

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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))))

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))))

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 the More Favorable in the Aggregate Test in R.C. 4928.143(E).)) Case No. 20-680-EL-UNC))))

**INITIAL BRIEF OF
INDUSTRIAL ENERGY USERS-OHIO**

Matthew R. Pritchard (Reg. No. 0088070)
Counsel of Record
Rebekah J. Glover (Reg. No. 0088798)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com

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**COUNSEL FOR INDUSTRIAL ENERGY USERS-
OHIO**

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**INITIAL BRIEF OF
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The Stipulation in this proceeding has widespread support from twenty parties representing a broad array of diverse interests. Only one party, the Office of the Ohio

Consumers' Counsel ("OCC"), opposes the settlement. While one of the primary benefits of the Stipulation is charting a reasonable path forward to an electric security plan ("ESP") without a nonbypassable non-cost-based charge, OCC's presentation of evidence against the Stipulation often appeared to assume that the Stipulation was authorizing the nonbypassable Rate Stability Charge ("RSC") as part of the Stipulation.

This case, however, is not about whether the Public Utilities Commission of Ohio ("Commission") should authorize the nonbypassable RSC. The RSC exists as a result of DP&L's withdraw from its ESP 3 and return to ESP 1. The terms and conditions of ESP 1, including the nonbypassable RSC, were created as part of a unanimous settlement supported by OCC and many other parties.¹ The Signatory Parties here are not recommending the creation or extension of the RSC. The RSC already exists and will continue by operation of law until some future intervening event.

Rather, the legal question relative to the RSC is whether its existence in ESP 1 causes the ESP to fail a prospective ESP v. MRO² review and/or fail a prospective SEET review.³ If the ESP fails either test, the Commission can terminate the ESP, or order modifications to transition to a more advantageous plan.⁴

¹ OCC Ex. 8 (ESP I Stipulation).

² R.C. 4928.143(E) asks the Commission to determine if the ESP "including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."

³ R.C. 4928.143(E) also asks the Commission to review if "the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."

⁴ R.C. 4928.143(E) provides that "The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative."

While Industrial Energy Users-Ohio (“IEU-Ohio”), and the other Signatory Parties, agree that the Commission should not find that the ESP fails either prospective review, the Commission need not modify the Stipulation if the ESP fails either test because the Stipulation already sets forward a transition to a “more advantageous alternative” ESP. Specifically, the Stipulation itself recognizes that its terms and conditions are designed:

to provide DP&L an opportunity to begin grid modernization efforts, set forth a transition path forward that provides economic development support during the ongoing pandemic and emergency conditions, and set the framework for both the timing and content of DP&L's next ESP by requiring DP&L to file an application for ESP IV by a date certain and prohibiting DP&L's ESP IV from containing the types of nonbypassable charges that have been subject to significant litigation before the Commission for the past decade.⁵

The bargained-for exchange reflected in the Stipulation is the product of serious bargaining among capable and knowledgeable parties, benefits ratepayers and the public interest, and does not violate any important regulatory principles. The bargained-for exchange in the Stipulation will produce a transition away from the very types of nonbypassable charges that have previously caused ESPs to fail the ESP v. MRO and SEET tests. The Stipulation produces a reasonable path to a better future. It should be adopted without modification.

I. ARGUMENT

The Commission reviews stipulations under a three-prong test, considering whether a stipulation is the product of serious bargaining among capable and knowledgeable parties, whether a stipulation, as a package, benefit ratepayers and the

⁵ Stipulation at 4.

public interest, and whether a stipulation violates any important regulatory principles.⁶ As demonstrated below, the Stipulation passes all three prongs of this test.

A. The Record Demonstrates that the Stipulation is the Product of Serious Bargaining Among Capable and Knowledgeable Parties

The Stipulation is supported by twenty of the twenty-one parties in the proceeding.⁷

In addition to the Commission Staff and DP&L, the Stipulation is supported by:

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 retail electric service, and four other parties that do business and represent interests in the smart grid field.⁸

Eight lengthy all-party settlement meetings were held over a period of time stretching months.⁹ Every party in the case was invited to the all-party settlement meetings, and all parties participated in the settlement discussions.¹⁰ Additional settlement negotiations were held outside of the all-party meetings and each party was provided multiple opportunities to review draft term sheets, offer their own proposals, and suggest revisions to other parties' proposals.¹¹ The parties and their counsel are all well-versed in Commission proceedings.¹² In fact, even OCC witness Hill conceded that the first prong was met as he testified that the Signatory Parties "are knowledgeable and capable of

⁶ *Office of the Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 64 Ohio St.3d 123, 126 (1992).

⁷ DP&L Ex. 4 at 12-13; see also Stipulation.

⁸ *Id.*

⁹ *Id.* at 13.

¹⁰ *Id.* at 13-14.

¹¹ *Id.*

¹² *Id.*

negotiating.”¹³ The Stipulation was the product of the product of serious bargaining among capable and knowledgeable parties.

B. The Stipulation, as a Package, Benefits Ratepayers and the Public Interest and Does not Violate any Important Regulatory Practice or Principle

The record demonstrates that the Stipulation is substantively lawful and reasonable and satisfies the second and third prongs of the stipulation test.

As a package, the Stipulation will end DP&L’s collection of nonbypassable non-cost-based charges like the current RSC, and the previously overturned Service Stability Rider (“SSR”) and Distribution Modernization Rider (“DMR”).¹⁴ To effectuate the end of these types of nonbypassable charges, the Stipulation provides that DP&L will file for approval of its next ESP by October 1, 2023.¹⁵ The Stipulation then prohibits DP&L from proposing in the ESP IV application “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.”¹⁶ While the law is clear that these types of charges are unlawful, prohibiting DP&L from even proposing them will significantly reduce administrative and litigation burdens in the ESP IV case. This is certainly a significant benefit to all customers and is in the public interest.

¹³ Tr. At 645.

¹⁴ Stipulation at 45-46.

¹⁵ *Id* at 45.

¹⁶ *Id.* at 45-46.

The Stipulation also sets forth economic development provisions to assist residential customers,¹⁷ businesses,¹⁸ hospitals,¹⁹ universities,²⁰ and municipalities²¹ during the continued pandemic and economic conditions.²² All of these benefits come from shareholders funds, and the Stipulation prohibits DP&L from seeking to collect any of the economic support in customers' rates. The Commission has previously found that stipulations that provide this type of economic development support from shareholder funds is a benefit of stipulations, in the public interest, and not in violation of any regulatory practice or principle.²³ In fact, the Commission previously concluded that this type of economic development support helps to "facilitate the state's effectiveness in the global economy in accordance with R.C. 4928.02(N)."²⁴

The Stipulation also authorizes a smart grid plan for DP&L. The Commission has already authorized a number of smart grid plans, held a robust PowerForward discussion, and generally signaled support for smart grid plans.²⁵ However, the Signatory Parties carefully considered DP&L's smart grid proposal and the Stipulation significantly scales back the cost to customers of the smart grid proposal from \$866.9 million to \$267.6

¹⁷ These benefits include: weatherization for low-income customers, upgrades to water heaters to reduce customer peak demand, elimination of a prepay proposal. Stipulation at 29-32.

¹⁸ This includes economic development funding to businesses. Stipulation at 35-42.

¹⁹ This includes economic development funding and elimination of the alternative feed service obligations.

²⁰ This includes exploration of a joint partnership with the University of Dayton as well as economic development grants. Stipulation at 32, 37.

²¹ This includes funding for the PACE program and economic development funding. Stipulation at 32-33.

²² Stipulation at 29-42.

²³ *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 95 (Mar. 31, 2016)

²⁴ *Id.*

²⁵ See OCC Ex. 66 (PowerForward roadmap).

million.²⁶ DP&L Witness Schroder testified on the benefits of the scaled-back smart grid plan contained in the Stipulation.²⁷

While the Signatory Parties were able to secure significant benefits for all customers, including a \$600 million reduction for all customers in the cost of a smart grid plan, a settlement package represents a compromise among the parties. In this case, the settlement package includes resolution of two of DP&L's historic SEET cases and a timeline that will allow DP&L to operate under ESP I for up to an additional couple years before the transition to ESP IV. But this was the bargained-for exchange that permitted all parties (except OCC) to put down their litigation positions and craft a reasonable path forward. The Commission has previously encouraged parties to take this very type of holistic approach to resolving multiple complex cases, noting these types of comprehensive settlement packages are "an efficient and cost-effective means of bringing issues before the Commission while also, often times, avoiding the consider time and expense associated with the litigation of a fully-contested case."²⁸

The Commission has also confirmed that these complex settlements of multiple proceedings should be viewed "as a package."²⁹ This settlement package allowed Signatory Parties to put down litigation positions in multiple proceedings, gain a firm commitment to end the cycle of non-cost-based nonbypassable charges, limited the duration of ESP I by requiring a date certain by which an ESP IV must be filed, reducing

²⁶ DP&L Ex. 4 at 24.

²⁷ *Id.* at 15-29.

²⁸ *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 79 (Mar. 31, 2016)

²⁹ *Id.*

the cost to all customers of the smart grid plan, and obtaining shareholder funded economic development support for a broad array of customers groups. Modification of the settlement would discourage the significant collaboration and negotiation required to resolve the complex issues in the case and would spurn unnecessary litigation at the Commission and in appeals before the Ohio Supreme court. The Stipulation is entitled to careful consideration and because it charts a reasonable and lawful path forward it should be approved without modification.

II. CONCLUSION

The Stipulation charts a lawful and reasonable path forward. The Stipulation will end the current nonbypassable RSC previously approved by the Commission, requires DP&L to move to a new ESP, and prohibits DP&L from seeking the types of nonbypassable charges (like the RSC) that have continually been overturned as unlawful and unreasonable. The Stipulation reduced the cost of DP&L's proposed smart grid plan to all customers by \$600 million. The Stipulation will result in economic development funding and support being provided by DP&L and prohibits DP&L from collecting any such support in customers' rates. As a package, the Stipulation satisfies the Commission 3-part test used to review stipulations and represents a just and reasonable course. The Commission should approve the Stipulation without modification.

Respectfully submitted,

/s/ Matthew R. Pritchard
Matthew R. Pritchard (Reg. No. 0088070)
(Counsel of Record)
Todd A. Long (Reg No. 0082296)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 719-2842
Telecopier: (614) 469-4653
mpritchard@mcneeslaw.com

tlong@mcneeslaw.com
(willing to accept service via email)

February 12, 2021

On Behalf of Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Notice of Initial Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 12th day of February 2021, *via* electronic transmission.

/s/ Matt Pritchard

Matthew R. Pritchard

Michael.Schuler@aes.com
JSharkey@ficlaw.com
DJlreland@ficlaw.com
CHollon@ficlaw.com
MKurtz@BKLawfirm.com
KBoehm@BKLawfirm.com
JKylerCohn@BKLawfirm.com
William.Michael@occ.ohio.gov
christopher.healey@occ.ohio.gov
Amy.Botschner.Obrien@occ.Ohio.gov
angela.obrien@occ.ohio.gov
slesser@beneschlaw.com
khehmeyer@beneschlaw.com
mkeaney@beneschlaw.com
dparram@bricker.com
dstinson@bricker.com
jspottswood@bricker.com
Bojko@carpenterlipps.com
Bethany.Allan@igs.com
Joe.Oliker@igs.com
Michael.Nugent@igs.com
FDarr2019@gmail.com
paul@carpenterlipps.com
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com
Dressel@carpenterlipps.co
Dutton@carpenterlipps.com
dborchers@bricker.com
kherrnstein@bricker.com
rsahli@columbus.rr.com
joe.halso@sierraclub.org
gpiacentino@wp-lawgroup.com
nvijaykar@elpc.org
mfleisher@dickinsonwright.com
ccox@elpc.org
fykes@whitt-sturtevant.com
jdunnlegal@gmail.com
dromig@armadapower.com
mjsettineri@vorys.com
glpetrucci@vorys.com
mdortch@kravitzllc.com
jdortch@kravitzllc.com
nvijaykar@elpc.org

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Summary: Brief Initial Brief of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio