

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
the Dayton Power and Light Company for ) Case No. 16-0395-EL-SSO  
Approval of its Electric Security Plan )

In the Matter of the Application of the )  
Dayton Power and Light Company for ) Case No. 16-0396-EL-ATA  
Approval of Revised Tariffs )

In the Matter of the Application of the )  
Dayton Power and Light Company for ) Case No. 16-0397-EL-AAM  
Approval of Certain Accounting Authority )  
Pursuant to Ohio Rev. Code § 4905.13 )

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**INITIAL POST-HEARING BRIEF OF THE KROGER COMPANY**

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## **I. INTRODUCTION**

The proposed settlement entered into between The Dayton Power & Light Company (DP&L), DPL Inc. (DPL Inc.), Staff of the Public Utilities Commission of Ohio (PUCO) (Staff), and thirteen other intervening Signatory or Non-Opposing Parties satisfies the criteria established by the PUCO when evaluating the reasonableness of a settlement. Specifically, the Amended Stipulation and Recommendation (Amended Stipulation) filed on March 14, 2017 is the product of serious bargaining among capable and knowledgeable parties; will create significant benefits for customers and, as a package; is in the public interest; and does not violate any regulatory principle or practice. As a whole, the Amended Stipulation is just and reasonable, and accordingly, should be approved.

For the reasons discussed herein, Kroger respectfully requests that the PUCO adopt and approve the proposed Amended Stipulation filed on March 14, 2017.

## **II. PROCEDURAL BACKGROUND**

On February 22, 2016, DP&L filed an application for an electric security plan (ESP) with the PUCO. Thereafter, on October 11, 2016, DP&L filed an amended application for an ESP, in which it sought the creation of a distribution modernization rider (DMR) (Amended Application). DP&L's initial request was for a \$145 million per year DMR for 8 years, totaling approximately \$1.16 billion. The parties engaged in extensive discovery and litigation relating to DP&L's Amended Application.

On January 30, 2017, after numerous settlement conferences, DP&L entered into a proposed settlement with approximately nine signatory or non-opposing parties. The initial stipulation proposed provided DP&L with \$125 million per year for 5 years, split between the

DMR and a Distribution Investment Rider-B (DIR-B), totaling approximately \$625 million. Kroger was not a party to the initial stipulation.

As explained by DP&L witness Sharon Schroder, even though the January 30, 2017 stipulation was filed, the Company continued to negotiate with Staff and other parties.<sup>1</sup> As a result of those continuous and ongoing negotiations, the parties were able to compromise on some issues in order to agree to an amended stipulation with additional parties supporting it, including Staff (Amended Stipulation).<sup>2</sup> DP&L filed the Amended Stipulation on March 14, 2017. The Amended Stipulation eliminates the DIR-B and includes an adjusted DMR of \$105 million per year for 3 years, with the option to extend it two additional years subject to PUCO approval.<sup>3</sup> The Amended Stipulation also includes significant commitments by DPL Inc. and its parent company, AES Corporation, through the conversion of tax sharing liabilities into additional equity investments into DPL Inc.<sup>4</sup> In total, in addition to the Company and Staff, 14 intervening parties are Signatory Parties or Non-Opposing Parties, or have separately agreed to not oppose the Amended Stipulation.<sup>5</sup>

Pursuant to an Attorney Examiner entry dated March 8, 2017, an evidentiary hearing commenced on April 3, 2017 and concluded April 11, 2017. Kroger participated in this evidentiary hearing regarding the Amended Stipulation as an intervening party.

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<sup>1</sup> DP&L Exhibit 3, Schroder Testimony at 4.

<sup>2</sup> *Id.* at 4.

<sup>3</sup> Joint Exhibit 1, Amended Stipulation at ¶ II.2.a.

<sup>4</sup> Joint Exhibit 1, Amended Stipulation at ¶ II.1.b.

<sup>5</sup> Joint Exhibit 1, Amended Stipulation; *see also* the Office of the Ohio Consumers' Counsel (OCC) Exhibit 4, Notice of the Dayton Power and Light Company's Notice of Filing Its Letter Agreement with Mid-Atlantic Renewable Energy Coalition (March 24, 2017).

### **III. STANDARD OF REVIEW**

Rule 4901-1-30, Ohio Administrative Code (O.A.C.), permits parties to enter into stipulations for review by the PUCO. In numerous cases, the PUCO has adopted the following criteria to evaluate whether a stipulation is reasonable and warrants acceptance:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
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?<sup>6</sup>

As explained in detail below, the Amended Stipulation satisfies this controlling three-part test and therefore, must be approved.

### **IV. LAW AND ARGUMENT**

#### **A. The Amended Stipulation is the Result of Serious Bargaining among Capable, Knowledgeable Parties.**

It is undisputed that the parties to the Amended Stipulation are capable and knowledgeable. Rather, through testimony, the few parties opposing the Amended Stipulation complain only that the Amended Stipulation fails to include diverse interest groups.<sup>7</sup> As an initial matter, however, “diversity” is not a requirement of the three-prong test. As the PUCO recently affirmed, “[t]he three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate [a] diversity of interest component . . . .”<sup>8</sup> Further, “[t]he Commission has repeatedly determined that [it] will not require any single party . . . to agree to a

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<sup>6</sup> See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (March 31, 2016).

<sup>7</sup> See, e.g., OCC Exhibit 12, Kahal Suppl. Direct Testimony at 13.

<sup>8</sup> *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposed to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 52 (March 31, 2016).

stipulation, in order to meet the first prong of the three-prong test.”<sup>9</sup> Indeed, “it is the quality of the parties that is determinative, not quantity.”<sup>10</sup>

Here, the record evidence establishes that there were numerous negotiating sessions held over the course of several months.<sup>11</sup> All of the Signatory Parties and Non-Opposing Parties were represented by experienced counsel.<sup>12</sup> The lengthy negotiations were conducted at arm’s length.<sup>13</sup> All parties who had timely intervened in the proceedings were invited to participate in the negotiation process if they so chose.<sup>14</sup> The fact that a few parties chose not to do so has no bearing on whether the Amended Stipulation should be approved by the PUCO.

Notwithstanding that “diversity” is not a requirement under the three-prong test, the record evidence is equally clear that the Signatory Parties and Non-Opposing Parties represent a wide array of diverse interests:

The Amended Stipulation was signed by a diverse group of parties that includes the Commission’s Staff, DP&L, three representatives of residential low-income customers, the largest municipality in DP&L’s service territory, two large state-wide organizations representing industrial customers in DP&L’s service territory, a large industrial customer, a large state-wide manufacturing association, a state-wide organization representing local hospitals in DP&L’s service territory, one of the largest supermarket chains in the country, a retail supplier association and an individual retail supplier.<sup>15</sup>

Clearly, the “Amended Stipulation represents a wide range of interests, including the interests of DP&L’s customers.”<sup>16</sup> In short, with this wide array of diverse interests being represented and the sheer number of Signatory Parties and Non-Opposing Parties supporting the Amended

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, Concurring Opinion of Commissioner Haque at 2 (emphasis in original).

<sup>11</sup> DP&L Exhibit 3, Schroder Testimony at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> DP&L Exhibit 3, Schroder Testimony at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.*

Stipulation, the Amended Stipulation has both quality and quantity support.<sup>17</sup> Accordingly, the Amended Stipulation satisfies the first prong of the three-prong test.

**B. As a Package, the Amended Stipulation Benefits Customers and the Public Interest.**

As the PUCO has affirmed, “the second part of the test specifically requires that [it] evaluate the settlement as a package.”<sup>18</sup> In this regard, the PUCO “has repeatedly found value in the parties’ resolution of pending matters through a settlement package, as an efficient and cost-effective means of bringing their issues before the Commission, while also, at times, avoiding the considerable time and expense associated with the litigation of a fully contested case.”<sup>19</sup>

DP&L witness Sharon Schroder testified in detail as to the terms and concessions contained in the Amended Stipulation. For example, the Amended Stipulation includes the following compromises from DP&L as compared to the application it filed:

1. DP&L’s as-filed Application supported the recovery of a \$145 million DMR for DP&L for a seven-year term. DP&L agreed instead to collect a \$105 million DMR for a shorter term. Amended Stipulation at ¶ II.2.a.
2. DP&L agreed to a six year ESP term, although the DMR will extend for at most five years. Amended Stipulation at ¶ I.1 and ¶ II.2.a.
3. DP&L’s as-filed case sought a seven year DMR, and DP&L agreed in the Stipulation to a DMR term of three years, with the potential for a two-year extension. Amended Stipulation, ¶ II.2.a. Limiting the DMR to three years, with the potential of a two-year adder, lowers the amount of the charge paid by customers and protects customers in the event that DP&L’s financial position improves during the ESP term and the financial need for the DMR

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<sup>17</sup> Staff Exhibit 2, Donlon Testimony at 3-4 (noting that the Signatory Parties represent a diverse group of interests and contain nearly all the intervening parties that are knowledgeable and experienced in regulatory matters before the PUCO).

<sup>18</sup> *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 77 (March 31, 2016).

<sup>19</sup> *Id.* at 77-78 (internal citations omitted).

is diminished or eliminated.

4. DP&L agreed to file a comprehensive plan to implement grid modernization (Amended Stipulation at ¶ II.3.), even though it has no obligation to do so. Grid modernization will provide substantial customer benefits and is consistent with the Commission's goals.
5. DP&L agreed to withdraw its request for a Clean Energy Rider. Amended Stipulation at ¶ VIII.2.<sup>20</sup>

Further, the Signatory and Non-Opposing Parties also agreed to withdraw notices of appeal and forego pursuing the appeals (and further litigation) in Supreme Court of Ohio Case Nos. 2017-204, 2017-205, and 2017-241.<sup>21</sup>

In addition to the foregoing concessions in the Amended Stipulation, DP&L explained the benefits to customers and the public interest from the Amended Stipulation include: (1) allowing DP&L to continue to provide safe and reliable service; (2) positioning DP&L to make investments to address reliability issues on its system, and provide a financial foundation targeted toward enabling and later implementing grid modernization; (3) providing standard service offer service via a competitive bidding process; (4) promoting economic development in DP&L's service territory; (5) promoting competition in DP&L's service territory; and (6) providing funding for low-income residential customers.<sup>22</sup> Most of these benefits would not have occurred absent the settlement. Specifically, the economic development commitments, competitive market enhancements, and funding for low-income residential customers were not part of DP&L's as-filed Amended Application.<sup>23</sup>

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<sup>20</sup> DP&L Exhibit 3, Schroder Testimony at 18.

<sup>21</sup> Joint Exhibit 1, Amended Stipulation at ¶ VIII.1.

<sup>22</sup> DP&L Exhibit 3, Schroder Testimony at 9; *see also* DP&L Exhibit 2(b), Malinak Testimony at 15-20 (detailing the quantifiable and non-quantifiable benefits of the Amended Stipulation as compared to an MRO).

<sup>23</sup> *Id.*; *see also* Edgemont Exhibit 1, Cronmiller Testimony at 2 ("The Stipulation provides for annual assistance to support consumers at or below 200% of the federal poverty line or those at risk of losing electric service. . . The assistance for low-income consumers and the proposed term are consistent with policy that benefits the public interest.")

Likewise, Staff witness Patrick Donlon detailed how the Amended Stipulation benefited consumers and the public interest by providing DP&L, through the DMR, the ability to access the capital markets at favorable rates in order to ensure distribution system investments: “Without the ability of the Company to secure capital at reasonable rates, the ratepayers could end up in a worse situation in the future. . . Additionally, the stipulation provides economic development incentives for DP&L’s service territory, enhancements to the competitive market, a smart grid rider, and a modernization plan.”<sup>24</sup>

In sum, the Amended Stipulation as a package provides meaningful and valuable benefits to customers and benefits the public interest. Accordingly, the Amended Stipulation satisfies the second prong of the three-prong test.

**C. The Amended Stipulation Does Not Violate any Important Regulatory Principle or Practice.**

As set forth above, the third prong of the PUCO’s legal inquiry regarding the reasonableness of a settlement relates to whether or not the Amended Stipulation violates any important regulatory principle or practice.<sup>25</sup> It does not. The record evidence is devoid of any citation to a specific law or regulation that can be said to be violated by the Amended Stipulation. Indeed, the record evidence establishes that the purported generic violations referenced by intervenors opposing the Amended Stipulation, including OCC, previously have been found by the PUCO to be legal and proper.<sup>26</sup> And, in some instances, the very same

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<sup>24</sup> Staff Exhibit 2, Donlon Testimony at 4.

<sup>25</sup> See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (March 31, 2016).

<sup>26</sup> Transcript at 630-633.



purported violations complained about by OCC have been included in past settlements and stipulations on which OCC itself has signed off.<sup>27</sup>

As testified to by DP&L witness Sharon Schroder, the Amended Stipulation allows “DP&L to accomplish the most important aspect of utility service – providing safe and reliable service – at the lowest prices in Ohio.”<sup>28</sup> In doing so, as testified to by both Ms. Schroder and Staff witness Patrick Donlon, the Amended Stipulation does not violate any regulatory principle or practice.<sup>29</sup> Accordingly, the Amended Stipulation satisfies the third, and final, prong of the three-part test.

## V. CONCLUSION

The proposed Amended Stipulation filed on March 14, 2017 is just, reasonable, and in the public interest. It also clearly satisfies all three criteria of the PUCO’s analysis for approving settlements as it is the product of serious bargaining among the parties; will create significant benefits for customers, as a package; is in the public interest; and does not violate any regulatory principle or practice. Accordingly, for the foregoing reasons, Kroger respectfully requests that the PUCO adopt and approve the Amended Stipulation that was submitted for its consideration in this proceeding.

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<sup>27</sup> *Id.* at 632-633.

<sup>28</sup> DP&L Exhibit 3, Schroder Testimony at 19.

<sup>29</sup> *Id.*; Staff Exhibit 2, Donlon Testimony at 4.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on  
May 5, 2017 by electronic mail upon the persons listed below.

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Summary: Brief Initial Post-Hearing Brief Of The Kroger Company electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.