BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 16-649-EL-POR
The Dayton Power and Light Company for	:	
Approval of Its Energy Efficiency Portfolio	:	Case No. 16-1369-EL-WVR
Plan	:	

THE DAYTON POWER & LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING

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I. **Introduction**

The Commission acted correctly in adopting the December 13, 2016 Stipulation and Recommendation ("2016 Stipulation") without modification through the September 27, 2017 Opinion and Order ("2017 Order"). The 2016 Stipulation and corresponding 2017 Order represent the culmination of extensive negotiation between the Dayton Power and Light Company ("the Company"), Public Utilities Commission of Ohio Staff ("Commission Staff"), and the signatory/non-opposing parties.

The only ground on which the Office of the Ohio Consumers' Counsel ("OCC") challenges the Commission's 2017 Order is the Company's recovery of lost distribution revenues directly tied to the Company's energy efficiency programs – programs that lead to reduced energy consumption, reduced generation, and ultimately, reduced costs to the customers. The vast majority of OCC's Application for Rehearing is simply a rehashing or repackaging of the arguments that were already rejected by the Commission, and accordingly, there are no grounds for the Application to be granted.

The Company cannot collect lost distribution revenues in an unregulated vacuum. This is not a secretive process. Any recovery of lost distribution revenues must be based on actual reported energy savings, verified by an independent third-party (in the Company's case, The Cadmus Group). The energy savings are reported annually and the Company's programs have regularly exceeded Ohio's statutory requirements. The Company can, and should, be made whole for the real sustained losses of distribution revenues resulting from successful and innovative energy efficiency programs.

Contrary to OCC's arguments, there is no basis to find the 2017 Order unlawful or unreasonable under R.C. §4903.10, and accordingly, the Company respectfully requests that OCC's Application for Rehearing be denied in total.

II. The Company's Responses to OCC's Assignments of Error

A. Response to Assignment of Error #1: The 2016 Stipulation and 2017 Order Clearly Benefit Customers and are in the Public Interest.

At its core, the 2016 Stipulation represented an extension of the Company's prior energy efficiency program portfolio. This extension allowed the Company to continue the programs without interruption to the benefit of customers, and the Company further committed to file a new three-year portfolio plan by June 15, 2017, which the Company did.[1] As an additional protection for customers, the Company agreed to continue the programs as set forth in the 2015 program budget, as well as a cost cap for its energy efficiency programs, and shared savings resulting from these programs, set at 4% of the Company's revenue for 2015.[2] The Company has also agreed to a hard cap on shared savings of \$4.5 million for 2017.[3] This provides the Company's residential and non-residential customers with energy efficiency and demand reduction programs. These programs encourage and promote energy savings by providing incentives for lowering customer energy consumption and demand, which in turn will lower customer electric bills.[4] Recovery of these lost distribution revenues merely makes the utility whole for reduced distribution sales resulting from its successful and innovative energy efficiency programs, and is specifically authorized by R.C. §4928.66 and Ohio Admin. Code 4901:1-39-07(A). OCC's arguments on rehearing, however, are little more than a recitation of the arguments that were already raised and summarily rejected by this Commission.

[1] See *In re Dayton Power & Light,* Case No. 17-1398-EL-POR (June 15, 2017).
[2] Joint Exhibit 1; 2016 Stipulation at pg. 6.
[3] 2016 Stipulation at pg. 12.
[4] Company Exhibit 1; Teuscher Testimony at pg. 6.

1. <u>OCC has Failed to Demonstrate that the Company's Lost Distribution Revenues are Unreasonable and OCC's Reliance on the ACEEE Study and Other Metrics is Misplaced.</u>

Without any material support, OCC continues its familiar refrain that the Company's lost distribution revenues are out of line with program costs, citing again a June 2015 Study from the American Council for an Energy-Efficient Economy ("ACEEE Study") to challenge the Company's requested recovery of lost distribution revenues.[5] As an initial matter, the ACEEE Study has not been admitted into evidence, and OCC has not provided any context for these comparisons that would make reliance on this Study, in any manner, worthwhile. There is no analysis by OCC or its testifying witness of: (1) what states these utilities are located in (are any in Ohio?); (2) what the relative regulatory environment in those states might be; (3) whether the utilities being compared are vertically integrated utilities; or, perhaps most importantly, (4) the frequency of the referenced utilities' respective rate cases. Put simply, the cherry-picked statistics and overbroad conclusions OCC draws from the ACEEE Study are not reliable.

Nevertheless, OCC once again relies upon the ACEEE Study to make broad proclamations regarding the average lost distribution revenues for 32 utilities surveyed in 17 states, as compared to their respective energy efficiency program costs.[6] OCC then compares the Company's respective lost distribution revenues to the corresponding program costs to arrive at the misguided conclusion that the Company's lost distribution revenues are too high. This is not a new argument upon appeal, which the Commission has routinely recognized as a reason to

[5] OCC Application for Rehearing at pgs. 3-4.
[6] Id.

deny rehearing.[7] Moreover, this is a red herring, and the Commission properly rejected this unfounded argument.

Lost distribution revenues are based on verifiable energy savings – calculations that are verified by an independent third-party (the Cadmus Group) and reported annually. The fact that the Company's lost distribution revenues for 2016 are approximately 90% of the overall program costs is not evidence that the lost distribution revenues are too high; rather, this is evidence that the Company's energy efficiency programs are incredibly effective and efficient. Nor should the Commission be persuaded by OCC's attempt to further analyze differences between rate classes on the same basis.[8] OCC has not established that comparing percentage of lost distribution revenues to programs costs is a reliable metric by which to measure the reasonableness of the revenue recovery, and the Commission appropriately disagreed with OCC's arguments. There is no evidence in the record that establishes this proposition as any sort of meaningful determination that the amount of lost distribution revenues are unreasonable, especially when viewed out of context. For instance, this comparison ignores the fact that the lost distribution revenues are calculated and allocated to customer classes based upon the savings that result from programs that benefit each respective customer class. Finally, OCC continues to ignore the fact that the Company committed to reset the lost distribution revenues upon resolution of its distribution rate case. Therefore, it was not unreasonable for the Commission to find that the 2016 Stipulation benefits customers and is in the public interest.

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[7] *In Re Ohio Edison Company*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing, ¶114 ("As the intervening parties have failed to raise any new arguments from those already addressed, we find these assignments of error should be denied.") (August 16, 2017); *In Re Commission's Review of Chapter 4901:1-6,* 14-1554-TP-ORD, Second Entry on Rehearing, ¶¶ 38, 41 and 44 (" Regarding the Consumer Groups' assignment of error specific to adopted Rule 4901:1-6-14 [et. seq.], the Commission finds that the application for rehearing should be denied. In reaching this determination, the Commission finds that the Consumer groups' have failed to raise any new arguments for the Commission's consideration.") (April 5, 2017).
[8] OCC Application for Rehearing at pgs. 4-5.

2. <u>**OCC's Reliance on Other Precedent is Misguided and Further Justifies that the Commission's Opinion and Order is Reasonable**</u>.

Peculiarly, OCC points to the Duke and AEP energy efficiency portfolio decisions to emphasize that the 4% cost cap, a benefit that is also found in the Company's 2016 Stipulation, "is a reasonable response to concerns which have been raised regarding potential increase in the costs of EE/PDR programs."[9] OCC then attempts to argue that the benefits are reduced because of the collection of lost distribution revenues outside of the cost cap.[10] However, the Duke and AEP decisions cited by OCC also excluded lost distribution revenues from the 4% cost cap.[11] This is an appropriate and reasonable outcome because, as recognized by the ACEEE Study upon which OCC bases many of its arguments, lost distribution revenues are not energy efficiency costs:

> One more point should be made about LRAM (Lost Revenue Adjustment Mechanism). <u>**This mechanism does not reimburse utilities for the cost of energy efficiency programs; rather, it makes them whole for revenues they have lost as a result of selling less energy**</u>. Analysts should not regard LRAM as a cost of energy efficiency, and they should not include it in cost calculations, for example when they compare the cost of energy efficiency with that or other resources. This mischaracterization becomes especially misleading when LRAM dollars compound over time if there are long intervals between rate cases.

(emphasis added.)

As a regulated distribution utility, the Company's rates are designed and regulated to recover a certain revenue requirement, which was set before the energy efficiency statutes were

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[9] OCC Application for Rehearing at pgs. 2-3; See also *In Re Ohio Power for Approval of Its Energy Efficiency/Peak Demand Reduction Portfolio Plan*, Case No. 16-574-EL-POR, Opinion and Order at ¶ 32 (Jan. 18, 2017).
[10] Id..
[11] *In Re Ohio Power for Approval of Its Energy Efficiency/Peak Demand Reduction Portfolio Plan*, Case No. 16-574-EL-POR, Opinion and Order at ¶21 (Jan. 18, 2017); *In Re Duke Energy Ohio for Approval of Its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion and Order at ¶¶ 47, 63 (Sept, 27, 2017).

passed in 2008. The lost distribution revenues approved by the 2017 Order serve to make the Company whole as a result of reduced sales from the implementation of successful energy efficiency measures. Absent lost distribution revenue recovery, customers would receive a windfall benefit at the peril of the distribution utility. Lost distribution revenues align those interests to ensure efficient and successful programs. As stated in the ACEEE Study, "[c]reating a regulatory environment that incentivizes utilities to invest in efficiency is critical for programs to be successful, impactful, and long lasting."[12]

To combat this, OCC recycles its reliance on *In Re Columbus Southern Power,* Case No. 09-1089-EL-POR, arguing the Company failed to establish that recovery of the claimed lost distribution revenues is necessary for the Company to meet its revenue requirement, and that lost distribution revenues should be limited in time until resolved in a base rate case or until a decoupling mechanism is implemented.[13] That is precisely what the Company committed to do in the 2016 Stipulation by agreeing to: (1) reset the lost distribution revenues consistent with the pending Distribution Rate Case; and (2) incorporate the lost distribution revenues into a distribution decoupling rider.[14]

Nevertheless, *In Re Columbus Southern Power* does not provide the legal support that OCC claims. In that case, IEU-Ohio challenged AEP's proposed Stipulation and argued that AEP-Ohio had failed to demonstrate the necessity of recovery of its lost distribution revenues. Ultimately the Commission found that AEP-Ohio failed to establish its "actual costs of service" because it had not filed a rate case in 20 years, and limited the lost distribution recovery AEP-Ohio had requested.[15]

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[12] ACEEE Study, pg. vii.
[13] OCC Application for Rehearing at pgs. 6-7.
[14] 2016 Stipulation at pp. 11, 13. 2017 Order at pg. 9.
[15] *In Re Columbus Southern Power*, Case No. 09-1089-EL-POR Opinion and Order, pg. 26 (May 13, 2010).

What OCC conveniently fails to discuss is that IEU-Ohio appealed to the Ohio Supreme Court,[16] and the Ohio Supreme Court found that the Commission's requirement that cost of service be established by the utility was in error under the statutory requirements. However, because AEP-Ohio had not appealed the Commission's ruling, that issue was technically not before the Ohio Supreme Court and it could not rule on whether the Commission's restriction of lost distribution revenue recovery was proper.[17] Additionally, the party challenging AEP-Ohio's lost distribution recovery mechanism in that case, IEU-Ohio, is a party to this case and did not oppose the Company's 2016 Stipulation or seek rehearing of the 2017 Order. Accordingly, pursuant to the Ohio Supreme Court's guidance in *In Re Columbus Southern Power*,129 Ohio St.3d 46 (2011), and contrary to OCC's unfounded arguments, the Company was not required to establish actual cost of service in connection with recovery of lost distribution revenue. Thus, it was not unreasonable for the Commission to approve the 2016 Stipulation which was supported and/or unopposed by all other parties, including those that represent customer groups.

B. <u>Response to Assignment of Error #2: The 2017 Order Properly Explains the Reasons for the Commission's Decision.</u>

The Commission's 2017 Order satisfies the statutory requirements of R.C. 4903.09, which states:

> In all contested cases heard by the public utilities commission, . . . , the commission shall 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 2017 Order begins with a detailed recitation of the procedural history of the case, as well as an analysis of its decision, to deny OCC's Motion to Strike certain portions of the Company's Post-Hearing briefs. Pages 7-9 of the 2017 Order contain a thorough summary of the

[16] *In Re Columbus Southern Power*, 129 Ohio St.3d 46 (2011).
[17] *Id.* at ¶¶ 16- 17.

contents of the 2016 Stipulation. Finally, on pages 10-19, the Commission offers a detailed recitation of the parties' respective arguments and, ultimately, its decision to adopt the 2016 Stipulation.

OCC relies exclusively on *In Re Columbus Southern Power*, 147 Ohio St.3d 439 (2016), to argue that the Commission failed to properly explain its decision in the 2017 Order. *In Re Columbus Southern Power* is readily distinguishable from the instant case. In that case, the Commission set a significantly-excessive-earnings test (SEET) threshold of 12 percent for the life of the subject ESP. AEP argued that in setting this SEET threshold, the Commission never explained why it failed to conduct the statutorily required common equity comparison of comparable utilities over the same period, as required by R.C. §4928.143(F).[18] The Ohio Supreme Court agreed that the Commission failed to properly explain its departure from this statutory requirement.[19]

There is no similar situation in this case and no claim that the Commission failed to consider or implement a statutorily required analysis. The Commission went through the required three-prong analysis that governs Stipulations with precision and detail, and went further to address OCC's arguments raised in its Post-Hearing Briefs. On page 8 of its Application for Rehearing, OCC initially lists three allegedly "distinct" arguments regarding the reasonableness or necessity of the Company's lost distribution revenues that OCC claims the Commission never addressed. In reality, the Commission summarized these arguments, and the counter-arguments of the Company and Ohio Partners for Affordable Energy ("OPAE"), on pages 12-14 of the 2017 Order. The Commission then addressed these arguments on pages 14-15 of the 2017 Order, holding:

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[18] *Id.* at ¶¶ 64-65.
[19] I*d.* at ¶ 66.

> Nor has any party presented evidence of undue prejudice that would result if the Company's current plan is extended until the Commission issues an order in Case No. 17-1398-EL-POR to address the concerns raised by OCC and ELPC in their pleadings. As noted above, the testimony of Mr. Teuscher indicates customer bills will actually decrease when DP&L's EER tariffs are updated in Case No. 16-329-EL-RDR.

The Commission reinforced its decision regarding the reasonableness and necessity for the Company's recovery of its lost distribution revenues on page 18 of the 2017 Order, holding:

> Finally, the Company argues that it would be patently unjust and unreasonable to permit customers to benefit under and extension of DP&L's programs that were continued through 2016, while not also making the utility whole for its lost distribution revenues. We agree.

On pages 8-10 of its Application for Rehearing, OCC argues that the Commission never properly addressed its arguments related to the Company's extension of the Second Energy Efficiency Program in the context of Senate Bill 310 ("S.B. 310"). To the contrary, pages 17-18 of the 2017 Order contain a detailed analysis of OCC's and the Company's respective arguments relative to the $72 million lost distribution revenue cost cap in the 2013-2015 EE/POR Plan, and whether that cap should have any impact on cost recovery for 2016. While OCC trivializes the determination, the Commission gave sufficient detail regarding how it reached its decision by stating "We agree" with the Company's argument that directly addressed S.B. 310. Furthermore, beginning on page 18 of the 2017 Order, the Commission states:

> Further, we cannot agree with OCC's suggestion that DP&L should not be permitted to recover lost distribution revenue because the Company opted to continue its programs under the one-year extension provided by S.B. 310. We are not persuaded by the evidence in the record that the $72 million cost cap on recovery of lost distribution revenues negotiated for DP&L's 2013-2015 Program Portfolio should automatically apply to any subsequent lost distribution revenues by virtue of the Company's election to extend its second Portfolio Plan through 2016 under S.B. 310.

The Commission specifically addressed OCC's S.B. 310 arguments, finding there was not sufficient evidence in the record to find that lost distribution revenues for 2016 were prohibited.

The Commission painstakingly recited the parties' arguments and positions in great detail, and then stated why it agreed that the 2016 Stipulation should be adopted. While OCC may not like the format, presentation or outcome of the explanations given by the Commission, the reasons supporting its decision are properly set forth on the 2017 Order. The Order does not violate R.C. §4903.09 or Ohio Supreme Court precedent and is, therefore, lawful, just and reasonable.

C. Response to Assignment of Error #3: The 2017 Order Properly Confirmed that the Company's Collection of Lost Distribution Revenues Beyond 2015 is Lawful and Not in Conflict with Senate Bill 310.

OCC argues that the 2017 Order violates S.B. 310 in that the Order permits the Company to collect lost distribution revenues beyond 2015. Under the 2013 Stipulation at issue, which was approved by the Commission, the Company agreed that a "lost revenue cap totaling $72 million over the seven year period ending December 31, 2015 as established in Case No. 08-1094-EL-SSO will continue to apply over the ***term of the 2013-2015 Program Portfolio***."[20] Thus, the $72 million cap was specifically limited to the portfolio for the years of 2013-2015, which the Company honored when it forewent collection of lost distribution revenues for the months of November and December 2015.[21]

However, roughly half-way through the period of the 2013-2015 Program Portfolio, S.B. 310 was passed and the Company was given the option of: (1) continuing its then existing successful and cost-effective programs; or (2) amending those programs under the new standards of amended R.C. §4928.66. In good faith, the Company allowed its robust 2013-2015 Program Portfolio to be extended through 2016 by operation of law with no amendments, which included not just the programs, but also the shared savings and lost distribution revenues. The 2013

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[20] OCC Exhibit CS-7, Oct. 2, 2013 Stipulation and Recommendation, *In Re Dayton Power and Light Company,* Case No. 13-0833-EL-POR, pgs. 12-13 (emphasis added).
[21] *In Re Application of The Dayton Power and Light Company to Update its Energy Efficiency Rider*, Case No. 16-329-EL-RDR, Application Schedule B-2.

Stipulation did not foreclose the possibility of recovering lost distribution revenues beyond 2015 – the cap in the 2013 Stipulation was simply there to limit the lost distribution revenues that were incurred during the original time period of the 2013-2015 Program Portfolio. The Commission's finding that there was no evidence that the $72 million cost cap on lost distribution revenue recovery is fully supported by the record, and therefore, it was not unlawful or unreasonable for the Commission to find that the 2016 Stipulation does not violate S.B. 310 or any important regulatory principles.[22]

OCC tries to draw a comparison to the funds for OPAE, OHA, PWC, and lighting programs.[23] This comparison, however, is misleading because those were ***annual*** amounts as opposed to the one-time cap on lost distribution revenues that only lasted through 2015 based on the plain language of the 2013 Stipulation. The 2013 Stipulation expressly contemplated the Company's recovery of lost distribution revenues beyond December 31, 2015 through a third energy efficiency portfolio filing, which is precisely what the Commission approved in this matter. Even absent this express language in the 2013 Stipulation, the Company would have been statutorily authorized to recover lost distribution revenues for 2016 by operation of law.

Any finding to the contrary would result in a patently unjust and unreasonable result wherein customers were afforded the benefits of programs that the Company continued in good faith through 2016, while not making the utility whole for its lost distribution revenues. This good faith extension of the existing programs had significant benefits for customers because they enjoyed another year of robust programs that had been thoroughly examined, evaluated and determined to be successful and cost-effective. This bell cannot be un-rung because the energy

[22] 2017 Order at pp. 18-19.
[23] OCC Application for Rehearing at pg. 11.

efficiency measures have already been instituted, resulting in reductions to customers' energy usage and lost sales/revenues for the Company.

For these reasons, it was not unlawful or unreasonable for the Commission to approve the 2016 Stipulation by finding that it benefited customers, was in the public interest, and did not violate any regulatory principles.

D. <u>Response to Assignment of Error #4: The 2017 Order Does Not Violate the Terms of 2013 Stipulation and Corresponding December 4, 2013 Order Because the 2017 Order was Issued After a Hearing in the Company's Third Energy Efficiency Portfolio Case.</u>

The 2017 Order is lawful and does not violate the terms of the 2013 Stipulation and corresponding December 4, 2013 Order. OCC now appears to be claiming, for the first time, that a "hearing" was not held relative to the Company's Third Energy Efficiency Portfolio filing, and therefore, this should somehow invalidate the 2017 Order.

OCC's argument is wholly unfounded. The 2013 Stipulation states:

> If the Commission does not authorize collection of lost distribution revenues from customers relating to DP&L's First Energy Efficiency Portfolio (approved in Case No. 08-1094, et al.) or Second Energy Efficiency Portfolio (Case No. 13-833-EL-POR) after a hearing held for DP&L's Third Energy Efficiency Portfolio Application, the Signatory Parties agree that DP&L shall not collect lost distribution revenues related to its First Energy Efficiency Portfolio or Second Energy Efficiency Portfolio beyond December 31, 2015.[24]

The Company is doing exactly what the 2013 Stipulation and corresponding Commission Order require. The 2016 Stipulation, and 2017 Order approving the same, grew out of the Company's Third Energy Efficiency Portfolio Application, which, as filed, was consistent with Commission rules and was designed to comply in all material respects with the requirements of O.A.C. 4901:1-39-04.

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[24] OCC Exhibit CS-7; *In Re Dayton Power and Light Company,* Case No. 13-0833-EL-POR, Stipulation and Recommendation, pg. 13 (Oct. 2, 2013).

The 2017 Order approves the consensus of the Company, Commission Staff and numerous signatory/non-opposing parties in this proceeding that the Company is authorized to recover lost distribution revenues beyond 2015. The Company never withdrew or amended its Third Energy Efficiency Portfolio Application. The Company did not elect to proceed with the one-year extension under the Second Energy Efficiency Portfolio filing – which the Company could have done. There was a hearing held before Attorney Examiner Bulgrin on February 7, 2017 in the Third Energy Efficiency Portfolio case wherein testimony and exhibits were admitted into the record. OCC, the Company and other parties filed "Post-Hearing Briefs." This all occurred in the Company's Third Energy Efficiency Portfolio filing. For OCC to now pursue the technical argument that no "hearing" took place should be disregarded by the Commission.

E. Response to Assignment of Error #5: The 2017 Order Does Not Result in Retroactive Ratemaking.

Contrary to OCC's arguments, lawful lost distribution revenue recovery is not retroactive ratemaking. Pursuant to O.A.C. 4901:1-39-07(A), the Company is legally entitled to recover lost distribution revenues, among other things, that result from the statutorily mandated energy efficiency portfolio programs. The Commission has expressly authorized this type of recovery for the Company, and other utilities, in prior cases. *See, e.g., In Re Duke Energy Ohio, Inc.*, Case No. 15-534-EL-RDR, Opinion and Order (October 26, 2016); *In Re Dayton Power and Light Company*, Case No. 13-833-EL-POR, Opinion and Order (December 4, 2013); *In Re Duke Energy Ohio, Inc*., Case No. 11-4393-EL-RDR, Opinion and Order (August 15, 2012).

OCC relies on *Keco,*[25] *Lucas County*[26] and *Columbus Southern Power*[27] in support of its erroneous retroactive ratemaking argument by regurgitating the exact same arguments that were

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[25] *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel Co.*, 166 Ohio St.254 (1957)
[26] *Lucas County Commissioners v. PUCO*, 80 Ohio St.3d 344 (1997).
[27] *In Re Columbus Southern Power*, 128 Ohio St.3d 512 (2011)..

already considered and rejected by this Commission. *Keco* and *Lucas County* stand for the proposition that a public utility must be protected from claims against it for refunds or credits to consumers for funds lawfully collected pursuant to rates that had been approved by the Commission. While the Company agrees with this proposition, it has no relevance to this specific situation. The Company implemented and administered its 2013-2015 (Second) Energy Efficiency Portfolio Plan, and pursuant to that Plan, recovered associated costs, lost distribution revenue and shared savings pursuant to O.A.C. 4901:1-39-07(A). The Company extended its programs by one year, through 2016. The program costs, lost distribution revenues and shared savings associated with that one-year extension are, therefore, recoverable and do not constitute retroactive ratemaking.

OCC's reliance on *Columbus Southern Power* in support of this erroneous argument is also misguided. *Columbus Southern Power* involved a very specific and limited situation wherein AEP was granted recovery of costs that were not collected exclusively because of a "delay in rate relief."[28] Specifically, AEP had sought a rate increase to be effective January 1, but the Commission did not approve the subject order until mid-March.[29] To remedy the regulatory lag, the Commission then set AEP's rates in a way to account for the January through March shortfall in revenue collection.[30] The Ohio Supreme Court held this to be impermissible retroactive ratemaking because the Commission "granted AEP additional rates to make up for the regulatory delay."[31] That is not the case here.

The 2017 Order authorizes the Company to recover lost distribution revenues incurred based upon the 2013-2015 Plan being extended by operation of law and does not compensate the

[28] *Id.* at ¶ 9.
[29] *Id.* at ¶¶ 9-10.
[30] *Id.* at ¶10
[31] *Id.* at ¶14.

Company "for revenues lost ***during the pendency of the commission proceedings***."[32] This is not a case of regulatory lag, "which is precisely the sort of rate increase that the court ruled on in *Keco*."[33] In fact, the Company has already collected the costs of the 2016 energy efficiency portfolio programs, shared savings, and lost distribution revenues.

The rate adjustment mechanisms contemplated by O.A.C. 4901:1-39-07(A) are the mechanisms that allow for regular true-ups for these types of programs. Taking OCC's argument to its illogical conclusion, any base rate case would be improper because those rates are incorporating costs that have previously been incurred. Further, using OCC's flawed logic, the Company would be able to keep any over-collected funds even if reconciliation shows otherwise.

Likewise, OCC's challenges to the Commission's reasoning under R.C. §4928.66(D), Ohio Admin. Code 4901:1-39-07(A) and *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509 (1982) are equally misguided.[34] The 2017 Order appropriately explains that the Commission has statutory authority through R.C. §4928.66(D) and Ohio Admin. Code 4901:1-39-07(A) to establish a recovery mechanism for utilities to recover costs associated with energy efficiency programs, lost distribution revenues and shared savings. *River Gas* represents Ohio Supreme Court precedent reinforcing this pass-through recovery ability for utilities in Ohio.

OCC attempts to distinguish *River Gas* by arguing that lost distribution revenue recovery was a new category of charges resulting in retroactive ratemaking.[35] But the 2016 Stipulation approved by the Commission in this case did not create a new type of charge. The Company has historically been recovering lost distribution revenues for energy efficiency measures, the

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[32] *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509 at 26 (2014), quoting *In Re Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶11 (emphasis added).
[33] *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509 at 26 (2014).
[34] OCC Application for Rehearing at pgs. 16-19; 2017 Order at pg. 18.
[35] OCC Application for Rehearing at pg. 19.

collection of which have been annually trued-up through the Energy Efficiency Rider ("EER"). Moreover, by operation of law, the Company was permitted to charge customers for lost distribution revenues in 2016. Thus, the 2016 Stipulation simply continued the existing EER Rider and acknowledged that, among other things, it would be populated with the 2016 lost distribution revenues (as extended by law) as well as future lost distribution revenues until incorporated into a distribution decoupling rider.[36] This truly was a rate adjustment mechanism akin to that approved in *River Gas*.

Taking OCC's draconian interpretation of retroactive ratemaking to its conclusion would bar utilities from updating or truing-up riders. This would not be an equitable outcome and would ultimately result in the Company retaining the over-collection of energy efficiency and lost distribution costs instead of refunding them to customers through the update to its tariffs as a result of the 2017 Order. The creation and implementation of rate adjustment mechanisms, such as for lost distribution revenue recovery, prevents the need for constant base rate cases, which are incredibly time consuming and expensive. Without such rate adjustment mechanisms, utilities, such as the Company, would be caught in a never-ending cycle of prohibitively costly rate cases – surely this cannot be what OCC intends. Accordingly, the 2017 Order appropriately found that the Company's authorization to collect lost distribution revenues beyond 2015 does not constitute retroactive ratemaking.

[36] 2016 Stipulation at p. 11.

F. **<u>Response to Assignment of Error #6: The 2017 Order is Reasonable Because the Company's Recovery of Lost Distribution Revenues is Aligned with the Interests of its Customers.</u>**

OCC appears to have no interest in balancing or aligning the interest of the utility and its customers as set forth in R.C. §4928.66(D). Rather, OCC seeks only to minimize the amount that customers pay at all costs, irrespective of the benefits that customers receive from the Company's continued commitment to operate robust energy efficiency programs and the savings customers receive when they take advantage of such programs to reduce their usage. Residential and non-residential customers directly benefit from energy efficiency and demand reduction programs because these programs encourage and promote energy savings – they provide incentives for lowering customer energy consumption and demand, which in turn will lower customer electric bills.[37] Recovery of lost distribution revenues makes the utility whole for reduced distribution sales resulting from its energy efficiency programs. No more, no less.

OCC provided no evidence in the proceeding that the Company's collection of lost distribution revenues will "result in a substantial increase to consumers' electric bills."[38] OCC ignores the fundamental reality that improved energy efficiency leads to savings for customers. OCC cannot have it both ways – it cannot argue that consumers should not be responsible for lost distribution revenues without also recognizing that improved energy efficiency will lead to reduced generation costs for consumers. Accordingly, the 2016 Stipulation approved by the Commission directly aligns the interests of both the Company and its customers.

[37] Teuscher Testimony at pg. 6.
[38] OCC Initial Brief at pg. 11.

III. Conclusion

The Commission's 2017 Order appropriately adopted the 2016 Stipulation without modification, and the evidence in the record demonstrates that the 2017 Order is reasonable and lawful. The Company should be made whole for the real sustained losses of distribution revenues resulting from successful and innovative energy efficiency programs. None of OCC's Assignments of Error are well-taken, and the Company respectfully requests that OCC's Application for Rehearing should be denied in total.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on November 6th, 2017.

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