

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the) Case No. 18-1875-EL-GRD
Application of Dayton Power and Light)
Company for Approval of Its Plan to)
Modernize Its Distribution Grid.)
)
)

In the Matter of the Application of the Dayton) Case No. 18-1876-EL-WVR
Power and Light Company for Approval of A)
Limited Waiver of Ohio Adm. Code 4901:1-)
18-06(A)(2).)
)
)

In the Matter of the Application of the Dayton) Case No. 18-1877-EL-AAM
Power and Light Company for Approval of)
Certain Accounting Methods.)
)
)

In the Matter of the Application of the Dayton) Case No. 19-1121-EL-UNC
Power and Light Company for Administration)
of the Significantly Excessive Earnings Test)
under R.C. 4928.143(F) and Ohio Adm. Code)
4901:1- 35-10 for 2018.)
)
)

In the Matter of the Application of the Dayton) Case No. 20-680-EL-UNC
Power and Light Company for A Finding)
That Its Current Electric Security Plan Passes)
the Significantly Excessive Earnings Test and)
More Favorable in the Aggregate Test in R.C.)
4928.143(E).)
)
)

In the Matter of the Application of the Dayton) Case No. 20-1041-EL-UNC
Power and Light Company for Administration)
of the Significantly Excessive Earnings Test)
under R.C. 4928.143(F) and Ohio Adm. Code)
4901:1- 35-10 for 2019.)
)

INITIAL POST-HEARING BRIEF OF THE KROGER CO.

I. INTRODUCTION

On October 23, 2020, The Dayton Power & Light Company (DP&L), with the support of the Staff of the Public Utilities Commission of Ohio (Commission) (Staff), and 18 other Signatory Parties, including The Kroger Co. (Kroger),¹ filed a Stipulation and Recommendation (Stipulation) resolving multiple complex issues in the above-referenced consolidated proceedings.² Indeed, only one party – the Office of the Ohio Consumers’ Counsel (OCC) – opposed and objected to the Stipulation. However, based upon the record before this Commission and in accordance with well-established precedent, the Stipulation satisfies the criteria established by the Commission when evaluating the reasonableness of a stipulation. Specifically, the 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 Stipulation is just and reasonable, and accordingly, should be approved.

For the reasons discussed herein, Kroger respectfully requests that the Commission overrule OCC’s objections and adopt and approve the proposed Stipulation filed on October 23, 2020 in its entirety.

II. PROCEDURAL AND FACTUAL BACKGROUND

The Stipulation resolves several cases relating to DP&L to the benefit of customers. On December 21, 2018, DP&L filed an application requesting Commission approval of its proposed

¹ The Signatory Parties to the Stipulation are as follows: Commission Staff; DP&L; City of Dayton; Industrial Energy Users-Ohio; Ohio Energy Group; Ohio Manufacturers' Association Energy Group; the Ohio Hospital Association; Ohio Partners for Affordable Energy; University of Dayton; Honda of America Mfg., Inc.; Kroger; Interstate Gas Supply, Inc. and IGS Solar, LLC; Sierra Club; Ohio Environmental Council; Environmental Law & Policy Center; Natural Resources Defense Council; Mission:Data Coalition; Smart Thermostat Coalition; ChargePoint, Inc.; and Armada Power, LLC.

² See Stipulating Parties Exhibit 1, Stipulation and Recommendation (Oct. 23, 2020).

grid modernization plan (Smart Grid Plan).³ In May 2019, DP&L filed an application in Case No. 19-1121-EL-UNC (2018 SEET Case), seeking a finding from the Commission that DP&L did not have significantly excessive earnings under R.C. 4928.143(F) for calendar year 2018.⁴ In April 2020, DP&L filed an application in Case No. 20-680-EL-UNC (Quadrennial SEET Case) seeking a determination by the Commission that DP&L's current electric security plan (ESP) passes the prospective significantly excessive earnings test (SEET) and the more favorable in the aggregate (MFA) test.⁵ Lastly, in May 2020, DP&L filed an application in Case No. 20-1041-EL-UNC (2019 SEET Case) seeking a finding from the Commission that DP&L did not have significantly excessive earnings under R.C. 4928.143(F) for calendar year 2019.⁶

In an effort to resolve all of the above-captioned cases, DP&L and the intervening parties participated in eight settlement conferences.⁷ All intervening parties participated in, or had the opportunity to participate in, those negotiations, including OCC.⁸ Despite those efforts, OCC ultimately did not reach an agreement with DP&L and the other Signatory Parties.⁹ Nonetheless, on October 23, 2020, DP&L, Staff, and eighteen other Signatory Parties filed the Stipulation.

³ See OCC Exhibit 74, *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid*, Case Nos. 18-1875-EL-GRD, *et al.*, Application (Dec. 21, 2018) (Smart Grid Case).

⁴ See OCC Exhibit 18, *In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2018*, Case No. 19-1121-EL-UNC, Application (May 15, 2019) (2018 SEET Case).

⁵ See *In the Matter of the Application of the Dayton Power and Light Company for A Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC, Application (Apr. 1, 2020) (Quadrennial SEET Case).

⁶ See OCC Exhibit 17, *In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2019*, Case No. 20-1041-EL-UNC, Application (May 15, 2020) (2019 SEET Case).

⁷ See DP&L Exhibit 4, Testimony of Sharon R. Schroder in Support of the Stipulation and Recommendation at 15 (Nov. 30, 2020) (Schroder Testimony).

⁸ *Id.* at 13.

⁹ *Id.*

The Stipulation approved DP&L's Smart Grid Plan with major modifications, which benefit customers and the public interest. For example, the Stipulation reduced the overall cost of the plan to customers, shortened the first phase of the plan from ten years¹⁰ to four years, and limits the request here for approval of only phase 1 (SGP Phase I).¹¹ In doing so, the Stipulation reduced the overall cost of the plan in DP&L's application from \$642 million¹² to \$267 million for capital investments and associated operation and maintenance expenses, which DP&L will collect from customers through its Infrastructure Investment Rider (IIR).¹³ Clearly, this represented a major cost reduction as DP&L originally projected a total 20-year cost of \$867 million¹⁴ and a 10-year revenue requirement of \$642 million¹⁵ for its Smart Grid Plan. DP&L must file further applications for approval of any additional phases, at which time any party can oppose or object to such applications.¹⁶ The Stipulation further provides that if DP&L does not file a new distribution rate case by January 1, 2025, the IIR will be set to zero.¹⁷ SGP Phase I is also subject to annual audits.¹⁸

Additionally, the Stipulation requires DP&L to file its application for a new ESP by October 1, 2023.¹⁹ And, significantly, DP&L agreed in the Stipulation that in its new ESP

¹⁰ OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018); OCC Exhibit 74, Smart Grid Case, Application at ¶ 21.

¹¹ Stipulating Parties Exhibit 1, Stipulation at ¶¶ 1-2.

¹² OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018); OCC Exhibit 74, Smart Grid Case, Application at ¶ 21.

¹³ Stipulating Parties Exhibit 1, Stipulation at ¶¶ 2-3.

¹⁴ See *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid*, Case Nos. 18-1875-EL-GRD, *et al.*, Application (Dec. 21, 2018) (Smart Grid Case).

¹⁵ OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018).

¹⁶ See Stipulating Parties Exhibit 1, Stipulation at ¶ 2.

¹⁷ *Id.* at ¶ 3(c).

¹⁸ *Id.* at ¶ 5.

¹⁹ *Id.* at ¶ 20(a).

application, it “shall not seek to implement any nonbypassable charge to customers related to provider of last resort risks, stability, financial integrity, or any other charge that is substantially calculated based on the credit ratings, debt, or financial performance of any parent or affiliated company of DP&L.”²⁰ This will ensure the elimination of the nonbypassable rate stabilization charge (RSC) and any similar successor charges. The RSC originated in 2009, in DP&L’s original ESP (ESP I).²¹ The Commission reinstated the RSC in 2019,²² after DP&L withdrew its third ESP (ESP III), following a Commission decision removing the distribution modernization rider (DMR) from ESP III.²³

Moreover, DP&L has committed to offer an opt-in, time-of-use rate plan on a pilot basis during SGP Phase I.²⁴ DP&L shareholders will fund \$450,000 annually for a smart thermostat marketing and rebate program,²⁵ and \$450,000 in 2021 and 2022 for Ohio Partners for Affordable Energy (OPAE) to provide weatherization for low-income customers, neither of which is to be recovered through the IIR or other rates charged to customers.²⁶ In addition, DP&L shareholders will fund economic development grants and incentives to commercial and industrial customers and healthcare providers, again without recovery from customers.²⁷

²⁰ *Id.*

²¹ *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Opinion and Order at 3, 5, 13 (June 24, 2009).

²² DP&L Exhibit 12, *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶¶ 36-42 (Dec. 18, 2019).

²³ *Id.* at ¶¶ 8-9; *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395, et al., Supplemental Opinion and Order at ¶ 110 (Nov. 21, 2019).

²⁴ Stipulating Parties Exhibit 1, Stipulation at ¶ 6(e).

²⁵ *Id.* at ¶ 9.

²⁶ *Id.* at ¶ 12(a).

²⁷ *Id.* at ¶ 15.

Finally, within six months of Stipulation approval, DP&L will begin investing in a new Customer Information System (CIS),²⁸ which will include no-cost data access to customers and to third parties.²⁹ DP&L has agreed as part of the Stipulation not to recover capital or incremental operation and maintenance costs associated with the CIS until its next base distribution rate case.³⁰ DP&L can defer certain expenses, capped at \$8.8 million, for future recovery, subject to a reasonableness and prudence review.³¹

In exchange for obtaining these many benefits for customers, the Signatory Parties agreed to recommend that the Commission approve DP&L's applications in the 2018 SEET Case and the 2019 SEET Case conditioned on the Commission's approval of this Stipulation without modification.³² Additionally, the Signatory Parties agreed to recommend the Commission accepts DP&L's testimony and application in the Quadrennial SEET Case, and agreed that the Stipulation satisfies the requirements of R.C. 4928.143(E).³³

Pursuant to an Attorney Examiner Entry dated October 27, 2020, an evidentiary hearing commenced on January 11, 2021 and concluded on January 15, 2021. Kroger participated in that evidentiary hearing regarding the Stipulation as an intervening party.

²⁸ *Id.* at ¶ 10.

²⁹ *Id.* at ¶ 11.

³⁰ *Id.* at ¶ 10(g).

³¹ *Id.*

³² *Id.* at ¶ 19(c)(iii).

³³ *Id.* at ¶ 19(a), (b).

III. STANDARD OF REVIEW

Ohio Adm.Code 4901-1-30 permits parties to enter into stipulations, subject to review for approval by the Commission. In numerous cases, the Commission has adopted the following criteria to evaluate whether a stipulation is reasonable and warrants acceptance:³⁴

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?³⁵

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

IV. LAW AND ARGUMENT

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

It is undisputed that the parties to the Stipulation are capable and knowledgeable. Nonetheless, through testimony, OCC opposes the Stipulation by complaining that the Stipulation fails to include diverse interest groups,³⁶ and argues that the Signatory Parties did not engage in serious bargaining.³⁷ OCC, however, is wrong.

As an initial matter, “diversity” is not a requirement of the three-prong test. As the Commission has previously stated, “[t]he three-prong test utilized by the Commission and

³⁴ See *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-26 (1992).

³⁵ 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).

³⁶ See OCC Exhibit 2, Supplemental Direct Testimony of Matthew I. Kahal at 15-17 (Dec. 17, 2020).

³⁷ See OCC Exhibit 3, Direct Testimony of Edward W. Hill, Ph.D. at 21 (Dec. 17, 2020) (Hill Testimony).

recognized by the Ohio Supreme Court does not incorporate [a] diversity of interest component . . .”³⁸ Further, “[t]he Commission has repeatedly determined that [it] will not require any single party . . . to agree to a stipulation, in order to meet the first prong of the three-prong test.”³⁹ Indeed, “it is the quality of the parties that is determinative, not quantity.”⁴⁰

Here, the record evidence establishes that the Signatory Parties held numerous bargaining sessions.⁴¹ All of the Signatory Parties were represented by experienced counsel.⁴² The lengthy negotiations were conducted at arm’s length.⁴³ All parties who had timely intervened in the proceedings participated in the negotiation process, and DP&L invited comments and revisions from the intervening parties.⁴⁴ The fact that a single party, OCC, chose not to join the Stipulation has no bearing on whether the Stipulation should be approved by the Commission.

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

The Stipulation is supported by parties representing a wide range of interests, including the interests of DP&L, the largest municipality in DP&L’s service territory (which represents itself and its residents), a representative of residential low-income customers, three state-wide organizations of large industrial customers, one large industrial customer, one of the largest supermarket chains in the country, a state-wide organization representing hospitals in DP&L’s service territory, a large, local university, four environmental groups, a provider of competitive

³⁸ *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).

³⁹ *Id.*

⁴⁰ *Id.*, Concurring Opinion of Commissioner Haque at 2 (emphasis in original).

⁴¹ DP&L Exhibit 4, Schroder Testimony at 13-14.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

retail electric service, and four other parties that do business and represent interests in the smart grid field. In addition, the Commission's Staff signed the Stipulation.⁴⁵

Clearly, the Stipulation represents a wide range of interests.

Importantly, contrary to OCC's assertions, the Signatory Parties do not represent a redistributive coalition.⁴⁶ When asserting that the parties did not engage in serious bargaining, OCC's witness Dr. Edward Hill describes a redistributive coalition as "a relatively small group that uses political or regulatory processes to secure benefits that cannot be earned in the competitive market."⁴⁷ These "benefits to the coalition members are large (such as for DP&L) and concentrated, [while] the costs are paid for by the entire population (for example, hundreds of thousands or millions of utility customers)."⁴⁸ In contrast to the small, homogeneous, represented group of parties, there is a large, heterogeneous class of unrepresented parties.⁴⁹

The Signatory Parties do not match this description for several reasons. First, benefits and charges associated with distribution and transmission are not secured in the open market in any situation.⁵⁰

Second, the Signatory Parties secured large concessions from DP&L which will result in benefits to all customers, whether or not they participated in the above-captioned cases. For example, the rate impact from eliminating the RSC and from the reduced grid modernization costs will benefit not just Kroger, but all DP&L customers.⁵¹ Dr. Hill takes particular issue with the fact that Kroger alone participated in the Stipulation, alleging that "the state of Ohio is

⁴⁵ DP&L Exhibit 4, Schroder Testimony at 13.

⁴⁶ See generally OCC Exhibit 3, Hill Testimony.

⁴⁷ OCC Exhibit 3, Hill Testimony at 6.

⁴⁸ *Id.* at 8.

⁴⁹ See OCC Exhibit 3, Hill Testimony at 7.

⁵⁰ Tr. Vol. IV at 652-53 (Cross Examination of Hill).

⁵¹ See Tr. Vol. IV at 669 (Cross Examination of Hill).

showing preference for one grocery store over another”⁵² that results in “unequal treatment being given to competitors or to similar organizations.”⁵³ However, in reality, the positive rate impacts of eliminating the RSC and lowering the costs of SGP Phase I will have an outsized benefit on Kroger’s competitors, as they will see the same positive rate impact as Kroger, but did not have to commit any time or resources to secure those lower rates.

Third, as discussed earlier, the Signatory Parties represent the diverse interests of a large, heterogeneous group of DP&L customers across a wide range of customer classes. Witness Schroder highlights the diverse interests of the parties.⁵⁴

Lastly, Dr. Hill’s expansive definition of a redistributive coalition is flawed in principle. Under his definition, no stipulation—even one that was totally uncontested—would ever satisfy the test for approval. Dr. Hill believes that burden should be on “the [Commission] to ensure equity of access.”⁵⁵ However, Dr. Hill admits that neither the Commission nor DP&L specifically invited Kroger to participate in the above-captioned cases, and that other large grocers that regularly intervene chose not to participate.⁵⁶ Simply put, the record is clear that: (i) the Commission did not single-out Kroger’s participation; (ii) Dr. Hill cannot identify any parties that were denied intervention in any of the above-captioned cases;⁵⁷ and (iii) DP&L invited all intervening parties to participate in settlement negotiations.⁵⁸ Thus, there is nothing more the Commission could have reasonably done to satisfy Dr. Hill’s purported equity of access

⁵² See OCC Exhibit 3, Hill Testimony at 13; Tr. Vol. IV at 672-73 (Cross Examination of Hill).

⁵³ *Id.* at 664.

⁵⁴ DP&L Exhibit 4, Schroder Testimony at 13.

⁵⁵ *Id.* at 677.

⁵⁶ Tr. Vol. IV at 673-75 (Cross Examination of Hill) (“I have no idea why any other grocery store did not participate in the proceedings.”).

⁵⁷ Tr. Vol. IV at 595 (Cross Examination of Hill).

⁵⁸ DP&L Exhibit 4, Schroder Testimony at 13-14.

standard. Unless the Commission actively solicited participation from any potentially interested party, it is unlikely more parties would participate. Of course, doing so would prove laborious and expensive, and would result in longer cases, overwhelmed dockets, and higher costs to participate.

In short, with this wide array of diverse interests being represented and the sheer number of Signatory Parties supporting the Stipulation, the Stipulation has both quality and quantity support. Accordingly, the Stipulation satisfies the first prong of the three-prong test.

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

As the Commission has affirmed, “the second part of the test specifically requires that [it] evaluate the settlement as a package.”⁵⁹ In this regard, the Commission “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.”⁶⁰

DP&L witness Sharon Schroder testified in detail as to the terms and concessions contained in the Stipulation.⁶¹ For example, the Stipulation secures the following benefits for customers:

1. The Stipulation provides for the elimination of the RSC. DP&L agreed to file an application for ESP IV by 2023, that does not contain any nonbypassable charge to customers related to provider of last resort (POLR) risks, financial stability or integrity, or any other charge calculated based on credit ratings or performance of

⁵⁹ *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).

⁶⁰ *Id.* at 77-78 (internal citations omitted).

⁶¹ *See* DP&L Exhibit 4, Schroder Testimony at 15-32.

any parent or affiliate of DP&L.⁶² This will eliminate the RSC, as well as potential replacement charges.⁶³

2. The Stipulation makes DP&L's grid modernization proposal more favorable to customers than as originally proposed in several ways:
 - a. It lowers the overall cost of grid modernization. Originally, DP&L applied for approval of grid modernization with a total 20-year cost of \$867 million⁶⁴ and a 10-year revenue requirement of \$643 million.⁶⁵ However, the Stipulation caps "[the] total amount that DP&L may spend on SGP Phase 1 capital investments and operational and maintenance expenses, collectively...at \$267,600,000."⁶⁶ Additionally, DP&L will offset the amount to be recovered under the IIR by the amount of operational benefits.⁶⁷
 - b. The Stipulation specifies that recovery under the IIR will end unless DP&L files a new base rate case by January 1, 2025.⁶⁸
 - c. The Stipulation breaks the originally-proposed ten-year grid modernization plan into smaller periods. SGP Phase I shall be capped at four years.⁶⁹ If DP&L seeks to implement grid modernization beyond those four years, it must submit a new application subject to future approval, which the Signatory Parties may oppose.⁷⁰
3. The Stipulation requires that within six months of approval, DP&L will be investing in a new Customer Information System (CIS).⁷¹ The CIS will include no-cost data access for customers and third parties.⁷² Costs of the CIS are not recoverable under the

⁶² Stipulating Parties Exhibit 1, Stipulation at ¶ 20(a).

⁶³ See Tr. Vol. V at 914 (Cross Examination of Duann); Tr. Vol. IV at 630 (Cross Examination of Hill).

⁶⁴ See OCC Exhibit 74, Smart Grid Case, Application at ¶ 21.

⁶⁵ OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018).

⁶⁶ Stipulating Parties Exhibit 1, Stipulation at ¶ 2.

⁶⁷ *Id.* at ¶ 3(b) ("[Recovery] of its capital investments and expenses through the IIR shall be offset by the estimated operational benefits that the parties agree DP&L will realize as a result of DP&L's SGP Phase 1 expenditures.").

⁶⁸ *Id.* at ¶ 3(c).

⁶⁹ *Id.* at ¶ 2 ("SGP Phase 1 shall be four years from the date of the Commission's Order approving this Stipulation and shall be limited to the projects as set forth in Exhibit 1.").

⁷⁰ *Id.* at ¶ 2.

⁷¹ *Id.* at ¶ 10.

⁷² Stipulating Parties Exhibit 1, Stipulation at ¶¶ 11(a), (b).

IIR. DP&L may defer prudently incurred capital investment and operation and maintenance expenses associated with the CIS to a future rate case.⁷³ However, this deferral is capped at \$8.8 million and is subject to prudence review.⁷⁴

4. DP&L agrees to implement a shareholder funded smart thermostat program, with at least 75% of funds reserved for customer rebates.⁷⁵
5. DP&L will propose a time-of-use rate pilot program, which DP&L shall offer on an opt-in basis.⁷⁶
6. DP&L agrees to provide \$900,000 in shareholder funding for Ohio Partners for Affordable Energy (OPAE) to provide weatherization and associated administrative costs for low and moderate-income electric customers.⁷⁷
7. DP&L will propose a shareholder-funded pilot program to install smart water heater controllers to percentage of income payment plan customers.⁷⁸
8. DP&L will provide \$200,000 annually in shareholder dollars to assist the City of Dayton in providing economic development programs and essential city services to residents.⁷⁹
9. In order to assist Ohio businesses and healthcare providers with their expenses so that they are better able to respond to financial consequences of COVID-19, DP&L will provide several different economic development incentives and grants to qualifying healthcare and commercial and industrial customers.⁸⁰

In addition to the foregoing benefits in the Stipulation, DP&L explained the benefits to customers and the public interest from the Stipulation include allowing DP&L to implement

⁷³ *Id.* at ¶ 11(g).

⁷⁴ *Id.*

⁷⁵ *Id.* at ¶ 9.

⁷⁶ *Id.* at ¶ 6(e).

⁷⁷ *Id.* at ¶ 12(a).

⁷⁸ *Id.* at ¶ 12(c).

⁷⁹ *Id.* at ¶ 13(a)(v).

⁸⁰ *Id.* at ¶ 15.

smart grid technology in its service territory, and ensuring that DP&L is able to maintain the financial integrity required to provide safe and reliable service to DP&L's customers.⁸¹ Most of these benefits would not have occurred absent the Stipulation. Specifically, the economic development commitments, competitive market enhancements, and funding for low-income residential customers were not part of DP&L's as-filed applications.⁸²

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

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

As set forth above, the third prong of the Commission's legal inquiry regarding the reasonableness of a settlement relates to whether or not the Stipulation violates any important regulatory principle or practice.⁸³ It does not.

OCC, through its witness Dr. Hill, alleges that the Stipulation violates regulatory practices and principals to the extent that the Signatory Parties represent a redistributive coalition.⁸⁴ According to Dr. Hill, "redistributive coalitions are a bad regulatory practice for settlements."⁸⁵

⁸¹ DP&L Exhibit 4, Schroder Testimony at 11.

⁸² *Id.*

⁸³ 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).

⁸⁴ See OCC Exhibit 3, Hill Testimony at 22-25.

⁸⁵ *Id.*

However, as discussed above,⁸⁶ the Signatory Parties are not a redistributive coalition. They do not match Dr. Hill’s proposed features of a coalition. The Signatory Parties intervened, participated, and negotiated this case. The Signatory Parties secured concessions from DP&L that benefit non-represented customers and the public interest, such as overall lower costs to customers.⁸⁷ The Signatory Parties represent a wide and diverse group of interests.⁸⁸

Furthermore, Dr. Hill’s testimony seems to suggest that the issue is not whether or not the Stipulation complies with Commission precedent, but that Commission precedent itself is the issue.⁸⁹ Dr. Hill implies that the Commission should completely abandon its approach to approving stipulations.⁹⁰ That is not a basis to claim that the Stipulation violates any regulatory principle or practice. To that contrary, it actually proves the point that the Stipulation is in compliance with existing regulatory principles and practices. As such, the Stipulation satisfies the third prong of the three-prong test.

V. CONCLUSION

The Stipulation filed on October 23, 2020 is just, reasonable, and in the public interest. It also clearly satisfies all three criteria of the Commission’s analysis for approving settlements as it is the product of serious bargaining among the 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.

⁸⁶ See *supra* pages 9-11.

⁸⁷ See Tr. Vol. IV at 669 (Cross Examination of Hill).

⁸⁸ DP&L Exhibit 4, Schroder Testimony at 13.

⁸⁹ See OCC Exhibit 3, Hill Testimony at 25 (“The PUCO’s regulatory process, involving the three-prong test for adopting settlements provides the opportunity for redistributive coalitions.”); see also Tr. Vol. IV at 598 (Cross Examination of Hill) (Dr. Hill agrees that he has a fundamental problem with intervening parties representing their own narrow interests).

⁹⁰ See *id.* at 26 (“To begin with, the second and third prongs of the PUCO’s settlement standard should be modified so that the settlement is not reviewed as a package, but rather each individual provision of a settlement must be scrutinized on its own merits.”).

Accordingly, for the foregoing reasons, Kroger respectfully requests that the Commission adopt and approve without modification the Stipulation that the Signatory Parties submitted for consideration in this proceeding.

Respectfully submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0068774)

Carpenter, Lipps & Leland LLP

280 N. High Street, Suite 1300

Columbus, Ohio 43215

Telephone: 614.365.4100

Fax: 614.365.9145

paul@carpenterlipps.com

(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on February 12, 2021 upon the parties listed below.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

SERVICE LIST

Case No. 18-1875-EL-GRD, et al.

christopher.healey@occ.ohio.gov	nvijaykar@elpc.org
angela.obrien@occ.ohio.gov	glpetrucci@vorys.com
william.michael@occ.ohio.gov	dparram@bricker.com
amy.botschner.obrien@occ.ohio.gov	dstinson@bricker.com
ambrosia.wilson@occ.ohio.gov	ccox@elpc.org
steven.beeler@ohioattorneygeneral.gov	Michael.schuler@aes.com
Robert.eubanks@ohioattorneygeneral.gov	jsharkey@ficlaw.com
Bethany.allen@igs.com	djireland@ficlaw.com
Joe.oliker@igs.com	chollon@ficlaw.com
Michael.nugent@igs.com	fdarr@mwncmh.com
dborchers@bricker.com	mpritchard@mwncmh.com
kherstein@bricker.com	mfleisher@dickinsonwright.com
jspottswood@bricker.com	cpirik@dickinsonwright.com
jdunnlegal@gmail.com	mkurtz@bkllawfirm.com
kevin.oles@thompsonhine.com	kboehm@bkllawfirm.com
stephanie.chmiel@thompsonhine.com	jkylercohn@bkllawfirm.com
cmooney@opae.org	Paul@carpenterlipps.com
whitt@whitt-sturtevant.com	slesser@calfee.com
glover@whitt-sturtevant.com	talexander@calfee.com
drinebolt@opae.org	

Case No. 19-1121-EL-UNC

christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
steven.beeler@ohioattorneygeneral.gov
Michael.schuler@aes.com

mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
talexander@calfee.com
jkylarcohn@bkllawfirm.com
paul@carpenterlipps.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com

Case No. 20-1041-EL-UNC

christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov

steven.beeler@ohioattorneygeneral.gov
Michael.schuler@aes.com
Paul@carpenterlipps.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
talexander@calfee.com

Case No. 20-680-EL-UNC

christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
thomas.lindgren@ohioattorneygeneral.gov
dparram@bricker.com
dstinson@bricker.com
jspottswood@bricker.com
Bethany.allen@igs.com
Joe.oliker@igs.com
Michael.nugent@igs.com
Fdarr2019@gmail.com
paul@carpenterlipps.com
kevin.oles@thompsonhine.com
stephanie.chmiel@thompsonhine.com

jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com
michael.schuler@aes.com
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylarcohn@bkllawfirm.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
slessor@calfee.com
talexander@calfee.com

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Summary: Brief INITIAL POST-HEARING BRIEF OF THE KROGER CO. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.