrary and without record support, that the new electric security plan is "expected to terminate all rate stability charges."

Second, the Settlement only prohibits DP&L from seeking a *nonbypassable* financial integrity charge.[89] By adding the word "nonbypassable" to this restriction, DP&L appears free to propose a bypassable charge, including one identical to the RSC. Rather than benefiting consumers, this could be even worse than the current situation, because then only a smaller subset of consumers (those taking generation from the standard service offer) would pay subsidies to boost DP&L or its affiliates' financial integrity. The Order ignores this concern in concluding that all financial integrity charges are expected to end in the next electric security plan case and concluding that the Settlement benefits customers.

Third, the Settlement requires only that DP&L *file* an ESP application by 2023. There is no requirement that DP&L actually pursue that application to completion. For example, DP&L could file an ESP application to comply with the terms of the Settlement and then simply withdraw it. In that case, DP&L would continue under ESP I for as long as it likes—including continuing to charge consumers under the Rate Stabilization Charge.

If this seems unlikely to occur, it isn't unlikely at all—DP&L has repeatedly used the withdrawal tactic to perpetuate its unlawful subsidy charges to consumers.

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[88] OCC continues to believe that the RSC is unlawful and does not concede that it would be lawful for the PUCO to re-implement the RSC if DP&L were to again revert to ESP I.

[89] Settlement at 45.

As part of the ESP I Settlement, DP&L was required to file an application for an ESP or MRO by March 30, 2012 so that a new rate plan could be in effect by January 1, 2013 after the expiration of ESP I.[90] DP&L complied with that requirement by filing an application for an MRO.[91] DP&L then waited six months and unilaterally decided to withdraw that application, thus ensuring that its ESP I would continue beyond the stated expiration date.[92] DP&L's tactic allowed it to deny signatory parties' like the OCC the benefit of their bargain, including the expectation that the Rate Stabilization Charge would not continue past December 31, 2012. There is nothing stopping DP&L from doing precisely the same thing here—complying with the Settlement by *filing* an application for ESP IV and then unilaterally withdrawing that application—in an effort to perpetuate the Rate Stabilization Charge.

Because there is no record support regarding the PUCO's finding that the next ESP is expected to end financial integrity charges to consumers, the PUCO cannot rely on this finding as support for its conclusion that the Settlement benefits consumers. To the contrary, because the Settlement leaves open the distinct possibility of continued financial integrity charges, it actively harms consumers rather than benefiting them.

If the PUCO does not modify the Order to reject the Settlement in its entirety, it should modify the Settlement to ensure that consumers actually realize the half-promised benefit of the Rate Stabilization Charge (and any similar charge) ending. The PUCO could modify the Settlement to provide that (i) DP&L cannot include any nonbypassable *or bypassable* Rate Stabilization Charge or any similar charge in its ESP IV application, and that DP&L cannot

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[90] ESP I Settlement at 5.

[91] *In re Application of the Dayton Power & Light Co. for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Application (Mar. 30, 2012).

[92] Case No. 12-426-EL-SSO, Notice of Withdrawal of Market Rate Offer Application (Sept. 7, 2012).

include such a charge in any settlement that it signs regarding ESP IV, and (ii) DP&L cannot withdraw its ESP IV application before the PUCO rules on it. At a minimum, making these changes could close the loopholes identified above, all of which could be exploited by DP&L to continue charging consumers for financial integrity charges for many years to come.

C. In rejecting OCC's consumer protection arguments regarding the redistributive coalition, the PUCO cited no record evidence for its erroneous conclusion that "many of the negotiated concessions contained in the Stipulation benefit all customer classes." To the contrary, because the Settlement is the product of a redistributive coalition, the record does not support the PUCO's conclusion that it benefits customers and the public interest.

OCC explained through the testimony of Ohio State Professor Ned Hill and its briefs that the Settlement does not benefit consumers because it was the product of a redistributive coalition that benefits limited parties (the signatory parties) rather than the broader customer base.[93] Rather than negotiate a settlement that benefits all customers and is in the public interest, some settling parties negotiated for cash or cash equivalents only for themselves (or their members). It is perhaps understandable that parties would negotiate in this manner, given the utility's unfair bargaining power in the settlement process, which results from the utility's ability to withdraw from its electric security plan, as well as the PUCO's de facto rule that a utility must sign every settlement.[94]

In rejecting OCC's argument, the PUCO summarily concluded, "many of the negotiated concessions contained in the Stipulation benefit all customer classes such that claims of bias or

[93] OCC Ex. 3 (Hill Testimony); OCC Initial Brief at 37-44; 73-75.

[94] *Accord In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009) (recognizing the utility's unfair bargaining power in settlements and the incentive it gives parties to sign settlements that are not necessarily in the public interest).

lack of protection as to residential customers are simply inaccurate."[95] This violates R.C. 4903.09 for several reasons.

It is a bare claim without any record support; the PUCO cites no record evidence for this conclusion. Further, the PUCO did not even identify the "many ... negotiated concessions" that it claims to benefit all customer classes. On appeal, the Ohio Supreme Court would have to guess what the PUCO is referring to here, which violates R.C. 4903.09.

Further, the record directly contradicts the PUCO's claim that many of the provisions in the Settlement benefit all customer classes. As Dr. Hill testified, by taking cash and cash equivalents, the signatory parties create only the "*veneer* of widespread support," even though in reality, the proposals set forth in the settlement benefit a small group of coalition members and not the broad public.[96] The Settlement is replete with provisions that are directed to individual signatory parties (or their members) and no one else. There is no customer class that benefits from the City of Dayton receiving $800,000 under the Settlement.[97] There is no customer class that benefits from OHA receiving $440,000 under the Settlement.[98] There is no customer class that benefits from Honda receiving $428,000 under the Settlement.[99] There is no customer class that benefits from IEU receiving $448,000 under the Settlement.[100] There is no customer class that benefits from Kroger receiving $104,000 under the Settlement.[101] There is no customer class

[95] Order ¶ 72.

[96] OCC Ex. 3 (Hill Testimony) at 10 (emphasis in original).

[97] Joint Ex. 1 (Settlement) at 33. Arguably, residents in the City of Dayton could indirectly benefit from this money. But residents of a single city are not a customer class. Residential consumers in other cities and towns throughout DP&L's service territory do not benefit from these payments.

[98] *Id.* at 35.

[99] *Id.* at 37.

[100] *Id.*

[101] *Id.*

that benefits from OMAEG receiving $1.04 million under the Settlement.[102] There is no customer class that benefits from the University of Dayton receiving $840,000 under the Settlement.[103] There is no customer class that benefits from IGS receiving $1 million under the Settlement.[104] There is no customer class that benefits from OHA, OEG, IEU, Honda, OMAEG, and Kroger receiving credits of $0.004 per kWh under the Settlement.[105] There is no customer class (or even a single customer) that benefits from customers being denied refunds under the Settlement despite DP&L's significantly excessive earnings. There is no customer class (or even a single customer) that benefits from DP&L continuing to charge customers $79 million per year under the RSC.

With so many provisions in the Settlement that either (i) harm customers, or (ii) limit benefits to a small subset of customers, it is not clear what provisions the PUCO could possibly be referring to when it claims that "many" of the Settlement's provisions benefit "all customer classes." The PUCO therefore had no basis to reject Dr. Hill's testimony regarding the ill effects of the redistributive coalition and the lack of benefits to *all* consumers under the Settlement. The PUCO's conclusion violated R.C. 4903.09 both because it is too vague for the Ohio Supreme Court to review and because it contradicts the record.

Assignment of Error 5. The Order violates R.C. 4928.143(F) because it denies consumers refunds under the Significantly Excessive Earnings Test despite a PUCO finding that DP&L's profits were significantly excessive as compared to comparable companies to the tune of $61 million.

Under R.C. 4928.143(F), the PUCO is required each year to determine whether an electric utility had "significantly excessive earnings" ("earnings" being another word for

[102] *Id.*

[103] *Id.*

[104] *Id.* at 41-42.

[105] *Id.* at 36-37.

"profits"). To determine whether a utility's profits were significantly excessive, the PUCO "shall consider" the utility's earned return on common equity compared to the "return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[106] In comparing the utility's return on equity to that of other comparable companies, "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[107] If the utility's profits were significantly excessive, then the PUCO "*shall* require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments."[108]

For more than a decade, the PUCO has adhered to the following process in determining whether a utility had significantly excessive profits:[109]

1. A profits threshold is established.
2. The utility's annual earnings (profits) are calculated for purposes of the SEET.
3. The value of the utility's equity is established for the year in question.
4. The earnings are divided by the equity to establish a "return on equity" percentage.
5. The return on equity percentage from step 4 is compared to the profits threshold from step 1.

In following these steps, the PUCO has consistently ruled that when the return on equity percentage is lower than the profits threshold, there are no significantly excessive earnings and

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[106] R.C. 4928.143(F).

[107] R.C. 4928.143(F).

[108] R.C. 4928.143(F) (emphasis added).

[109] All parties' witnesses followed these same steps in assessing DP&L's profits under the significantly excessive earnings test. *See* OCC Ex. 4 (Duann Initial Testimony) at 13-14, 18; DP&L Ex. 3 (witness Garavaglia and Malinak's calculations); DP&L Ex. 2 (Malinak Supplemental Testimony) at 51-62; Staff Ex. 1 (Buckley Testimony) at 5-10.

no refunds for consumers.[110] The PUCO's analysis instantly ends when the return on equity is lower than the profits threshold, resulting in a favorable ruling for the utility.

Yet now, in the rare case where the PUCO finds that the utility's profits were *above* the profits threshold by more than $60 million, it still reached the same utility-friendly result: no refunds for consumers. To accomplish this result, the PUCO relied on language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[111]

The PUCO has essentially interpreted this language to mean that the PUCO has absolute authority to wipe out consumer refunds whenever the utility commits to making future capital investments in Ohio. But the PUCO's interpretation in this regard is unreasonable and unlawful.

First, if a utility's commitment to future capital investments can erase refunds for consumers under the significantly excessive earnings test, then the PUCO would effectively be legislating the earnings test out of existence. Electric utilities are capital-intensive businesses; their very existence (and profitability) relies on large-scale, constant capital investments. It will *always* be the case that an electric utility expects to make future capital investments in Ohio, so there will never be a situation where the PUCO would be unable to deny refunds to consumers under this justification.[112]

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[110] *See, e.g., In re Application of Dayton Power & Light Co. for Admin. of the Significantly Excessive Earnings Test*, Case No. 17-1213-EL-UNC, Opinion & Order (July 31, 2019) (no refund for 2016 where return on equity was 9.4% and SEET threshold was 12%; no refund for 2017 where return on equity was 4.5% and SEET threshold was 12%); *In re Application of Ohio Power Co. for Admin. of the Significantly Excessive Earnings Test for 2017*, Case No. 18-989-EL-UNC, Opinion & Order (July 17, 2019) (no refund for 2017 where return on equity was 9.87% and SEET threshold was below safe harbor).

[111] R.C. 4928.143(F); Order ¶ 68 (citing R.C. 4928.143(F)).

[112] *See* OCC Ex. 2 (Kahal Supplemental) at 12 ("If capital requirements of future committed investments in the state can be used to completely deny SEET refunds to customers, then the protection that the statute provides to customers would be undermined. Every utility could avoid ever paying a SEET refund to customers by simply declaring that they intend to make capital investments in the future.").

Further, the PUCO's statutory interpretation contradicts PUCO precedent. In *In re Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test,*[113] the PUCO addressed the statutory language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[114] The PUCO took into account the utility's future capital investments only for purposes of determining the proper SEET *threshold*.[115] The PUCO ruled that because the utility had committed to making future capital investments, it was appropriate to use a slightly higher SEET threshold.[116] This interpretation follows the words and placement of the "future committed investment" language. The future committed investment sentence immediately follows the comparable analysis language and links back to the analysis by reiterating that the PUCO must "also" consider future committed investment in its comparable analysis. The placement of the language was intentional. The language does not allow the PUCO to consider future committed investment in the last step of the profits test, when the PUCO is merely applying the threshold to the profits and setting the refund to consumers.

The PUCO abandoned that precedent in the current case. Had it followed that precedent, it could have slightly increased the SEET threshold to account for DP&L's future capital investments. But it did not do that. Instead, it ruled that all refunds would be wiped out simply because DP&L has committed to invest $249 million in capital expenditures for smart grid (investments for which it would be allowed to charge consumers, including charges for profits.

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[113] Case No. 10-1261-EL-UNC.

[114] *Id.*, Opinion & Order (Jan. 11, 2011).

[115] *Id.* at 25-27.

[116] *Id.* at 26-27.

on an accelerated basis).[117] This result is particularly confusing, given that in *Ohio Power*, the utility's commitment to capital investments was substantially larger: nearly $1.7 billion. It is not clear how the PUCO could conclude that a $249 million investment by DP&L warrants complete elimination of refunds, when a $1.7 billion investment by Ohio Power still resulted in refunds for consumers.

It appears that there is no hope that consumers will ever get a refund, no matter how significantly excessive a utility's earnings are. The PUCO has turned the test into a heads-I-win-tails-you-lose proposition for the utility. When a utility's earnings are below the adopted SEET threshold, there are no refunds. And when a utility's earnings are above the adopted SEET threshold, the PUCO offers the utility a get out of jail free card with its "capital investment" justification for denying refunds. On rehearing, the PUCO should modify the Order to provide refunds to consumers in the amount of $61.1 million—the amount that the PUCO Staff's witness calculated as being significantly excessive.

Assignment of Error 6. The Order violates R.C. 4928.143(F) because it provides consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits, which undermines the consumer protection purpose of the statute and allows the utility to profit, on an accelerated basis, through its Infrastructure Investment Rider.

The significantly excessive earnings test statute provides that if a utility has significantly excessive earnings, the PUCO "*shall* require the electric distribution utility to return to customers the amount of the excess by prospective adjustments."[118] Here, the record supports a finding of at least $61.1 million in significantly excessive earnings, as testified to by PUCO Staff witness Buckley.[119] But rather than order a prospective adjustment—a refund—to consumers, the PUCO

[117] Order ¶ 68.

[118] R.C. 4928.143(F) (emphasis added).

[119] Staff Ex. 1 (Buckley).

ruled that it is "appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment."[120] The PUCO continued, "Therefore, we will offset $3.7 million for 2018 and $57.4 million for 2019 for a total of $61.1 million of the capital expenditures include within the $267.6 million of [Smart Grid Plan] Phase 1 expenditures."[121]

This offset ruling is unlawful for several reasons. First, it violates R.C. 4903.09 because the PUCO failed to adequately explain what it means by "offset." Does the PUCO mean that charges to consumers for smart grid under the Infrastructure Investment Rider ("IIR") will be reduced by $61.1 million? Does the PUCO mean that the amount of capital investments embedded in the revenue requirement calculation will be reduced by $61.1 million? If so, will consumers still pay a return on the full investment ($249 million) or a return on the reduced investment ($249 million minus $61.1 million)? Does the PUCO simply mean that because the capital investments are greater than the would-be refund, the refund is eliminated with no reduction in charges under the IIR? Without further clarification regarding the PUCO's intent with its "offset" ruling, there is no basis for the Ohio Supreme Court to review the Order, which violates R.C. 4903.09.

Further, regardless of the interpretation, it is unlawful because the $61.1 million amount should be refunded to consumers, not used to offset other charges. For one, the statute says that the PUCO *shall* require the utility to "return to customers" the excess profits.[122] Offsetting grid smart costs (whatever that might mean) is not returning money to consumers.

In addition, consumers do not receive the full benefit of the refund if is applied to future smart grid charges. At a minimum, offsetting smart grid charges will substantially delay any

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[120] Order ¶ 68.

[121] *Id.*

[122] R.C.4928.143(F).

relief to consumers because it is not clear when DP&L will actually make its smart grid investments and when charges to consumers under the IIR might start. Consumers paid the significantly excessive profits in 2018 and 2019, so they should not be made to wait any longer to receive any potential benefits from the offset. And of course, the utility is already benefiting from the IIR because it allows DP&L to charge consumers, including a return on and of capital investments, on an accelerated basis through single-issue ratemaking. Consumers are already being harmed by the PUCO's approval of charges through the IIR, so using that same rider to "offset" refunds diminishes the consumer protection that is supposed to exist in the significantly excessive earnings test.

On rehearing, the PUCO should modify the Order to eliminate the "offset" language and instead order a full and prompt refund, through a bill credit, to consumers, for all significantly excessive profits.

Assignment of Error 7: The PUCO's Order permitting DP&L to charge consumers through the Infrastructure Investment Rider violates R.C. 4928.143(C)(2)(b) because the rider was not a provision, term, or condition of DP&L's most recent standard service offer.

The PUCO determined in the Order that DP&L's SGP "is consistent with ESP I" and as a result, permitted DP&L to charge consumers for SGP investments through the IIR.[123] However, the IIR, as a tariffed cost recovery mechanism for SGP, was not a part of ESP I. The IIR actually came from ESP III and was known under ESP III as the SmartGrid Rider. This placeholder rider was not in effect prior to ESP III.[124] When DP&L withdrew from operation under ESP III, the PUCO found that DP&L's ESP I was the most recent standard service offer that must be reinstated under R.C. 4928.143(C)(2)(b) and that the PUCO "must restore the provisions, terms,

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[123] Order ¶ 75.

[124] OCC Ex. 21 (DP&L Notice of Filing of Proposed Tariffs, Nov. 25, 2019).

and conditions of ESP I which were in effect prior to the effective date of ESP III."[125] Consistent with the PUCO's determination, the PUCO's Order should not have permitted DP&L to charge consumers for SGP through the IIR.

The ESP I settlement does reference an IIR tariff that DP&L could implement at a future point to collect charges for "prudently incurred costs related *solely to the Company's AMI and/or Smart Grid approved plans*."[126] However, the unrefuted evidence demonstrates that DP&L never filed an IIR placeholder tariff after the ESP I settlement.[127] And DP&L unilaterally withdrew the application it filed under ESP I that would have implemented an AMI or Smart Grid program. The PUCO accepted DP&L's withdrawal. Instead, the tariff that DP&L will now use to charge consumers for SGP was filed as part of DP&L's ESP III distribution infrastructure modernization plan.[128] But DP&L no longer operates under ESP III, so that nonexistent cost recovery mechanism cannot now be used to charge consumers under ESP I.[129]

When DP&L filed its Notice of Filing Proposed Tariffs after withdrawing from ESP III, it represented to the PUCO that an IIR placeholder tariff identical to the ESP III SmartGrid Rider had been filed after the ESP I settlement.[130] But that was inaccurate.[131] Nevertheless, the PUCO

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[125] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO *et al.*, Second Finding and Order (Dec. 18, 2019) ("2019 Tariff Order") ¶ 27.

[126] OCC Ex. 8 (ESP I Settlement), at 5, ¶ 4(c) (emphasis added).

[127] OCC Ex. 6 (Williams Direct), at 17; Tr. Vol. 5 at 845-46; *See also* OCC Ex. 63 (DP&L 6/29/09 ESP I Tariff Filing).

[128] OCC Initial Brief at 78-80.

[129] OCC Ex. 6 (Williams Direct) at 15-24.

[130] OCC Ex. 21 (DP&L Notice of Filing of Proposed Tariffs, Nov. 25, 2019).

[131] OCC Ex. 6 (Williams Direct) at 17; Tr. Vol. 5 at 845-46; *See also* OCC Ex. 63 (DP&L 6/29/09 ESP I Tariff Filing).

subsequently approved the IIR, and has now through the Order authorized DP&L to use the IIR to charge consumers for SGP.[132]

The Order is contrary to R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the "provisions, terms, and conditions of the utility's most recent standard service offer." The IIR—in the form set forth in DP&L's Notice of Filing Proposed Tariffs—did not exist as a provision, term, or condition of DP&L's most recent standard service offer. Accordingly, the PUCO cannot lawfully permit DP&L to charge consumers for SGP investments through the IIR. For these reasons, the PUCO should grant rehearing of the Order.

III. CONCLUSION

To protect consumers, the PUCO should grant this Application for Rehearing and abrogate the Order. The PUCO should reject the Settlement, terminate the Rate Stabilization Charge, reject DP&L's proposed charges to consumers for smart grid investments, and order DP&L to refund its significantly excessive profits to consumers.

[132] Order ¶ 75.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission this 16th day of July 2021.

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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
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 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
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

THIRD APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

In its June 16, 2021 Opinion and Order, the PUCO denied consumers' $61.1 million in refunds, despite a finding that DP&L had $61 million in significantly excessive earnings (profits).[1] For the benefit of DP&L and at consumer expense, the PUCO is nullifying even the minimal consumer protection in Ohio's 2008 energy law. OCC applied for rehearing, arguing, among other things, that this Order violated R.C. 4928.143(F) because it provided consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits.[2]

OCC noted in its application for rehearing that the PUCO's ruling was vague because it was not clear what it meant in using the word "offset."[3] For example, a $61.1 million offset could mean that smart grid charges are reduced by $61.1 million. A $61.1 million offset could mean that the capital component of DP&L's smart grid charges is reduced by $61.1 million. Or it could mean that because DP&L's capital investments are greater than $61.1 million, the refund is eliminated.[4]

In its recent Second Entry on Rehearing, the PUCO granted OCC's assignment of error, resolving the ambiguity regarding its use of the word "offset" in the original Order. The PUCO clarified that it meant the third option: that there would be no $61.1 million refund to consumers, no $61.1 million reduction in smart grid charges, and no $61.1 million reduction in the smart grid rate base—the "offset" simply meant that the $61.1 million refund would be wiped out completely and consumers would get nothing.[5] This was unlawful and unreasonable.

<u>Assignment of Error 1:</u> The PUCO erred by denying consumers $61.1 million in refunds of DP&L's significantly excessive profits, including by using an unlawful and unreasonable "offset" of refunds, in violation of R.C. 4928.143(F).

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[1] Opinion & Order ¶ 68 (June 16, 2021) (the "Order").

[2] Application for Rehearing by Office of the Ohio Consumers' Counsel, Assignment of Error 6 (July 16, 2021).

[3] *Id.* at 32.

[4] *Id.*

[5] Second Entry on Rehearing ¶ 40 (Oct. 6, 2021).

The reasons in support of this application for rehearing are set forth in the accompanying memorandum in support. Under R.C. 4903.10 and O.A.C. 4901-1-35, the PUCO should grant rehearing and abrogate or modify its Entry as requested by OCC.

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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 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

MEMORANDUM IN SUPPORT

The PUCO violated the law (R.C. 4928.143(F)) by denying consumers $61.1 million in refunds resulting from DP&L's significantly excessive earnings (profits). It lacked authority to deny refunds based on a so-called "offset" of DP&L's future capital investments. On rehearing, the PUCO should modify its prior ruling and provide consumers with a $61.1 million refund.

I. ASSIGNMENT OF ERROR

Assignment of Error 1: The PUCO erred by denying consumers $61.1 million in refunds of DP&L's significantly excessive profits, including by using an unlawful and unreasonable "offset" of refunds, in violation of R.C. 4928.143(F).

The PUCO Staff's witness testified that DP&L had significantly excessive earnings (profits) in the amount of $61.1 million.[6] Despite this, he recommended no refund to consumers.[7] The PUCO likewise ruled that consumers would get no refund. According to the PUCO:

> [W]e agree with Staff as to the conclusion that customer refunds are not necessary (or appropriate), notwithstanding the earnings amounts above the SEET threshold calculations, due to DP&L's commitment to make substantial capital expenditures as part of its $267.6 million SGP [smart grid plan] Phase 1 expenditures over the next four years.... Given the magnitude of the committed investment, the Commission finds that it is appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment. Therefore, we will offset $3.7 million for 2018 and $57.4 million for 2019 for a total of $61.1 million of the capital expenditures included within the $267.6 million of SGP Phase 1 expenditures.[8]

The word "offset" is a transitive verb, meaning you must have two things for there to be an offset. That is, you "offset" one thing against another. For example, if your mortgage

[6] Testimony in Support of the Stipulation of Joseph P. Buckley at 8 (Jan. 4, 2021) ($3.7 million in 2018 and $57.4 million in 2019).

[7] *Id.* at 11.

[8] Opinion & Order ¶ 68.

increases by $100 a month, you might try to *offset* that increase by lowering your spending on clothing by $100, thus breaking even.

So in its Order, when the PUCO said that it would "offset, dollar-for-dollar, the excessive earnings against the future committed investment," one would think that the $61.1 million in excessive earnings would be used to benefit consumers by *reducing* charges to consumers for the "future committed investment," *i.e.*, charges to consumers under DP&L's smart grid rider.

In its Second Entry on Rehearing, however, the PUCO ruled that this is not the case. The PUCO is not ordering DP&L to reduce its smart grid charges by $61.1 million or by any other amount. There is no "offset" to the charges that would provide consumers a comparable benefit to a $61.1 million refund. Rather, the PUCO has now clarified that when it used the word "offset," it meant the following: because smart grid investments are greater than $61.1 million, the $61.1 million in refunds that consumers would otherwise get as a result of DP&L's significantly excessive profits are simply erased.

Denying consumers' refunds in this manner is unlawful under R.C. 4928.143(F).

Under R.C. 4928.143(F), the PUCO is required each year to determine whether an electric utility had "significantly excessive earnings." In determine whether a utility's profits were significantly excessive, the PUCO "shall consider" the utility's earned return on common equity compared to the "return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[9] In comparing the utility's return on equity to that of other comparable companies, "[c]onsideration also shall be given to

[9] R.C. 4928.143(F).

the capital requirements of future committed investments in this state."[10] If the utility's profits were significantly excessive, then the PUCO "*shall* require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments."[11]

Here, the PUCO found that the utility's profits were *above* the profits threshold by more than $60 million. Yet it still reached a utility-friendly result: no refunds for consumers. To accomplish this result, the PUCO relied on language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[12]

The PUCO has essentially interpreted this language to mean that the PUCO has absolute authority to wipe out consumer refunds whenever the utility commits to making future capital investments in Ohio. But the PUCO's interpretation in this regard is unreasonable and unlawful.

First, if a utility's commitment to future capital investments can erase refunds for consumers under the significantly excessive earnings test, then the PUCO would effectively be legislating the earnings test, which was put into place by the General Assembly in 2008, out of existence. The PUCO, as a creature of statute, is required to follow the letter of the law and cannot overrule the General Assembly.[13] Electric utilities are capital-intensive businesses; their very existence (and profitability) relies on large-scale, constant capital investments. It will *always* be the case that an electric utility expects to make future capital investments in Ohio, so there will never be a situation where the PUCO would be unable to deny refunds to consumers

[10] R.C. 4928.143(F).

[11] R.C. 4928.143(F) (emphasis added).

[12] R.C. 4928.143(F); Order ¶ 68 (citing R.C. 4928.143(F)).

[13] *In re Ohio Edison Co.*, 162 Ohio St.3d 651, 656 (2020).

under this justification.[14] The statement that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state" cannot reasonably be interpreted as giving the PUCO such broad and possibly unlimited authority to undermine the entire intent of the significantly excessive earnings test.

Further, the PUCO's statutory interpretation contradicts PUCO precedent. In *In re Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*,[15] the PUCO addressed the statutory language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[16] The PUCO took into account the utility's future capital investments only for purposes of determining the proper SEET *threshold*.[17] The PUCO ruled that because the utility had committed to making future capital investments, it was appropriate to use a slightly higher SEET threshold.[18] This interpretation follows the words and placement of the "future committed investment" language. The future committed investment sentence immediately follows the comparable analysis language and links back to the analysis by reiterating that the PUCO must "also" consider future committed investment in its comparable analysis. The placement of the language was intentional. The language does not allow the PUCO to consider future committed investment by denying refunds after it has already found that the utility had significantly excessive earnings.

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[14] *See* OCC Ex. 2 (Kahal Supplemental) at 12 ("If capital requirements of future committed investments in the state can be used to completely deny SEET refunds to customers, then the protection that the statute provides to customers would be undermined. Every utility could avoid ever paying a SEET refund to customers by simply declaring that they intend to make capital investments in the future.").

[15] Case No. 10-1261-EL-UNC.

[16] *Id.*, Opinion & Order (Jan. 11, 2011).

[17] *Id.* at 25-27.

[18] *Id.* at 26-27.

The PUCO abandoned that precedent in the current case. Had it followed that precedent, it could have slightly increased, within reason and based on the evidence in the record, the SEET threshold to account for DP&L's future capital investments. But it did not do that. Instead, it ruled that all refunds would be wiped out simply because DP&L has "committed" to invest $249 million in capital expenditures for smart grid.[19] This result is particularly confusing, given that in *Ohio Power*, the utility's commitment to capital investments was substantially larger: nearly $1.7 billion.[20] It is not clear how the PUCO could conclude that a $249 million investment by DP&L warrants complete elimination of refunds, when a $1.7 billion investment by Ohio Power still resulted in refunds for consumers.

On rehearing, the PUCO should modify the Order to provide refunds to consumers in the amount of $61.1 million—the amount that the PUCO Staff's witness calculated as being significantly excessive. Or at a minimum, it should rule that "offset" actually means "offset" such that consumers' charges under DP&L's smart grid rider are reduced by $61.1 million. Either way, consumers are entitled to a $61.1 million benefit under R.C. 4928.143(F), but instead, the PUCO has unlawfully determined their benefit to be $0. The PUCO should abrogate or modify its order to restore this $61.1 million benefit for consumers.

III. CONCLUSION

To protect consumers from unjust and unreasonable charges, the PUCO should grant rehearing and abrogate or modify its October 5, 2021 Second Entry on Rehearing, consistent with this application for rehearing.

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[19] Order ¶ 68.

[20] Case No. 10-1261-EL-UNC, Opinion & Order at 25-27.

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To Do List

Case Description	Case	Due Date	[illegible]	Pg. Ct.	Sent By	Date Sent	BW	MH	DD	MW	LS
TE/Campbell	21-1047-EL-AEC	12/6	Mike Haugh Testimony	11 pgs	Deb	12/3	*	N/A	12/4		
FE Corp. Sep. et al	17-974-EL-UNC ET AL	Would like to file 11/29	Notice to Take Depos	5 pgs	Deb	11/23	*	N/A	11/24	11/23	
AEP OVEC	18-1004-EL-RDR et al	12/3	Reply Comments	17 pgs	Deb	11/22	*	?	11/22	11/24	
FE DCRR	20-1629-EL-RDR	12/6	Memo Contra FE Mot. Prot. Order	7 pgs	Deb	12/1	?	N/A	12/1		
AEP Billing Pilot	21-1150-EL-UNC	Internal 12/6	MTI	8 pgs	Deb	11/30	Will rev.	N/A	11/30	12/1	
Duke MGP	14-375-GA-RDR et al	12/9	Initial Brief	16 pgs	Tracy	11/29	Will rev.	N/A	11/30	11/30	
AEP v. NEP	21-990-EL-ESS	12/9	MC NEP Mot. Prot. Order/Stay Discovery	7 pgs	Deb	12/2	Will rev	N/A	12/2		
FE DMR	17-2474-EL-RDR	12/10 Internal	Mot. To Sub Auditor for Depo/Sub	7 pgs & 14 pgs	Deb	12/3	?	N/A			
FE Corp. Sep.	17-974-EL-UNC	12/13	Reply Comments	24 pgs	Deb	11/30	Will rev.	N/A	11/30		
Duke DCIR	20-1205-EL-RDR	SOON	Revised Stipulation		Amy	12/2		N/A	11/12	12/3	
AEP Quadrennial/SEET	21-1166-EL-UNC et al	12/17	MTI	8 pgs	Deb	12/2	?	N/A	12/2		
Duke Adj. Power Forward	20-666-EL-RDR	12/17	Recommends No AFR		Amy	11/19			11/21	11/26	
Winter Reconnections	21-750-GE-UNC	12/17	Recommends No AFR		Ambrosia	11/19			11/21	11/19	
AT&T Relinquish ETC	21-917-TP-UNC	12/17	Recommends No AFR		Angela	11/19			11/19	11/19	
Dominion Infrastructure	21-519-GA-RDR	12/17	Recommends No AFR		John	11/17			11/17		
FE/Tesla	21-1205-EL-AEC		Recommends Intervention - MTI due 12/20		Ben	11/30		N/A	11/30	11/30	
Duke DCIR	18-1036-EL-RDR	1/3	Recommends No AFR		Bill	12/1		12/1	12/1	12/1	
AEP gridSMART Phase 3	19-1475-EL-RDR	1/3	Recommends No AFR		Bill	12/1		N/A	12/1	12/3	
Annual Disconnections	21-548-GE-UNC	1/3	Recommends No AFR		Bill	12/1		N/A	12/1	12/1	
FE SEET/FE Cases	15-2173-EL-RDR et al	1/3	Recommends No AFR		Chris	12/1		N/A		12/1	
FE Auction	16-776-EL-UNC	1/3	Recommends No AFR		Chris	12/1		12/1		12/1	
Suburban Rate	18-1205-GA-AIR et al	1/3	Recommends No AFR		Chris	12/1		N/A	12/1		
DPI Global	18-1875-EL-GRD et al	1/3	Recommends No AFR - file NOA		Chris	12/1		N/A	12/1	12/1	
FE Tax Savings	21-1134-EL-RDR		Recommends No Intervention		Ross	12/2		N/A	12/7	12/2	
FE Various Riders (DCR/GCR PUR/NDU/EDR)	21-1133-EL-RDR		Recommends No Intervention		Ross	12/2		N/A	12/2	12/2	
FE AER	21-1129-EL-RDR		Recommends No Intervention		Ross	12/2		N/A	12/2	12/2	
FE Delta Revenue	21-1132-EL-RDR		Recommends No Intervention		Ross	12/2			12/2	12/2	
DPL Legacy Generation	21-1204-EL-RDR		Recommends No Intervention		Ross	12/2		N/A	12/7	12/3	
FE Legacy Generation	21-1135-EL-RDR		Recommends No Intervention		Ben	12/2	Sent to MU 12/2	N/A	12/7	12/2	12/2
Duke Legacy Generation	21-1200-EL-RDR		Recommends No Intervention		Ben	12/2		N/A	12/2	12/2	
Ohio Edison Long-Term Debt	21-1013-EL-AIS		Recommends No Intervention		Daniel	11/23		N/A	N/A		
DEO FE Rate Adj	21-1096-GA-RDR		Recommends No Intervention			11/22		N/A	11/22	12/2	
Duke Alt. Energy Recovery Rider	21-991-EL-RDR		Recommends No Intervention		Colleen	11/23		N/A	11/24	11/24	

Case Description	Case	[illegible]	Issue	[illegible]	Person Responding	Date	[illegible]	[illegible]	DS	MW	LS
Duke Solar Gen. Rider	21-1164-EL-RDR		Recommends No Intervention		Ross	11/16			11/16	11/16	
FE Solar Gen. Rider	21-1177-EL-RDR		Recommends No Intervention		Ross	11/16			11/16	11/16	
AEP Solar Gen. Rider	21-1171-EL-RDR		Recommends No Intervention		Ross	11/15			11/15	11/15	
AEP Smart City Rider	21-1119-EL-RDR		Recommends No Intervention		Ross	11/1	Sent to MU 11/4	N/A	11/1	11/1	11/4
DPL Econ. Development	21-1034-EL-RDR		Recommends No Intervention		Ross	10/19	Sent to MU 11/4	N/A	10/19	N/A	11/4
DPL Solar Gen	21-921-EL-ATA		Recommends No Intervention		Ross	9/20	Sent to MU 9/21	N/A	9/20	9/21	9/28
Comm. PUCO GCR Formula Rules	21-671-GA-ORD		Recommends No Intervention		Kerry	6/17	Sent to MU 6/21		6/21	6/17	6/27
DEO/Duke Infrastructure Replacement Prog.	Larry yes to 20-1625 DEO Larry no to 20-1536 Duke		Recommends No Intervention		Kerry	12/3			(No to all)	(No to all)	12/21 2020 (DEO Yes) Duke No; Larry to talk to [illegible]
Cobra Assets to Knox Co-op	21-803-GA-ATR		Recommends No Intervention		Kerry	7/27	Sent to MU 8/31	7/27	7/22	7/27	8/31
Recommendations for "New Matters" on CAR - Discussed at JAM											