

**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)

REPLY BRIEF OF THE KROGER COMPANY

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I. INTRODUCTION

On March 14, 2017, Dayton Power and Light Company (DP&L), DPL Inc., Staff of the Public Utilities Commission of Ohio, and thirteen other Signatory Parties or Non-Opposing Parties filed an Amended Stipulation and Recommendation¹ (Amended Stipulation). Thereafter, beginning on April 3, 2017 and concluding on April 11, 2017, the Commission conducted an evidentiary hearing on the Amended Stipulation. The record evidence presented at the hearing establishes that the Amended Stipulation 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.

The arguments of the Parties opposing the Amended Stipulation do nothing to change that fact. Indeed, those Parties failed to introduce any evidence that the Amended Stipulation violates important regulatory principles or practices, and, as a package, does not benefit ratepayers and the public interest. They cannot as the economic development and job retention provisions will benefit the public interest in Ohio, allowing Ohio to remain competitive in the global market, which will translate into the retention of facilities and jobs in Ohio. In fact, in many instances, the economic development incentives of which some of the Parties now complain are of the same or similar substance that those very same Parties obtained for themselves in other Commission proceedings.

Therefore, for the reasons discussed in its Initial Brief as well as herein, Kroger respectfully requests that the Commission adopt and approve the proposed Amended Stipulation filed on March 14, 2017.

¹ Joint Exhibit 1.

II. LAW AND ARGUMENT

A. Legal Standard

The Commission has established and used the following criteria in evaluating whether a stipulation is reasonable:

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?²

Here, the evidence establishes that the Amended Stipulation satisfies these factors and thus is reasonable.

B. The Settlement Does Not Violate Any Important Regulatory Principles or Practices.

In its initial post hearing brief, the Office of the Ohio Consumers' Counsel (OCC) argued that the Settlement includes financial inducements that are not supported by regulatory practices and principles.³ Specifically, OCC alleges that in Section IV of the Amended Stipulation, DP&L provides financial inducements to Signatory or Non-Opposing Parties in exchange for their support, which do not meet the requirements of traditional economic development arrangements and violates Section 4905.33, Revised Code.⁴ Similarly, Wal-Mart Stores East, LP, and Sam's East, Inc. (collectively, Walmart), in its initial brief, argues that "specific benefits" under the Amended Stipulation are discriminatory and the Economic Development Rider (EDR) does not

² *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 48-49 (March 31, 2016).

³ OCC Brief at 45.

⁴ OCC Brief at 46-47.

require recipients to create new jobs.⁵ As more fully discussed below, OCC's and Walmart's arguments fail because they are unsupported by the record and are contrary to Ohio law and Commission policy and precedent.

1. The Amended Stipulation Provides for Economic Development and Job Retention in Accordance with Ohio Law and Commission Policy and Precedent.

OCC argues that the economic development provisions contained in Section IV of the Amended Stipulation are not supported by regulatory practice or principle.⁶ This argument fails, however, because economic development provisions in an electric security plan (ESP) are expressly authorized and the Commission previously has approved similar provisions on several occasions.

Section 4928.143(B)(2)(h)(i), Revised Code, provides that an “electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.” OCC does not appear to dispute that economic development and job retention provisions can be a part of an ESP, but instead seems to create a requirement that just does not exist in the law. OCC argues that the Amended Stipulation must fail because it does not mandate the creation of *new* jobs.⁷ OCC, however, fails to point to any such requirement in Section 4928.143, Revised Code.

By the clear language of the statute, job *creation* mandates are not a prerequisite to approving economic development or job retention programs.⁸ Rather, the statute expressly

⁵ Walmart Brief at 8-10.

⁶ OCC Brief at 45.

⁷ OCC Brief at 39.

⁸ See Section 4928.143(B)(2)(h)(i), Revised Code.

enumerates “job retention” programs. Section IV of the Amended Stipulation promotes retaining jobs in Ohio by large Ohio employers.⁹ DP&L witness Schroder explained that the EDR is “designed to promote Ohio’s ability to create and retain jobs. Not only will the EDR assist those businesses in retaining and hiring employees, but there would also be a multiplier effect in that those employees will support local businesses.”¹⁰ Notably, Section 4928.143(B)(2)(h)(i), Revised Code, contains no reference to any other law or Commission rule providing additional criteria for economic development or job retention programs as part of an ESP.

Additionally, Walmart provides no analysis or evidence of how economic development and job retention provisions in an ESP are discriminatory. It is axiomatic that an Ohio statute expressly permitting an electric distribution utility (EDU) to implement an economic development and job retention programs in an ESP cannot also violate the state policy.

The economic development and job retention provisions included in Section IV of the Amended Stipulation are not only in accord with Ohio law, they are also in accord with Commission policy and precedent. Like this ESP case, the Commission in Duke Energy Ohio’s (Duke) ESP Case (Case Nos. 11-3549-EL-SSO, et al.) approved a stipulation where Duke offered economic development incentives to various parties.¹¹ Notably, OCC was a signatory party to the stipulation.¹²

⁹ The Ohio Business Incentive is only available to businesses that are headquartered in Ohio. Therefore, should a business move its headquarters to another state and fail to retain those jobs in Ohio, that business would no longer qualify for the Ohio Business Incentive. *See* Joint Exhibit 1, Amended Stipulation at Section IV(1)(a)(iii).

¹⁰ *See* Direct Testimony of Sharon R. Schroder at 12:17 – 13:4 (March 22, 2017) (DP&L Exhibit 3) (Schroder Testimony).

¹¹ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, et al., Opinion and Order at 22 (Nov. 22, 2011).

¹² *Id.*, Stipulation at 44 (Oct. 24, 2011).

Further, the Commission also recently approved an automaker credit provision in Ohio Power Company's (AEP Ohio) power purchase agreement (PPA) stipulation providing automakers with a \$10/MWh credit for all KWh consumption above the customer baseline consumption.¹³ The Commission in its order approving the stipulation noted "that the automaker credit is intended to encourage economic development by creating an incentive for automakers to use or locate their manufacturing facilities within this state."¹⁴ In approving that portion of the AEP Ohio PPA stipulation, the Commission neither required automakers to create jobs, nor did it specifically require automakers to retain jobs. The Commission specifically approved the economic development provision as an "incentive" to use or locate their automaker manufacturing facilities in Ohio.¹⁵

OCC witness Haugh even testified that incentives for certain customers on a per kWh basis, similar to the \$0.004/ kWh economic development incentive in the Amended Stipulation,¹⁶ have been previously approved by the Commission.¹⁷ OCC witness Haugh acknowledged that the Commission previously has approved settlements containing various types of payments to parties, including cash payments.¹⁸ Furthermore, OCC has been a signatory party to settlements

¹³ *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 Nos. 14-1693-EL-RDR et al., Stipulation at 11 (December 14, 2015).

¹⁴ *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 Nos. 14-1693-EL-RDR, et al., Opinion and Order at 84 (March 31, 2016).

¹⁵ *Id.*

¹⁶ Amended Stipulation at 9.

¹⁷ Tr. Vol. III at 627:23-18.

¹⁸ Tr. Vol. III at 628:6-22; 630:4-19; see *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 (March 31, 2016) and Fifth Entry on Rehearing (October 12, 2016).

in other cases where the settlement allowed for rate reductions and direct payments to certain groups.¹⁹

The economic development and job retention provisions contained in Section IV of the Amended Stipulation are expressly authorized by Section 4928.143(B)(2)(h)(i), Revised Code. Accordingly, the Commission should approve the economic development and job retention provisions of the Amended Stipulation without modification.

2. The Economic Development Payments Made Under the Economic Development Fund are to Offset Costs Associated with the Amended Stipulation and Rate Design Modifications.

OCC also alleges that the Amended Stipulation's Economic Development Grant Fund (Section V of the Amended Stipulation) violates Section 4905.33, Revised Code, as providing rebates to individual customers in favor of their support of the Amended Stipulation.²⁰ OCC's arguments are wholly unsupported by the record.

OCC witness Kahal agreed that the Amended Stipulation states that the parties or non-opposing parties are supporting or agreeing not to oppose the Amended Stipulation as a *package*.²¹ Mr. Kahal also agreed that the Amended Stipulation is more favorable than the Application,²² and acknowledged as improvements many favorable reductions to charges or elimination of certain riders.²³ Mr. Kahal also agreed that the Amended Stipulation provided several other benefits over the term of the Application, including a shorter term.²⁴

¹⁹ Tr. Vol. III at 630:20 – 633:23; see *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company an Ohio Power Company*, et al., Cases Nos. 09-872-EL-FAC, et al., Opinion and Order at 25-26, 31-32 (February 23, 2017) (Global Settlement Order).

²⁰ OCC Brief at 47.

²¹ Tr. Vol. III at 735:4-8.

²² Application (October 11, 2016) (Application).

²³ Tr. Vol. III at 735:9 – 736:5.

²⁴ Tr. Vol. III at 736:22 – 738:11.

Further, the economic development payments provided in Section V(c) of the Amended Stipulation are expressly intended to be “partially offset the costs of this [Amended] Stipulation and rate design modifications.”²⁵ By the express terms of the settlement, the payments are not special rates or rebates in violation of Section 4905.33, Revised Code, as alleged by OCC. Walmart similarly alleges that the economic development payments under the Economic Development Grant Fund are discriminatory.²⁶ Walmart does not, and cannot, point to any record evidence to establish that these rate design modifications are discriminatory.

The Commission has on numerous occasions permitted rate mitigation mechanisms. Recently, in the global settlement resolving several cases between AEP Ohio and customers, the Commission approved one-time aggregate rate mitigation credits or bill credits to Signatory Parties that were negatively impacted by rate design changes to offset increases from an EDU’s application and/or settlement.²⁷ OCC was also a signatory party to the stipulation containing the rate mitigation credits or bill credits to offset increases to customers that were negatively impacted by rate design modifications.²⁸ DP&L’s Amended Stipulation provides for similar rate mitigation credits to partially offset costs imposed upon customers due to rate design modifications. Therefore, because rate mitigation mechanisms in the form of payments or bill credits is an accepted regulatory practice, Section V of the Amended Stipulation does not violate Section 4905.33, Revised Code, or any regulatory practice or principle. Accordingly, the Amended Stipulation, including Section V, should be approved without modification.

²⁵ Joint Exhibit 1, Amended Stipulation at 11 (emphasis added); Tr. Vol. III at 739:1-21.

²⁶ Walmart Brief at 9.

²⁷ Global Settlement Order at 25-26, 31-32.

²⁸ Tr. Vol. III 630:20 – 632:3.

3. The Economic Development Provisions in Sections IV and V of the Amended Stipulation Will Benefit Ohio Customers and are in the Public Interest.

Economic development in DP&L's service area will be enhanced by the provisions of the Amended Stipulation. OCC admits that "increased charges to non-residential customers will likely be passed on to residential customers through higher priced goods and services."²⁹ The rate mitigation and economic development incentive provisions of the Amended Stipulation help to offset the potential increased costs to commercial customers throughout Ohio, which in turn promotes job retention and creation, and the reinvestment of dollars in Ohio facilities.³⁰

Although OCC argues that the economic development incentives and payments do not require the Signatory or Non-Opposing Parties receiving the incentive to create new jobs, OCC ignores the benefits of job retention and reduced costs of goods and services compared to higher electric prices without the incentives and payments. OCC also ignores the fact that in order to qualify for the Ohio Business Incentive, businesses must retain their headquarters in the State of Ohio.³¹ OCC further ignores the fact that the entities qualifying for the economic development incentives are large employers in the state of Ohio. Such incentives will assist those employers in retaining jobs and remaining competitive in the global marketplace, as well as incentivize them to reinvest in the state of Ohio.

III. 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

²⁹ OCC Brief at 39.

³⁰ See Tr. Vol. II at 256:2 – 256:12

³¹ Joint Exhibit 1, Amended Stipulation, Section IV(1)(a)(iii) at 10.

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 Commission adopt and approve the Amended Stipulation that was submitted for its consideration in this proceeding.

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 15, 2017 by electronic mail upon the persons listed below.

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Summary: Brief REPLY BRIEF OF THE KROGER COMPANY electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.