BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Application of 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 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
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

POST-HEARING BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

On October 23, 2020 a diverse group of signatory parties, including the Ohio Manufacturers' Association Energy Group (OMAEG), filed a Stipulation and Recommendation (the Settlement) in a multilateral effort to resolve the above-captioned cases pending before the Public Utilities Commission of Ohio (Commission) involving the Dayton Power and Light Company (DP&L). Despite an overwhelming almost unanimous consensus among the parties—including Commission Staff—in support of the Settlement and the resolution of the above-captioned cases, one party, the Office of the Ohio Consumers' Counsel (OCC), is attempting to thwart that consensus, opposing the approval of the Settlement.

Contrary to OCC's assertions, the record clearly demonstrates that this Settlement is the product of serious bargaining between capable, knowledgeable parties, as a package, benefits ratepayers and the public interest, and does not violate any regulatory principle or practice. As such, the Settlement passes the Commission's three-part test for reviewing stipulations, and should be adopted by the Commission in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Settlement resolves numerous related cases. On December 21, 2018, DP&L filed an application to implement a grid modernization plan (Smart Grid Plan), proposing a variety of grid investments in its application.[1] Additionally, DP&L sought to recover capital investment and expenses associated with grid modernization from ratepayers through the SmartGrid Rider that the Commission previously approved in DP&L's ESP III proceeding.[2] DP&L predicted that the Smart

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[1] *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).

[2] *Id.* at 9.

Grid Plan would have a total 20-year cost of $867 million,[3] with a 10-year revenue requirement of $643 million.[4] OMAEG subsequently intervened in the Smart Grid Case.[5]

In May 2019, in Case No. 19-1121-EL-UNC (2018 SEET Case), DP&L filed an application 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.[6] In May 2020, in Case No. 20-1041-EL-UNC (2019 SEET Case), DP&L filed an application seeking a similar finding for calendar year 2019.[7] DP&L averred that administration of the SEET with respect to its revenues for both 2018 and 2019 should not warrant a refund to customers. OMAEG subsequently intervened in both cases.[8] On September 11, 2020, the Commission issued an Entry consolidating the 2018 SEET Case and the 2019 SEET Case.[9]

In Case No. 20-680-EL-UNC (Quadrennial SEET Case), DP&L filed an application 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.[10] R.C. 4928.141 requires an electric distribution utility to provide a standard

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[3] *Id.* at 5.

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

[5] Smart Grid Case, Motion to Intervene of the Ohio Manufacturers' Association Energy Group (Jan. 31, 2019).

[6] 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).

[7] 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).

[8] 2019 SEET Case, Motion to Intervene of the Ohio Manufacturers' Association Energy Group (July 2, 2020); 2018 SEET Case, Motion to Intervene of the Ohio Manufacturers' Association Energy Group (Sept. 30, 2020).

[9] 2018 SEET Case, Entry at ¶ 8 (Sept. 11, 2020).

[10] *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).

service offer (SSO) for generation services to customers within the utility's certified territory. The utility may offer the SSO in the form of either an Electric Security Plan (ESP) or Market Rate Offer (MRO).[11] If the Commission authorizes an ESP to run for more than three years, then the Commission, in every fourth year, must determine whether the ESP is more favorable in the aggregate than a hypothetical MRO, and if the ESP is likely to result in significantly excessive earnings.[12] On behalf of its members, OMAEG intervened in this case.[13]

On October 23, 2020, twenty signatories, including DP&L, the Commission Staff, OMAEG and seventeen other intervenors (collectively, Signatory Parties) filed the Settlement with the Commission, in an effort to resolve all outstanding issues in the above-referenced cases. Although OCC did actively participate in Settlement negotiations (as did all intervening parties),[14] OCC failed to join the Settlement. Nonetheless, the Settlement contained several provisions beneficial to all customers.

First, the Settlement modified DP&L's Smart Grid Plan, making it significantly more favorable to consumers than the as-filed plan. The Settlement reduced the overall cost of the plan to consumers, shortened the first phase of the plan from ten years[15] to four years, and only requests that the Commission approve phase one, for four years (SGP Phase I).[16] The Settlement reduces the overall cost of the plan that DP&L is requesting approval for from $642 million[17] to $267

[11] R.C. 4928.141(A); *see also* R.C. 4928.142 and R.C. 4928.143.

[12] R.C. 4928.143(E).

[13] Quadrennial SEET Case, Motion to Intervene of the Ohio Manufacturers' Association Energy Group (May 13, 2020).

[14] *See* DP&L Exhibit 4, Testimony of Sharon R. Schroder at 13 (Nov. 30, 2020) (Schroder Testimony).

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

[16] Stipulating Parties Exhibit 1, Stipulation and Recommendation at ¶¶ 1-2 (Oct. 23, 2020) (Settlement).

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

million for capital investments and associated operation and maintenance expenses, which DP&L will collect from customers through its Infrastructure Investment Rider (IIR).[18] Pursuant to the Settlement terms, any subsequent phases and cost recovery will require DP&L to file new applications and seek additional approvals from the Commission, which the Signatory Parties are free to oppose.[19] Additionally, the Settlement provides that if DP&L does not file a new distribution rate case by January 1, 2025, the IIR will be set to zero.[20] SGP Phase I is also subject to annual audits.[21]

The Settlement further requires DP&L to invest in a new Customer Information System (CIS) within six months of Commission approval of the Settlement.[22] As part of CIS, DP&L will provide no-cost data access to customers, suppliers, and to third parties, which will enable customers to access their load data and better manage their usage.[23] However, DP&L has agreed not to recover capital or incremental operation and maintenance costs associated with the new CIS until its next base distribution rate case.[24] DP&L has explicitly agreed to not recover the capital investment in the new CIS and its incremental operation and maintenance expenses through the IIR. However, DP&L may defer operation and maintenance expenses related to implementation of the CIS for future recovery in an amount not to exceed $8.8 million, subject to a reasonableness and prudence review.[25]

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[18] Stipulating Parties Exhibit 1, Settlement at ¶¶ 2-3.

[19] *Id.* at ¶ 2.

[20] *Id.* at ¶ 3(c).

[21] *Id.* at ¶ 5.

[22] *Id.* at ¶ 10.

[23] *Id.* at ¶ 11.

[24] *Id.* at ¶ 10(g).

[25] *Id.*

The Settlement also ensures the elimination of the rate stabilization charge (RSC), and any similar or related charges in the company's next electric security plan (ESP). DP&L is to file an application for a new ESP, no later than October 1, 2023.[26] The application for DP&L's next ESP "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."[27]

The Settlement also secures several other benefits for customers. DP&L shall offer an opt-in, time-of-use rate plan on a pilot basis during SGP Phase I.[28] DP&L will provide $450,000 annually in shareholder dollars for a smart thermostat marketing and rebate program,[29] and $450,000 in 2021 and 2022 for Ohio Partners for Affordable Energy (OPAE) to provide weatherization for low-income customers.[30] DP&L will also provide economic development grants and incentives to commercial and industrial customers and healthcare providers to assist those customers with the devastating financial effects of COVID-19 and as a tool to restart the economy, again funded by shareholder dollars (not by customers).[31]

In exchange for obtaining these benefits and conditioned on the Commission's approval of this Stipulation without modification, the Signatory Parties agreed to recommend that the

[26] Stipulating Parties Exhibit 1, Settlement at ¶ 20(a).

[27] *Id.*

[28] *Id.* at ¶ 6(e).

[29] *Id.* at ¶ 9.

[30] *Id.* at ¶ 12(a).

[31] *Id.* at ¶ 15.

Commission approve DP&L's smart grid application as modified and DP&L's applications in the SEET Cases.[32]

III. LAW AND ARGUMENT

Any two or more parties to a Commission proceeding may enter into a stipulation concerning the proposed resolution of some or all of the issues in a proceeding.[33] While a stipulation does not bind the Commission,[34] the Commission may put substantial weight on the terms of the stipulation.[35] The Commission uses a three-part test to determine if it should adopt a stipulation:

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?[36]

In this case, all of the capable, knowledgeable parties, except for two,[37] entered into a global stipulation, which expeditiously and equitably resolves all of the issues in several related proceedings as a package in a way that benefits ratepayers and the public interest, and does not violate any regulatory principle or practice. The weight of the evidence presented by the parties demonstrates that the Settlement passes the Commission's three-part test, and should be adopted by the Commission.

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[32] *Id.* at ¶ 19(a), (b), and (c)(iii).

[33] Ohio Adm.Code 4901-1-30(A).

[34] Ohio Adm.Code 4901-1-30(E).

[35] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-26 (1992).

[36] *Id.*

[37] DP&L Exhibit 4, Schroder Testimony at 13. It should be noted that while two parties did not sign the Settlement, only one actively opposed.

A. The Settlement is the product of serious bargaining among capable, knowledgeable parties.

There is no requirement that every party, or the parties most adverse to a stipulation, join a stipulation as a signatory.[38] The Commission acknowledges that the parties to a proceeding are in the best position to evaluate their own best interests and costs, and "expects that parties to Settlement negotiations will bargain in support of their own interest in deciding whether to support a stipulation."[39]

The Signatory parties are capable and knowledgeable. In this case, the Signatory Parties represent a diverse range of interests. Many of the Signatory Parties, such as OMAEG, have a history of participation in proceedings before the Commission, and many have participated throughout the pendency of the above-captioned cases. OCC's witnesses do not refute the capability or knowledge of the Signatory Parties.[40]

The Signatory Parties also participated in serious bargaining to reach the Settlement. As one of DP&L's witnesses explained, the Signatory Parties participated in at least eight separate, all-party bargaining sessions before reaching the Settlement.[41] The Settlement resolves a variety of complex issues, and represents major concessions from all parties, resulting in extensive changes from DP&L's proposals.[42] Individual parties also discussed their particular interests directly with DP&L.[43] OCC incorrectly alleges that since the parties represent their own interests,

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[38] *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 44 (Dec. 30, 2020).

[39] *Id.*

[40] *See* Tr. Vol. IV at 645 (Cross Examination of Hill); OCC Exhibit 2, Supplemental Direct Testimony of Matthew I. Kahal at 15-16 (Dec. 17, 2020) ("I did not participate in the settlement process and do not contest [DP&L Witness Schroeder's] factual assertions concerning the capabilities of the settling parties.").

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

[42] *See id.* at 14.

[43] *Id.*

the Settlement is not the product of serious bargaining.[44] However, as the Commission expects parties to bargain for their own interests,[45] the fact that the Signatory Parties secured some benefits for themselves, in addition to benefits for customers as a whole, does not have any bearing on the level or legitimacy of the bargaining involved in the Settlement. To the contrary, the concessions that the Signatory Parties agreed to, despite their own interests, demonstrate the degree of bargaining involved in negotiating the Settlement and the value attributed to the benefits received on behalf of all customers.

One of OCC's witnesses also claims that "serious bargaining did not occur," since the parties represent a redistributive coalition.[46] However, the record demonstrates that this witness has no knowledge of the bargaining that went on between the parties to the Settlement.[47] He did not analyze the difference between DP&L's original proposals in the 2018 and 2019 SEET Cases, the Quadrennial SEET Case, or the original Smart Grid Plan as compared to the Settlement in order to determine what concessions DP&L made in the Settlement to its detriment and to the benefit of customers and other parties.[48] As discussed further later in this brief,[49] the Settlement contained major benefits for all customers, as well as benefits for other parties.[50]

One of OCC's witnesses argues that the Signatory Parties were not sufficiently diverse.[51] This argument fails to dispute the first prong of the test for two reasons. First, diversity of the

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[44] *See* OCC Exhibit 3, Direct Testimony of Edward W. Hill, Ph.D. at 5 (Dec. 17, 2020) (Hill Testimony).

[45] *See* Case No. 19-468-GA-ALT, Opinion and Order at ¶ 44 (Dec. 30, 2020).

[46] OCC Exhibit 3, Hill Testimony at 21. OMAEG will further address the concept of redistributive coalition in Part III.C., *infra*.

[47] Tr. Vol. IV at 584-86.

[48] Tr. Vol. IV at 589; *see also* DP&L Exhibit 4, Schroder Testimony at 14.

[49] *See infra* Part III.B.

[50] *See* DP&L Exhibit 4, Schroder Testimony at 14.

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

parties is not part of the Commission's three-part test—as another one of OCC's witnesses acknowledges.[52] OCC and its witnesses have not pointed to any law, rule, or precedent that provides otherwise. Second, in reality the Signatory Parties *are* diverse—they include a major utility,[53] PUCO Staff, groups representing commercial and industrial users of various sizes,[54] a provider of competitive retail natural gas service and competitive retail electric service,[55] a municipality,[56] a university,[57] a nationwide grocery chain headquartered in Ohio,[58] a group representing low income residential customers,[59] an auto manufacturer,[60] and environmental groups.[61] OCC's solitary resistance does not refute this point, as two other Signatory Parties also represent the interests of residential customers.[62] Thus, any concerns about whether or not the parties represent a sufficiently diverse group of interests are both ill-founded and irrelevant. As such, the Settlement passes the first prong of the Commission's three-part test.

B. The Settlement as a package, benefits ratepayers and the public interest.

When analyzing the benefits to ratepayers and the public interest, the Commission will evaluate the stipulation as a whole, rather than focusing on individual provisions. "The question before the Commission is not whether there are other mechanisms that would better benefit

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[52] *See* Tr. Vol. IV at 645 (Cross Examination of Hill).

[53] DP&L

[54] Industrial Energy Users-Ohio, Ohio Energy Group, and OMAEG.

[55] Interstate Gas Supply, Inc. and IGS Solar, LLC.

[56] The City of Dayton.

[57] The University of Dayton.

[58] The Kroger Co.

[59] OPAE.

[60] Honda of America Mfg., Inc.

[61] Environmental Law & Policy Center, Sierra Club, Natural Resources Defense Council, and Ohio Environmental Council.

[62] The City of Dayton represents its residents, and OPAE represents low and moderate-income residential customers throughout Ohio.

ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest."[63] To the degree that any Settlement provisions differ from a Signatory Party's pre-Settlement position, such differences represent the product of serious bargaining between parties with diverse, and sometimes adverse, interests. When analyzed as a package, overall the Settlement benefits ratepayers and the public interest by lowering the costs of SGP Phase I, and ensuring other concessions from DP&L. OCC's focus on individual provisions, rather than the Settlement as a whole, is contrary to the Commission's precedent.[64]

First and foremost, the Settlement lowers the duration and cost of DP&L's grid modernization plan by capping SGP Phase I at $267 million, while ensuring customers still receive the benefits that come with smart grid technology. OCC's witness, James D. Williams, agrees that this is a benefit: when all else is held equal, an agreement to lower costs paid by customers benefits customers.[65] OCC's witness Paul Alvarez attempts to argue against the Settlement, claiming that based on his calculations, SGP Phase I's net present value does not exceed its expected costs. However, witness Alvarez did not conduct any analysis on the net present value or a cost-benefit analysis of DP&L's Smart Grid Plan as originally proposed.[66] Therefore, his analysis does not focus on whether the Settlement, as a package, benefits ratepayers by making SGP Phase I more favorable to customers than it otherwise would be. Instead, he looks at whether, in his view, there are other investments that would better benefit ratepayers. However, as discussed above, this is

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[63] *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

[64] *See In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

[65] Tr. Vol. V at 792 (Cross Examination of Williams).

[66] Tr. Vol. III at 532-33 (Alvarez Cross).

not the Commission's test.[67] Further, witness Alvarez's concerns about a rate case timing issue[68] are also unfounded. As discussed above, if DP&L does not file a new rate case by January 1, 2025, then it will cease all further collection under the IIR.[69] Thus, an attempt to manipulate a rate case filing to avoid passing through benefits to customers would instead prove costly to DP&L.

Importantly, witness Alvarez also did not consider the economic impact of spending by parties (particularly the manufacturing and commercial sectors) that receive economic development incentives.[70] Furthermore, the Ohio Administrative Code contains reliability provisions, which will ensure benefits manifest for customers, contrary to his assertions.[71] Additionally, Alvarez admits that the Settlement, makes SGP Phase I more favorable to customers in terms of overall costs,[72] and in terms of eliminating CIS costs from recovery under the IIR[73]

Eliminating CIS costs from recovery under the IIR also ensures that DP&L will install the CIS before customers pay for it. OCC's witness Alvarez acknowledges that this will allow customers to obtain benefits from the CIS before they experience any costs.[74] OCC's witness Hill recognizes that it is generally more favorable for customers if DP&L makes capital improvements in the system and then seeks recovery after the new facility is used and useful.[75] As discussed above, while the Settlement allows DP&L to defer certain costs associated with the

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[67] *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

[68] *See* Tr. Vol. III at 500-01 (Cross Examination of Alvarez).

[69] Stipulating Parties Exhibit 1, Settlement at ¶ 3(c).

[70] Tr. Vol. III at 536 (Cross Examination of Alvarez).

[71] Tr. Vol. III at 544 (Cross Examination of Alvarez).

[72] Tr. Vol. III at 534 (Cross Examination of Alvarez).

[73] Tr. Vol. III at 535 (Cross Examination of Alvarez).

[74] Tr. Vol. III at 529 (Cross Examination of Alvarez).

[75] Tr. Vol. V at 782 (Cross Examination of Williams).

implementation of the CIS for potential future recovery (deferrals are not guaranteed cost recovery), the Settlement does not state that DP&L may defer costs with interest, and specifies that any deferral will be subject to prudency review and Commission approval.[76]

Secondly, the Settlement benefits customers by ensuring they will no longer pay the RSC, or any substantially similar charge. The Commission first approved a version of DP&L's current ESP (ESP I) in 2009, which, among other things, included the nonbypassable RSC.[77] In 2013, the Commission approved DP&L's application for a second ESP (ESP II).[78] However, the Supreme Court of Ohio reversed the Commission decision after invalidating a similar retail stability rider in a different utility's ESP.[79] After the reversal, DP&L withdrew ESP II and the Commission allowed DP&L to revert to an ESP, which retained certain provisions from ESP II and certain provisions from ESP I.[80]

The Commission then approved DP&L's third ESP (ESP III) in 2017.[81] Among other riders, ESP III contained a distribution modernization rider (DMR). However, the DMR was also subsequently eliminated by the Commission after the Supreme Court of Ohio reversed a Commission decision approving a similar DMR contained in another utility's ESP, holding that R.C. 4928.143 did not authorize that DMR.[82] As a result, DP&L withdrew ESP III on November

[76] Stipulating Parties Exhibit 1, Settlement at ¶ 10(g).

[77] *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).

[78] *In re The Dayton Power and Light Co.*, Case No. 12-426- EL-SSO, et al., Opinion and Order (Sept. 4, 2013).

[79] *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, *citing In re Application of Columbus Southern Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608.

[80] 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 ¶ 28 (Dec. 18, 2019).

[81] *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, Opinion and Order at ¶ 131 (Oct. 20, 2017).

[82] *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

26, 2019.[83] Over the objections of many parties, including OMAEG, the Commission ultimately approved DP&L's application to revert back to the prior blended ESP and collect charges from ESP I and ESP II, including the reinstatement of RSC, while eliminating several riders approved as part of ESP III (such as the reconciliation rider, the regulatory compliance rider, and the uncollectible rider).[84] OMAEG and others explicitly advocated for the Commission to terminate the RSC.[85] However, as OCC's witnesses acknowledge, past efforts to repeal the RSC have not proven successful.[86]

As such, the intervening parties were able to obtain a commitment from DP&L in the Settlement to eliminate the RSC charge at the expiration of its current ESP. More specifically, DP&L committed to not including a request to implement any nonbybassable charge (including the continuation of RSC) 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 any parent or affiliate of DP&L in its application for its next ESP (ESP IV) to be filed in 2023.[87] This is a significant benefit for customers as it places an end date to the RSC charge. But for the Settlement provision, the RSC could continue indefinitely. As such, customers will benefit by

[83] DP&L Exhibit 12, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order, ¶¶ 8-9 (Dec. 18, 2019); *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).

[84] DP&L Exhibit 12, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶¶ 36-42.

[85] *See, e.g.*, Quadrennial SEET Case, Reply Comments of the Ohio Manufacturers' Association Energy Group at 9-11 (July 16, 2020).

[86] Tr. Vol. III at 456 (Cross Examination of Kahal) ("My understanding is that the -- is that the charge will continue until the Commission issues a ruling eliminating the charge."); Tr. Vol. IV at 616 (Cross Examination of Hill) (Hill states that the Commission has not issued a ruling invalidating the RSC); Tr. Vol. V at 911 (Cross Examination of Duann) (Duann acknowledges that neither the Supreme Court of Ohio nor the Commission have yet to invalidate the RSC.).

[87] Stipulating Parties Exhibit 1, Settlement at ¶ 20(a).

saving money, by no longer paying a nonbypassable, per kWh charge as part of their monthly bills. OCC's witnesses agree that removing the RSC benefits customers.[88]

Furthermore, the Settlement's elimination of the RSC has the added benefit of ensuring that DP&L does not simply replace the RSC with an equivalent or substantially similar charge.[89] For example, when the Supreme Court of Ohio invalidated the DMR, DP&L simply sought to reinstate the RSC as a substitute.[90] While intervenors in that case—including some Signatory Parties—argued that this amounted to an equivalent, unlawful replacement charge, the Commission rejected this argument, determined that the RSC was a POLR charge and allowed DP&L to reinstate the RSC.[91] Since the Settlement expressly prohibits DP&L from requesting either a financial stability charge or a POLR charge, it ensures that DP&L will not continue the RSC or replace the RSC with a new charge.

Thus, while OCC may argue that it may be more beneficial to eliminate the RSC altogether, the reality is that the Settlement guarantees elimination of the RSC and prevents its replacement, albeit not immediately, but the alternative is for the RSC to continue indefinitely or to be replaced by a new, similar charge.[92] The Settlement presents the most effective way of actually eliminating the charge—obtaining a commitment from the utility not to seek the charge (or its equivalent) at all. Again, while OCC may attempt to argue that other mechanisms of elimination are more

[88] Tr. Vol. III at 450 (Cross Examination of Kahal).

[89] *See, e.g.* Tr. Vol. V at 914 (Cross Examination of Duann).

[90] DP&L Exhibit 12, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order, ¶¶ 36-42 (Dec. 18, 2019).

[91] *Id.* at ¶ 40.

[92] OMAEG takes no position as to the lawfulness of the RSC, but again notes that in the past, the Commission has declined to terminate it. *See* DP&L Exhibit 12, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order, ¶¶ 36-42 (Dec. 18, 2019).

beneficial (although none of those have been successful to date), this is not what the Commission looks to when evaluating a proposed stipulation.[93]

Despite the above benefits, and the multitude of other customer benefits contained in the Settlement,[94] OCC's witness Williams seems to suggest that the Settlement contains no benefits at all.[95] However, he also acknowledges that many provisions of the Settlement, including grid modernization,[96] a time-of-use program,[97] a new CIS system,[98] a customer portal and third-party access to the CIS,[99] a shareholder funded smart thermostat program,[100] and the low-income weatherization program and PIPP water heater pilot program[101] could all benefit customers. Additionally, witness Williams acknowledges that a CIS system is necessary for DP&L, customers, and third-parties to make use of advanced metering infrastructure and for DP&L's "core functionality."[102]

Unlike the benefits of the Settlement, which are guaranteed, OCC's witnesses argue that the Settlement does not benefit ratepayers or the public interest due to hypothetical costs. However, OCC premises these hypothetical costs on inaccurate assumptions. OCC alleges that

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[93] Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

[94] *See supra* pages 4-6.

[95] Tr. Vol. V at 793 (Cross Examination of Williams) ("I don't know that it's providing any more benefits.").

[96] Tr. Vol. V at 752 (Cross Examination of Williams).

[97] *Id.* at 784.

[98] *Id.* at 758.

[99] *Id.* at 784-85.

[100] *Id.* at 756-57.

[101] *Id.* at 762-63.

[102] *Id.* at 758 ("Well, a new customer information -- the customer information system is required for core functionality of DP&L. In and of itself new CIS systems, you know, aren't required to install Smart Grid. But there are interface components like you mentioned, the meter data management system, that are applications that need to be made to a CIS system.").

the Settlement thus represents a $450 million "cost penalty" for customers.[103] OCC's witnesses base this cost penalty off two hypothetical scenarios. First, that absent the Settlement, the Commission would order a $150 million in SEET refunds associated with DP&L's 2018 and 2019 revenues.[104] Second, that absent Settlement, DP&L customers would not pay $300 million under the RSC over the next four years.[105] These scenarios require several inaccurate or wishful assumptions.

First, OCC's witnesses included DMR revenues in their SEET calculations.[106] Thus, these SEET calculations rely on the assumption that the Commission would also include DMR revenues in its SEET calculations. OCC has not produced any evidence or precedent where the Commission has in fact included DMR revenues in the SEET calculations, and, unfortunately, the Commission has not refunded any DMR revenues to date.[107]

Second, OCC's witnesses base their SEET calculation off a hypothetical 12% allowable return on equity (ROE) threshold. However, it is inaccurate or wishful to assume the Commission will use a 12% threshold and the OCC has failed to produce any evidence to demonstrate that the Commission will in fact use a 12% threshold. In fact, as OCC's witness Duann testified, the Commission has approved allowable ROE thresholds much higher than 12%.[108] More specifically, over the objections of parties, the Commission has previously approved thresholds as high as

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[103] *See* OCC Exhibit 2, Supplemental Testimony of Matthew I. Kahal at 12 (Dec. 17, 2020). While Mr. Kahal originally claim this would cost about $900 per customer, he admits that this is simply based on dividing the total cost by total amount of customers, and does not represent the actual allocation of costs under the Settlement. Tr. Vol. III at 454 (Cross Examination of Kahal). *See also* Tr. Vol. V at 909-10 (Cross Examination of Duann).

[104] Tr. Vol. III at 458 (Cross Examination of Kahal).

[105] Tr. Vol. III at 454-55 (Cross Examination of Kahal).

[106] Tr. Vol. III at 463 (Cross Examination of Kahal) ("There were -- in each year there was something like in excess of $100 million of DMR revenue"); Tr. Vol. V at 899-900 (Cross Examination of Duann).

[107] Tr. Vol. III at 463 (Cross Examination of Kahal).

[108] *See* Tr. Vol. V at 915 (Cross Examination of Duann).

17%.[109] Indeed, Staff's witness recommended higher than 12% ROE thresholds for DP&L's cases—15.73% in the 2018 SEET Case and 14.53% in the 2019 SEET Case.[110] Whether or not these thresholds are appropriate, it is unlikely that the Commission would adopt an ROE threshold in this case that is 3-4% lower than what its Staff recommends.

Thus, regardless of OMAEG's position on the application of SEET review to this case—or OCC's for that matter—the reality is that refunds are far from guaranteed absent the Settlement of the cases, and are unlikely to occur. In fact, the Commission has only ordered SEET refunds twice in the decade-plus history of SEET review.[111] Both of these refunds concerned the same utility, Columbus Southern Power, in subsequent years, 2009 and 2010. In these cases, the Commission determined that Columbus Southern Power had allowable ROE thresholds of 17.6% and 17.56% and actual earnings of 20.84% and 17.9%.[112] Again, without taking a position as to the proper allowable ROE threshold, this precedent demonstrates how unlikely it is that the Commission would order SEET refunds in the amount OCC's witnesses suggest.

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[109] *See, e.g., In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case Nos. 11-4571, *et al.*, Opinion and Order at 27 (Oct. 23, 2013) ("Recognizing AEP-Ohio's future committed investments in Ohio and acknowledging that the purpose of the SEET is to be a statutory check on rates that result in excessive earnings, the Commission believes that the record indicates that the appropriate SEET threshold is in the range of 17.05 percent to 17.56 percent.").

[110] Staff Exhibit 1, Testimony of Joseph P. Buckley at 8-9 (Jan. 4, 2021).

[111] OCC's witness Duann initially stated that the Commission ordered refunds three times. Tr. Vol. V at 916 (Cross Examination of Duann). However, the third refund resulted from a settlement agreement that took no position as to the existence of significantly excessive earnings, not from a Commission order. *In the Matter of the Fuel Adjustment Clauses for Columbus So. Power CO. and Ohio Power Co.*, Case Nos. 09-872-EL-FAC, *et al.*, Order on Global Settlement Stipulation at 28 (Feb. 23, 2017).

[112] *See In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case No. 10-1261, Opinion and Order at 36 (Jan. 11, 2011); *In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case No. 11-4571-EL-UNC, Opinion and Order (Oct. 23, 2013).

Third, by claiming that the Settlement imposes $300 million in RSC charges on customers,[113] OCC's witnesses assume that absent the Settlement, customers would not pay the RSC charge. This is simply not the case. As explained above, customers already pay the RSC and will continue to pay the charge until the Commission affirmatively acts to remove the charge.[114] Again, previous attempts to remove the RSC have not been successful, and the Commission has rejected arguments that it constitutes an unlawful charge. Customers will pay the RSC for the next four years with or without the Settlement, but only the Settlement ensures that the RSC charge is terminated at the end of that period and will not be replaced by an equivalent charge.

Thus, the record demonstrates that the Settlement benefits ratepayers and the public interest. The Settlement secures numerous guaranteed benefits for ratepayers and the general public, such as reducing the duration and lowering the costs of SGP Phase I and eliminating the RSC. OCC's purported costs of the Settlement, on the other hand, rely on inaccurate and unfounded assumptions without evidence. Thus, when analyzed as a package, the Settlement represents a good outcome for ratepayers and is in the public interest.

C. The Settlement does not violate any regulatory principle or practice.

The Settlement also satisfies the third prong of the Commission's three-part test for evaluating stipulations. When determining whether a stipulation violates any regulatory principle or practice, the Commission tends to consider its own precedent, and favor stipulations that follow that precedent.[115] The Settlement does not contain any provisions that run contrary to Commission precedent.

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[113] Tr. Vol. III at 463 (Cross Examination of Kahal).

[114] Tr. Vol. V at 910 (Cross Examination of Duann).

[115] *See, e.g., In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 79 (Dec. 30, 2020) (Where the stipulating parties had "presented adequate

First, the Settlement does not create any unlawful charges. To the degree that OCC argues the RSC is unlawful, the Settlement does not create the RSC nor depart from Commission precedent authorizing it. Customers will continue to pay the RSC until the Commission orders otherwise, regardless of the Settlement.[116] Additionally, and more importantly, nothing in the Settlement requires the RSC to be collected from customers. The Commission could still terminate the RSC immediately as OCC advocates. As OCC's witness Duann acknowledges, neither the Commission nor the Supreme Court of Ohio have invalidated the RSC.[117] The RSC will otherwise continue, unless the Commission or the Supreme Court of Ohio takes further action to remove it.[118] But, the Settlement on the other hand, affirmatively prohibits the inclusion in DP&L's next ESP application of any nonbypassable charge to customers relating to POLR risks, stability, or financial integrity. Thus, if the RSC is in fact unlawful, the Settlement solves the issue by terminating it.

Second, the Signatory Parties do not represent a redistributive coalition. OCC witness Hill incorrectly portrays the Signatory Parties as "a relatively small group that uses political or regulatory processes to secure benefits that cannot be earned in the competitive market."[119] He identifies several features of a redistributive coalition, none of which apply to the Signatory Parties in the case at bar.[120]

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justification for the Commission to uphold the precedent" and "no argument presented by opposing Intervenors [convinced] the Commission to change or revise this practice," the Commission adopted the stipulation.).

116 Tr. Vol. III at 456 (Cross Examination of Kahal).

117 Tr. Vol. V at 910-11 (Cross Examination of Duann).

118 Tr. Vol. V at 912 (Cross Examination of Duann).

119 OCC Exhibit 3, Hill Testimony at 6.

120 Moreover, Dr. Hill seems to acknowledge that generally benefits are not secured in the open market in any situation, as "charges for distribution and transmission are regulated, so they are not set through a market process," nor are utility distribution capital expenditures. Tr. Vol. IV at 652-53 (Cross Examination of Hill).

OCC witness Hill claims that "the members of a redistributive coalitions are small in number relative to the rest of the population."[121] On the other hand, a large, heterogeneous group is not represented.[122] This is clearly not the case. As discussed above,[123] the Signatory Parties include twenty separate entities, which represent diverse interests. There is no requirement that a stipulation is unanimous.[124] Additionally, OCC was invited to participate in Settlement negotiations. OCC's witnesses have not presented any evidence that any parties were not invited to the negotiations.[125] Commission proceedings in general are open for all interest parties to participate. Unless OCC asserts that the Commission should direct parties to participate, or that interested parties should actively seek benefits for competitors without contribution, there is nothing preventing an interested party from participating in the proceeding or subsequent negotiations.

OCC witness Hill also alleges that "the 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)."[126] He claims that Signatory Parties have secured only limited benefits for themselves and their members.[127] This ignores the multitude of benefits secured from the Settlement,[128] which will benefit all customers, from low-income residential customers to commercial and industrial customers, as well as suppliers and other

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[121] OCC Exhibit 3, Hill Testimony at 7.

[122] Tr. Vol. IV at 609 (Cross Examination of Hill).

[123] *Supra* Part III.A.

[124] Tr. Vol. IV at 606 (Cross Examination of Hill).

[125] *Id.* at 605.

[126] OCC Exhibit 3, Hill Testimony at 8.

[127] Tr. Vol. IV at 583 (Cross Examination of Hill).

[128] *Supra* Part III.B.

parties. For example, since all customers, not just the Signatory Parties, would see increased rates from the IIR,[129] reducing the cost of SGP Phase I will benefit all DP&L customers, not just the Signatory Parties.[130] Similarly, eliminating the RSC will benefit all customers currently paying it—not just the Signatory Parties. Additionally, OCC witness Hill admits that he did not consider the benefits of several aspects of the Settlement, including general cost reductions, grid modernization benefits, customer data access, the new CIS system, and increased reliability benefits.[131]

Finally, the economic development grants and incentives contained in the Settlement do not even represent redistribution, as they come from shareholder, not ratepayer dollars. While OCC witness Hill incorrectly argues that all money is ratepayer money, since money paid to DP&L through the RSC is fungible,[132] this position does not reflect reality. Regardless of this Settlement, customers will pay the same amount under the RSC, and DP&L will receive the same amount from the RSC.[133] Thus, these grants and incentives do not cost customers anything, but without them, shareholders would pocket more profit. Further, while the economic development grants and incentives do not cost customers anything, they will provide significant benefits to many Signatory Parties, who are customers in DP&L's service territory and who will reinvest the dollars back into their businesses and the community.

Thus, the Settlement does not violate any regulatory principles or practice, the Signatory Parties do not represent a redistributive coalition as described by OCC, and the Settlement does

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[129] Tr. Vol. IV at 654 (Cross Examination of Hill).

[130] *Id.* at 669.

[131] *Id.* at 586-87 ("my testimony is restricted to the gains that were received by the members of the redistributive coalition itself").

[132] *Id.* at 635.

[133] *See id.* at 634.

not create any unlawful charges. The Signatory Parties represent a diverse group with divergent interests, who secured benefits to customers through extensive bargaining.

IV. CONCLUSION

The Settlement passes the Commission's three-part test for evaluating stipulations. By resolving a variety of complex issues involving DP&L, the Signatory Parties have secured a just, reasonable, and expeditious outcome that obtains major benefits for customers and is in the public interest. In order to fully provide these benefits to customers, the Commission should adopt the Settlement in its entirety.

Respectfully submitted,

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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.

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