BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Increase its Rates for Electric Distribution.	))))	Case No. 15-1830-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority.	))))	Case No. 15-1831-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 15-1832-EL-ATA

OBJECTIONS TO THE STAFF REPORT SUBMITTED BY THE KROGER CO.

I. INTRODUCTION

Nearly three years ago, on October 30, 2015, The Dayton Power and Light Company ("DP&L") filed a notice of intent to file an application to increase its electric distribution rates in its service area and requested a test period beginning June 1, 2015 and ending May 31, 2016, with a property valuation date certain of September 30, 2015.[1] By Entry dated November 18, 2015, the Public Utilities Commission of Ohio ("Commission") approved the requested time period and date certain, and granted DP&L waivers for the filing of certain Standard Filing Requirement documents.[2] Thereafter, on November 30, 2015, DP&L filed its application to increase its electric distribution rates with the Commission.[3] The Staff of the Commission

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1 Notice of The Dayton Power & Light Company's Intent to File an Application for an Increase in Rates (October 30, 2015).
2 Entry at 3 (November 18, 2015).
3 Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates at 1 (November 30, 2015) ("Application").

("Staff") filed its Staff Report of Investigation ("Staff Report") in the above-captioned proceeding on March 12, 2018.[4]

Pursuant to Section 4909.19, Ohio Revised Code, and Rule 4901-1-28, Ohio Administrative Code, The Kroger Co. ("Kroger") hereby respectfully submits its objections to the Staff Report. Kroger reserves the right to supplement or modify these objections in the event that Staff makes additional findings, conclusions, or recommendations with respect to the Staff Report and the supplement thereto. Kroger also reserves the right to respond to objections or other issues (either in support or opposition) raised by other parties in this proceeding.

II. OBJECTIONS

A. Not Including The Impact Of The Tax Reform Act In DP&L's Base Distribution Rates Is Unjust And Unreasonable.

On December 20, 2017, the United States Congress enacted the *Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018*, also known as the Tax Cuts and Jobs Act (the "Tax Reform Act").[5] Among other changes to federal tax law, the Tax Reform Act reduced the corporate income tax rate from 35% to 21%, thus significantly reducing DP&L's federal tax expense for regulatory purposes. By opening a Commission Investigation to address the implications of the Tax Reform Act, the Commission recognized that enactment of the Tax Reform Act must be addressed in rates charged to customers.[6] However, this generic docket proceeding does not obviate the need to reflect the direct impact of the Tax Reform Act on the revenue requirement determined in this proceeding. Notwithstanding the foregoing, the Staff Report "does not address any corporate tax

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[4] Staff Report (March 12, 2018).

[5] PL 115-97.

[6] See *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry (January 10, 2018).

rate changes as a result of the Tax Cuts and Jobs Act of 2017."[7] Therefore, Kroger objects to Staff's recommendation for a revenue increase for DP&L of between $23.2 million and $28.1 million,[8] which does not incorporate the federal tax law changes and is unjust and unreasonable.

Under well-established Ohio law, the Commission may not disregard a change in federal tax law when setting DP&L's distribution base rates in this proceeding. The Supreme Court of Ohio, in *East Ohio Gas Co. v. Public Utilities Commission* ("*East Ohio Gas*"), has held that it is the Commission's duty to consider changes in tax laws that occur after the test period of a pending rate case.[9] Since the Supreme Court of Ohio's decision in *East Ohio Gas*, the Commission has held that an approach to a pending rate case that does not fully account for the new tax rates "misses the point" because, in a rate case, "rates are being set prospectively."[10]

Although Staff states that the Staff Report is subject to the outcome of the investigation in Case No. 18-47-AU-COI,[11] accounting for the Tax Reform Act in this proceeding would better reflect sound ratemaking principles inasmuch as it would ensure that customers timely receive the benefits of the Tax Reform Act to which they are entitled. It is possible that this proceeding will be concluded prior to the resolution of the Commission's investigation into the impacts of the Tax Reform Act, and, as Kroger noted in its Reply Comments filed in the Commission's tax investigation proceeding, a utility that has its rates set based upon an outdated federal tax law could claim that Ohio law prevents it from implementing the new tax rates under the Tax Reform Act until its next rate case under the guise of retroactive ratemaking or the as-

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7 Staff Report at 2.
8 Staff Report at 6.
9 See *East Ohio Gas Co. v. Public Utilities Commission*, 133 Ohio St. 212 (1938).
10 *In re Application of the Toledo Edison Company for an Increase in Rates for Electric Service*, Case No. 86-2026-EL-AIR, Entry on Rehearing (December 16, 1987).
11 Staff Report at 2.

filed rate doctrine.[12]

Kroger recognizes that while DP&L was not paying the reduced or modified taxes under the Tax Reform Act during the test period that preceded Staff's investigation, it will be paying the reduced or modified taxes under the Tax Reform Act when the new distribution rates go into effect. As such, the Commission should not approve any rates or an increase in rates based on a revenue requirement that does not fully account for the Tax Reform Act. Kroger objects to the Staff Report inasmuch as it failed to require that DP&L's distribution rates incorporate the modifications imposed by the Tax Reform Act. DP&L saw a 40% reduction in its federal corporate income tax as a result of the Tax Reform Act, which Staff should have accounted for in its Staff Report that recommends a revenue increase.

B. The Recommendations In The Staff Report Regarding The Distribution Investment Rider Are Unjust And Unreasonable.

Kroger objects to the establishment of a Distribution Investment Rider ("DIR") rate upon approval of the proposed distribution rate increase. DP&L requested this rider in both its ESP III and this proceeding, which was established in the ESP III case and set at zero.[13] In the ESP III case, the Commission determined that recovery of the revenue requirement through the DIR would be determined in the distribution rate case proceeding and that all other issues related to the DIR would also be resolved in this proceeding.[14] Kroger objects to several of Staff's recommendations regarding the DIR. Kroger objects to the determination that DP&L be permitted to immediately collect revenue from customers under the DIR. While Kroger favors cost caps for distribution riders, Kroger objects to the level of the revenue caps set by Staff in its

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12 See *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Kroger's Reply Comments at 7-8 (March 7, 2018).

13 ESP III Order at 7.

14 Id.

Staff Report as Staff did not take into consideration the reduction in the federal income tax rates when establishing the revenue caps. Additionally, while Kroger supports the sunset provisions of the DIR, Kroger objects to the date by which DP&L must file its next distribution rate case application. Kroger also objects to the lack of customer protections regarding audits of the DIR.

First, Kroger objects to the immediate collection of any funds under the DIR. Staff's recommendation to implement the DIR *in this proceeding* through October 31, 2023, or November 1, 2022 if a rate case application is not filed by October 31, 2022, is inconsistent with the statutory framework governing an application to increase electric distribution rates pursuant to Section 4909.18, Revised Code, and the fixation of those rates.[15] The purpose of a distribution rate case is to set base rates paid by customers going forward. Under Section 4909.18, Revised Code, when an electric utility submits an application to increase rates, it must submit a "complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application." Thus, DP&L's expenses included in its DIR proposal should already be incorporated in the base rates it will collect after this case is resolved. It is therefore unnecessary to impose additional costs on DP&L customers through the DIR at this time.

Second, the revenue caps recommended by Staff are excessive. As an initial matter, like the rest of the Staff Report, it appears that the DIR caps do not account for the Tax Reform Act, as discussed above. Staff is proposing that DP&L be allowed to collect revenue from customers without considering the fact that DP&L is now paying a lower tax rate than the one used to calculate the revenue caps in the first place. Moreover, Staff also recommends a rate of return that, as discussed below, is not calculated by using DP&L's actual cost of debt but rather a

[15] See R.C. 4909.15.

hypothetical figure. Staff should have accounted for these realities and advocated for lower caps as less revenue is needed to recover the same expenditures.

Third, Kroger objects to Staff's recommendation regarding future audits of the DIR and the failure to recommend incorporating language regarding refunds. Staff recommends that the DIR be subjected to an annual compliance audit by an independent auditor.[16] While Kroger agrees that any costs collected under the DIR should be audited, Kroger objects that Staff did not include a recommendation that the tariffs for the DIR include language that the monies collected be subject to refund in the event that the independent auditor or Commission determines that DP&L improperly collected charges under the DIR. In the case *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, the Supreme Court of Ohio held that customers' monies could not be refunded upon an auditor's determination that a utility improperly collected charges *unless* the rider under which the charges were collected provides for refunds to customers. Since that decision, other utilities in the State have filed updates to their tariffs to include language making the charges collected under the tariffs subject to refund.[17] The Commission should require DP&L to include language subjecting charges over-collected under the DIR to refunds. This is the only way to ensure that the annual audit Staff proposes can meaningfully protect customers, especially given that Staff recommends that DP&L's annual filings under the DIR be automatically approved.[18]

Fourth, Kroger objects to Staff's proposed term of the DIR. Staff proposes that DP&L be permitted to collect charges from customers, in increasing amounts, under the DIR until October

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[16] Staff Report at 9.

[17] See, e.g., *In the Matter of the Application of the Tariff Update on Rider DCR*, Case No. 17-1920-EL-RDR, Tariff Update (April 2, 2018) (adding language that FirstEnergy's Delivery Capital Investment Rider is subject to refunds); *In the Matter of the Reports Enclosing Quarterly Rider DCI Schedules and tariffs of Duke Energy Ohio, Inc.*, et al., Case Nos. 17-2088-EL-RDR, et al., Finding and Order at 2 (March 28, 2018) (approving Duke's update to its Deliver Capital Investment Rider which made that rider subject to reconciliation, including refunds to customers).

[18] Staff Report at 9.

31, 2023, so long as DP&L meets its reliability commitments and files a new distribution rate case application by October 31, 2022.[19] However, the Commission should consider the possibility that at some point during the term of the DIR, collection of these costs from customers might no longer be necessary to meet reliability commitments. In the event that this happens, the Commission should provide a procedure through which the DIR could be terminated prior to the sunset date recommended by Staff.

Finally, Kroger objects to requiring DP&L to file a new rate case application by October 31, 2022 as that is an insufficient period of time to resolve the matter prior to the expiration of the ESP. It has taken approximately 2.5 years to review the current DP&L rate case application. Given the expiration of the ESP period, Kroger is concerned that requiring DP&L to file a distribution rate case around the same time that DP&L will need to file its next ESP/MRO filing will cause the proceedings to occur simultaneously, which will impose an unreasonable burden on the parties.

With regard to the DIR, Kroger does, however, support Staff's recommendation that revenue caps for the DIR be set to zero following any periods of noncompliance by DP&L and its position that the DIR should sunset one year early if DP&L does not timely file a new distribution rate case.[20]

C. The Revenue Requirement Recommendation Contained In The Staff Report Is Overstated Inasmuch As It Does Not Take Into Account The Substantial Risk Mitigation Granted To DP&L Through Commission-Approved Riders.

Kroger objects to Staff's recommendation for an unjust and unreasonable revenue increase for DP&L of between $23.2 million and $28.1 million.[21] This recommendation equates

19 Id. at 9-10.
20 Id at 10.
21 Staff Report at 6.

to an increase of between 10.58% and 12.8% over the test year operating revenue.[22] Kroger objects to Staff's recommended return on equity between 9.59% to 10.61% and the rate of return between 7.33% and 7.82%[23] because Staff failed to account for the reduced risk to DP&L as the provider of electric distribution service within its service territory and as the recipient of extensive, guaranteed recovery of costs through the numerous non-bypassable riders that it charges to customers.

DP&L is the exclusive provider of electric distribution service within its service territory. Moreover, in Case Nos. 16-395-EL-SSO, et al., DP&L's most recent ESP proceeding, the Commission approved a number of riders that guarantee DP&L full and timely recovery for many of its costs. For instance, the Commission approved a Regulatory Compliance Rider ("RCR") to recover costs for its Consumer Education Campaign, its Retail Settlement System, its Green Pricing Program, Generation Separation, and Bill Format Redesign,[24] a placeholder Storm Cost Recovery Rider ("SCRR") under which DP&L can apply to recover costs associated with major storms,[25] an Uncollectible Rider to recover uncollectible expense,[26] a Distribution Modernization Rider ("DMR") that collects $105 million in revenue per year for the purpose of paying interest on debt, making discretionary debt prepayments, and positioning DP&L to make capital investments to modernize and/or maintain transmission and distribution infrastructure (with those revenues excluded from the Significantly Excessive Earnings Test),[27] and the DIR,

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22 Id.

23 Id. at 18.

24 See *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, et al.*, Case No. 16-395-EL-SSO, et al., Opinion and Order at 12 (October 20, 2017) (DP&L ESP III Order).

25 Id. at 13.

26 Id. at 14.

27 Id. at 6-7.

which the Commission approved to be initially set at zero and through which Staff now proposes to allow DP&L to collect over $175 million from customers by 2023.[28]

These Commission-approved riders effectively eliminate DP&L's risk of recovery for many costs associated with its distribution system by ensuring that the Company is able to recover its dollar-for-dollar costs on a timely basis. The substantial risk mitigation that these riders provide obviates the need for the Commission to adopt the excessive rate of return that Staff recommends. DP&L, having already secured guaranteed recovery from customers for many of its costs, does not also require a 7.33% to 7.82% rate of return that results in a $23.2 million to $28.1 million increase in distribution rates.

D. The Allocation Of The Revenue Requirement Among Customer Classes Contained In The Staff Report Does Not Go Far Enough To Reflect Actual Cost Of Service.

Kroger recognizes that the allocation recommendations for the revenue requirement among customer classes set forth in the Staff Report are a step in the right direction as compared to DP&L's proposed allocation. However, Kroger objects to the allocation recommendation in the Staff Report inasmuch as it does not go far enough. A closer alignment between class cost of service and revenue allocation would be more equitable and fair. For example, based upon DP&L's cost-of-service study, the Secondary class should be getting only a 21% increase at DP&L's requested revenue requirement increase.[29] However, DP&L's proposed allocation would result in a nearly 31% increase to the Secondary class.[30] While Staff's recommended allocation to the Secondary class at nearly 26% is better than DP&L's proposed 31% allocation to the Secondary class, it is still not close enough to the actual cost to serve the Secondary class. In sum, in allocating revenue requirement among classes, it is important to move toward the goal

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[28] Staff Report at 9; DP&L ESP III Order at 7.
[29] See Direct Testimony of Kevin C. Higgins at 12 (April 11, 2018).
[30] Id. at 11.

of aligning rates with cost responsibility in order to achieve a fair and equitable outcome for all customers.

E. The Staff Report Improperly Relies Upon A Hypothetical, Instead Of The Actual Embedded Cost Of Debt, In Violation Of Ohio Law In Calculating A Fair And Reasonable Rate Of Return.

Kroger objects to Staff's calculation of DP&L's rate of return. In its Application, DP&L submitted a hypothetical cost of debt, stating in testimony that the actual cost of debt has been distorted due to other factors.[31] Rather than determining an actual embedded cost of debt for DP&L as required by Section 4909.15, Revised Code,[32] Staff recommended adopting the hypothetical cost of debt submitted by DP&L's witness, Jeffrey MacKay.[33] In calculating a fair and reasonable rate of return, the Commission, Staff, and DP&L should be using the actual embedded cost of debt as set forth in Section 4909.15(E)(2)(a), Revised Code, and not a hypothetical cost of debt based on the average cost of debt in other domestic electric utility rate cases over a certain time period.[34] Staff could have conducted its own separate analysis of an appropriate cost of debt rather than simply comparing the number submitted by DP&L to other utilities and accepting DP&L's number because it was within a certain margin of error.[35]

The use of a hypothetical cost of debt violates the requirement of Section 4909.15, Revised Code. As such, Kroger objects both to the use of a hypothetical cost of debt, and, even assuming that a hypothetical number could be used (which it cannot), the deference that Staff afforded to DP&L's calculation.

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31 See Testimony of Jeffrey K. MacKay at 10 (November 30, 2015).
32 R.C. 4909.15(E)(2)(a)("Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility").
33 Staff Report at 18.
34 Id.
35 Id.

F. The Staff Report Should Have Recommended The Withdrawal Of Certain Riders Included In DP&L's Application.

1. Storm Cost Recovery Rider ("SCRR")

Kroger objects to the Staff's recommendation to include the SCRR in this case. Kroger notes that this rider was approved as a placeholder in DP&L's ESP III case, Case Nos. 16-395-EL-SSO, et al.[36] In approving the SCRR, the Commission directed DP&L to file a future application to seek recovery of costs of major storms.[37] The Commission specifically stated that the SCRR would be for the recovery of costs *incremental to base rates*.[38] DP&L filed an application in a separate proceeding to recover costs through this rider on March 30, 2018.[39] Kroger presumes that the issues surrounding the recovery of those costs will be determined in that separate proceeding. Therefore, given that the SCRR has already been approved in the ESP III proceeding, is currently being litigated in a separate case, and is for costs incremental to base rates, DP&L's request to establish the SCRR should be withdrawn from this proceeding.

As Kroger has explained previously, Kroger objects to single issue ratemaking. Kroger believes that the costs associated with storms affecting DP&L's distribution system are sufficiently embedded in the base rates DP&L will recover in this case. Kroger believes that storm-related costs of electric utilities should generally be included in distribution base rates, along with the rest of the utility's costs, with the allowance for emergency rate cases in the event of storms that cause an extraordinary amount of damage and expense. As such, Kroger objects to the inclusion of the SCRR in the Staff Report and recommends that it be withdrawn from this distribution rate case.

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36 See DP&L ESP III Order at 13.
37 Id.
38 Id.
39 See *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 18-381-EL-RDR, Application (March 30, 2018).

2. Regulatory Compliance Rider ("RCR")

Kroger objects to the Staff Report's failure to recommend that the RCR be withdrawn from this case. As Staff notes in its Report, the Commission already addressed the RCR in the ESP III case.[40] Given that the RCR was addressed as part of the ESP III case, it should be affirmatively withdrawn from DP&L's Application in this case. Moreover, DP&L cannot show that it actually incurred costs associated with regulatory compliance during the test period, rendering this rider inappropriate for inclusion in a distribution rate case under Section 4909.18, Revised Code.

3. Uncollectible Rider

Kroger objects to the Staff Report's failure to recommend that the Uncollectible Rider be withdrawn from this case. As Staff notes in its Report, the Commission already approved the establishment of the Uncollectible Rider in the ESP III case.[41] As with the RCR, because the Uncollectible Rider was addressed in the ESP III case, it should be affirmatively withdrawn from DP&L's Application in this case.

III. CONCLUSION

Kroger respectfully submits these Objections to the Staff Report in this proceeding. The objections and accompanying testimony set forth the major issues in this case.

[40] See Staff Report at 26; ESP III Order at 12.
[41] See Staff Report at 26; ESP III Order at 14.

Respectfully submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on April 11, 2018.

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)

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