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 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. 20-0680-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 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

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTLITIES COMMISSION OF OHIO

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INTRODUCTION

The Public Utilities Commission of Ohio (Commission) is presented with a Stipulation that resolves all the issues in six complex cases that were consolidated to form this proceeding. The Stipulation, among other things, modified the Dayton Power and Light Company's (DP&L or the Company) Smart Grid Plan (SGP) making it significantly more favorable to consumers than the application as-filed. The Stipulation reduces the overall cost of the plan to consumers, shortened the first phase of the plan from ten years[1] to four years, and only requests that the Commission approve phase one for four years (SGP Phase I).[2] The Stipulation reduces the overall cost of the plan from $642 million[3] 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).[4] The Stipulation also provides numerous additional benefits to customers with minimal rate impacts.

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1 OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018); OCC Exhibit 74, Smart Grid Case, Application at ¶ 21.
2 Joint Exhibit 1 (Stipulation and Recommendation) at ¶¶1-2.
3 OCC Exhibit 73, Smart Grid Case, Schedules and Workpapers, Schedule A (Dec. 21, 2018); OCC Exhibit 74, Smart Grid Case, Application at ¶ 21.
4 Joint Ex. 1 (Stipulation and Recommendation) at ¶¶2-3.

Overall, the Stipulation is reasonable and meets the Commission's three-part test for approval of stipulations. It should be adopted by this Commission. Below is Staff's reply to the arguments raised by the Ohio Consumer's Counsel (OCC) in its initial brief.

DISCUSSION

I. The Stipulation meets the Three-Part Test for reasonableness.

Ohio Adm.Code 4901-1-30, authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.[5] The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.[6] In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(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?

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[5] *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St, 3d 123, at 125, citing *Akron v. Pub. Util. Comm*. (1978), 55 Ohio St, 2d 155.

[6] See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 92-1463-GA-AIR, et al. (August 26, 1993); *Ohio Edison Co.*, Case No. 89-1001-EL-AIR (August 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (January 31, 1989); and *Restatement of Accounts and Records* (Zimmer Plant); Case No, 84-1187-EL-UNC (November 26, 1985).

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.[7] When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."[8] The agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.[9]

The signatory parties, and the Commission staff, respectfully submit that the Stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

A. The Stipulation is the product of serious bargaining among knowledgeable parties.

The Stipulation is the product of serious negotiations among knowledgeable parties. 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

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7 *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St. 3d 559, citing, *Consumers' Counsel*, supra, at 126.

8 *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370.

9 *In re Application of Columbus S. Power Co.* (2011), 129 Ohio St.3d 46.

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. In addition, the Staff, which is charged with balancing the interests of all parties and the public, signed the Stipulation.

All of the intervening parties in the matters participated in the negotiations, and all but two of them support it.[10] Numerous bargaining sessions were held.[11] All parties that intervened in these proceedings were invited to participate in those sessions. All of the Signatory Parties were represented by attorneys, most if not all of whom have years of experience in regulatory matters before this Commission and who possess extensive information.[12] All of the negotiations were at arm's length.[13] Numerous hours were devoted to the negotiating process and to the exchange of language and information associated with the terms of the Stipulation.[14] The result of the negotiations was a compromise and many parties receive benefits under the Stipulation, but neither DP&L nor any other Signatory Party received everything that it wanted.[15] The Stipulation strikes a reasonable balance that benefits customers and the public interest.[16]

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10 DP&L Ex. 4 (Schroder Direct) at 13-14.
11 *Id*. at 14.
12 *Id*.
13 *Id*.
14 *Id*.
15 *Id*.
16 *Id*.

OCC challenges the serious bargaining prong of the three-part test through its witnesses Hill and Kahal.[17] This OCC testimony should be rejected for a number of reasons. Dr. Hill asserts that the Commission should conclude that the Stipulation is not a product of serious bargaining because the Stipulation is a product of a "redistributive coalition."[18] Dr. Hill claims that a "redistributive coalition is a relatively small group that uses political or regulatory processes to secure benefits that cannot be earned in a competitive market."[19] He claims that the Signatory Parties form a redistributive coalition because the "signatories are essentially limited to those who regularly interact with the PUCO" and they "opportunistically form redistributive coalitions with slightly varying membership as each regulatory opportunity presents itself."[20] This claim is baseless and the Commission should reject his arguments for the following reasons.

Dr. Hill claims that the Signatory Parties acted in their own self-interest and the Stipulation places costs on parties that did not participate in the case.[21] Dr. Hill, however, admitted on cross-examination that Commission proceedings are open to the public; the Commission's docket is available on-line; he is not aware of any party being denied intervention and the Commission cannot force parties to intervene.[22] The record further demonstrates that Dr. Hill has no knowledge of the bargaining that went on between the

17 OCC Brief at 37-49.
18 OCC Ex. 3 (Hill Direct) at 6; OCC Brief at 37.
19 OCC Ex. 3 (Hill Direct) at 6; OCC Brief at 39.
20 OCC Ex. 3 (Hill Direct) at 10; OCC Brief at 49.
21 *Id.* at 13.
22 Tr.Vol. IV at 584, 595.

parties to the Settlement.[23] Also, Staff signed the Stipulation in this case and Staff is responsible for acting in the interests of all of DP&L's customers.[24]

Dr. Hill also claims that the Stipulation benefits only the Signatory Parties.[25] Dr. Hill, however, failed to consider the benefits of grid modernization or continued reliability on DP&L's system.[26] These reliability benefits apply to all of DP&L's customers. Furthermore, the signatories to the Stipulation are hardly a small group. The signatory parties are Staff and a variety of diverse interests including 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 retail electric service, and four other parties that do business and represent interests in the smart grid field. Only OCC challenges the Stipulation – all of the other parties either support it or do not oppose it.

Dr. Hill further claims that DP&L received everything that it wanted in the Stipulation.[27] This is not accurate. DP&L made numerous concessions in this

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23 Tr. Vol. IV at 584-586.
24 Joint Ex. 1 (Stipulation and Recommendation) at 53.
25 OCC Ex. 3 (Hill Direct) at 15; OCC Brief at 48.
26 Tr. Vol. IV at 587.
27 OCC Ex. 3 (Hill Direct) at 21; OCC Brief at 48.

consolidated case. The principal compromises made by DP&L include but are not limited to[28]:

(1) DP&L's SmartGrid Application proposed capital and O&M expenditures totaling $678,400,000 over 10 years. DP&L agreed to significantly reduce the scope of the program to $267,600,000 over four years. (Stipulation, ¶ 2.) That reduction in scope will significantly reduce the customer bill impacts, while still allowing them to receive tremendous benefits of Smart Grid.

(2) DP&L agreed to use its own funds to pay for the following programs:

a. The Smart Thermostat program described in Stipulation ¶ 9;

b. The low-income weatherization program described in Stipulation ¶ 12.a.;

c. The PIPP water heater pilot program described in Stipulation ¶ 12.c.;

d. The PACE program and similar programs described in Stipulation, ¶ 13.a.iii;

e. The City of Dayton economic development programs described in Stipulation ¶ 14.a.v;

f. The hospital education grant described in in Stipulation ¶ 14.d.;

g. The economic development grants and incentives described in Stipulation, ¶ 15;

h. The resiliency projects described in Stipulation ¶ 16.a.; and

i. The solar project described in Stipulation ¶ 16.c.

(3) DP&L agreed that the costs of its CIS and related components, a significant component of its SGP, would be recovered through distribution rates instead of the IIR.

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[28] DP&L Ex. 4 (Schroder Direct) at 30-32.

(4) DP&L agreed not to own EV charging stations, but instead will implement a rebate program to promote the installation of such stations.

(5) DP&L agreed to file for ESP IV by October 30, 2023, and that its ESP IV Application will not include a request for a 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.

Dr. Hill overall is critical of the Commission's settlement process, but he does not make any recommendations on how to change the process.[29] The Commission has previously rejected Dr. Hill's redistributive-coalition argument in FirstEnergy's most-recent ESP proceeding. In that case, the Commission stated:

> [w]ith respect to the claims that the Stipulations represent mere "favor trading" and a lack of serious bargaining among the parties, the Commission notes that, while many signatory parties receive benefits under the Stipulations, we will not conclude that these benefits are the sole motivation of any party in supporting the Stipulations. We expect that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. Further, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs. The claim that benefits for low-income customers and for small businesses reflect mere "favor trading" and a lack of serious bargaining flies directly in the face of Ohio policy, which calls upon the Commission to protect at-risk populations and to encourage the education of small business owners regarding the use of, and to encourage the use of, energy efficiency programs. R.C. 4928.02(L), (M). Moreover, the Commission notes that nothing in the Stipulations can be construed to represent "favor trading" with Staff. Staff receives no benefits whatsoever under the Stipulations.[30]

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29 Tr. Vol. IV at 595.

30 *In re Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at p. 44.

The Commission has also rejected Dr. Hill's redistributive-coalition argument in a recent multi-party settlement in an AEP case.[31]

Finally, OCC witness Kahal argues that the Signatory Parties were not sufficiently diverse.[32] As mentioned above, both the Staff and a variety of diverse interests were signatory parties to the Stipulation. Although the conclusion that the Stipulation results from serious bargaining among knowledgeable parties is obvious, that does not prevent opposing parties from challenging it.

In sum, the Stipulation in this case is the product of serious negotiations among knowledgeable parties. OCC arguments to the contrary should be rejected.

B. The Stipulation benefits customers and is in the public interest.

The Stipulation benefits customers and is in the public interest. The benefits of the Stipulation are that it will allow DP&L to modernize its distribution grid while maintaining its financial integrity and continuing to provide safe and reliable service. The Stipulation also provide numerous additional benefits to customers with minimal rate impacts. 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.[33] Any Settlement provisions that differ from a Signatory Party's pre-

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31 *In re Ohio Power Co., Case No.* 14-1693-EL-RDR, et al. (Direct Testimony of Edward W. Hill in Opposition to AEP-Ohio's Settlement Agreement on Behalf of the Ohio Manufacturers' Association Energy Group) (Dec. 28, 2015) at 16-20; *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al. Opinion and Order (Mar. 31, 2016) at 51-53.

32 OCC Ex. 2 (Kahal Supplemental Direct) at 15-17.

33 *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*

Settlement position represent the product of serious bargaining between parties with diverse, and sometimes adverse, interests.[34] When considered as a package, the Settlement here benefits ratepayers and the public interest. OCC's focus on individual provisions, rather than the Settlement as a whole, is contrary to the Commission's precedent.

The Commission should reject OCC witness Alvarez's testimony. The Stipulation lowers the cost of DP&L's grid modernization plan by capping SGP Phase I at $267 million, while ensuring that customers still receive the benefits of smart grid technology. OCC witness Alvarez is critical of DP&L's cost-benefit analysis (CBA) and claims that, based on his calculations, SGP Phase I's net present value does not exceed its expected costs.[35] Mr. Alvarez, however, 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.[36] As a result, his analysis fails to focus on whether the Stipulation, as a package, benefits ratepayers by making SGP Phase I more favorable to customers than it would be otherwise.

Mr. Alvarez's specific criticisms of DP&L's CBA are flawed in a number of ways. On cross examination, Mr. Alvarez admitted that a well-designed Smart Grid plan can provide net benefits to customers.[37] He also admitted that the benefits of a Smart Grid plan could include: utility cost savings, energy and demand savings, reliability

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Program Rider Mechanism, Case No. 19-468-GAALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

34 *Id.*

35 OCC Brief at 52.

36 Tr. Vol. III at 532-33.

37 Tr. Vol. III at 477.

improvements, reduced greenhouse gases, and stimulus for the economy.[38] He further admitted that the equipment that DP&L plans to install is not novel, and similar equipment has been installed by other utilities.[39] He also admitted that utilities and customers have significant future needs that can be satisfied only through Smart Grid.[40] This testimony on cross-examination demonstrate that Smart Grid can have significant benefits for customers.

Furthermore, Mr. Alvarez never inspected DP&L's distribution system.[41] Mr. Alvarez conceded that every utility system was "unique."[42] Given the unique nature of DP&L's system and his failure to review any technical information about the system, he has no basis to opine on the costs or benefits of DP&L's system.

Mr. Alvarez also did not consider the economic impact of spending by parties that receive economic development incentives.[43] In addition, contrary to Mr. Alvarez's assertions, the Ohio Administrative Code contains numerous reliability provisions, which will ensure benefits occur for customers.[44] Moreover, Mr. Alvarez admits that the Stipulation makes SGP Phase I more favorable to customers in relation to overall costs, and in terms of eliminating CIS costs from recovery under the IIR.[45] Eliminating the

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38 *Id*. at 478.
39 *Id.* at 483.
40 *Id*. at 479-82; see also DP&L Ex. 9 June 30, 2011 Duke Energy Ohio Smart Grid Audit and Assessment.
41 Tr. Vol. III at 485.
42 *Id.* at 484.
43 *Id.* at 536.
44 *Id.* at 544.
45 *Id.* at 534-535.

customer information system (CIS) costs from recovery under the IIR also ensures that DP&L will install the CIS before customers pay for it – Mr. Alvarez acknowledges that this will allow customers to obtain benefits from the CIS before they experience any costs.[46]

For the above-stated reasons, the Commission should reject OCC witness Alvarez's testimony and OCC's arguments that the Stipulation does not benefit customers and the public interest.

C. The Stipulation does not violate any important regulatory principle or practice.

The Stipulation complies with all relevant and important regulatory principles and practices. The Stipulation encourages compromise as an alternative to litigation and allows DP&L to recover just and reasonable rates while implementing smart grid technologies that benefit its customers.[47] The Stipulation further promotes DP&L's financial condition and its ability to provide safe and reliable service to its customers.[48]

1. Retrospective SEET

In this proceeding, Staff submitted testimony regarding the narrowly-focused issue regarding how the Significantly Excessive Earnings Test (SEET test) should be conducted in light of the Supreme Court of Ohio's recent decision in *In re Ohio Edison*.[49]

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46 *Id.* at 529.
47 *Id.* at 32.
48 *Id*.
49 *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan for Ohio Edison Co.,* Slip Opinion No. 2020-Ohio-5450;
Staff Ex. 1 (Buckley Direct) at 2-3.

As mentioned its initial brief, based on the AES Corporation's commitment to provide a capital contribution of $300 million to DP&L to improve its infrastructure and modernize its grid, Staff believes that DP&L has made a substantial commitment to invest in Ohio.[50] The investment exceeds what would be customary to maintain its system and therefore Staff believes that DP&L has satisfied the criteria of the SEET test and recommends that no refund is appropriate at this time.[51]

OCC criticizes Staff's use of a hypothetical capital structure in its analysis.[52] R.C. 4828.143(F), however, permits the use of hypothetical capital structure and in the Staff Report in Case No. 15-1830-EL-AIR, DP&L's most recent approved rate case, Staff adopted the same hypothetical capital structure used in the previous rate case of 52.48 percent debt and 47.52 percent equity.[53] R.C. 4928.143(F) states:

> With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, *with such adjustments for capital structure as may be appropriate*.[54] (Emphasis Added).

A hypothetical capital structure for DP&L is appropriate here. On cross examination, Staff witness Buckley further explained his use of the hypothetical capital structure:

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50 *Id.*
51 *Id.*
52 OCC Brief at 31-32.
53 *Id.*
54 R.C. 4920.143(F).

> Q. Have you recommended the use of a hypothetical capital structure in a retrospective SEET case in any of your past testimony?
>
> A. As we talked about earlier and you pointed out, typically companies don't earn above the threshold. And one of the first things that we typically do or I typically do when I look at a SEET case is look at the filed initial numbers, either FERC or SEC filed numbers, and do a quick calculation. If they are below that SEET threshold, then I stop. And I go to -- go on from there. And one of the reasons I do that is to try to be as transparent and also try to give the Commission -- the Commissions as much flexibility to determine what is the appropriate SEET threshold or over-earning levels should be. So I haven't had to get into manipulating capital structures because it hasn't been necessary. But the statute allows for you to look at different infrastructures, and I do believe that is one of the big weaknesses of the SEET test is that it only looks at one metrics to determine over-earnings. It simply looks at return on equity. And that could be short sided and not give a good view and I would hate for Ohio utilities to manage their capital structures to avoid paying a SEET penalty, but I don't think that would be a good business practice. So I think in changing the capital structure in this case, that avoids a company trying to manage their capital structure to avoid fees. That's one of the reasons why I did it in this case. And I don't recall what their capital structure was, but I don't think it was what a utility should -- how a utility should be capitalized. Staff did not feel it had an appropriate capital structure here, so it used the hypothetical structure.[55]

OCC further argues that selecting a hypothetical rate structure here is a one-sided manipulation of the SEET test.[56] Mr. Buckley explained why it was not one-sided in this case:

> A. We -- currently in Ohio we don't have the situation where we have a capital structure that would -- that would be very, very skewed in one way, that the company would look to be underrated where they are over-earning. That's why we have situations where the opposite is, in fact, the case. That's why I don't have to look on the other side. I only need to look to see if a company has got too little equity, and one of the reasons that -- that this equity problem came into -- came to pass was because of the impairments, and you are removing equity, it appears that the return on equity is much

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55 Tr. Vol. II at 378-379.

56 OCC Brief at 32.

> higher. If you are adding a bunch of equity, which I don't think we have any utilities that have a 70 percent equity position, then I would definitely look to see if that's the appropriate rate capital structure. We just don't have those.
>
> Q. So you are not testifying that the PUCO should always use whatever capital structure was approved in the utility's most recent rate case, are you?
>
> A. What I am saying is they should use an appropriate capital structure.
>
> Q. And the "appropriate" meaning what?
>
> A. When compared to their peers, then it is within a reasonable range.[57]

Staff, here, used an appropriate capital structure that, when compared with DP&L's peers, is within a reasonable range.[58]

OCC next disagrees with Staff's SEET thresholds of 15.73% for 2018 and 14.53% for 2019. Instead of calculating a SEET threshold, OCC asks the Commission to use the 12% SEET threshold that was included in ESP III.[59] The Commission should reject OCC's argument. First, the ESP III Stipulation has been terminated pursuant to R.C. 4928.143(C)(2)(a).[60] The 12% threshold from ESP III therefore no longer applies. OCC witness Duann nonetheless asserts that the Commission should enforce the 12% threshold in the ESP III Stipulation and modify the ESP III Stipulation by eliminating the clause that excludes distribution modernization rider (DMR) revenue from the Retrospective SEET.[61] Dr. Duann's proposal that the Commission enforce and modify the ESP III

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57 Tr. Vol. II 380-381.
58 Tr. Vol. II at 381.
59 OCC Ex. 5 (Jan. 11, 2021 Duann Supplemental Testimony) at 28-29.
60 *In re The Dayton Power and Light Company*, Case No. 16-0395- EL-SSO, et al. (ESP III Case), Opinion and Order, (Dec. 18, 2019) at ¶ 1.
61 Tr. Vol. V at 900.

Stipulation leads to absurd results. Assuming the ESP III Stipulation could still be enforced for purposes of the 2018-2019 Retrospective SEET, DP&L would then have the right to terminate, under R.C. 4928.143(C)(2)(a), when the Commission would modify the Stipulation by eliminating the DMR exclusion. This absurd result further demonstrates that the ESP III Stipulation can no longer be enforced. The Supreme Court of Ohio has held that the Commission cannot modify an ESP that is no longer in effect, since doing so would be inconsistent with the utility's right to terminate that ESP after the Commission modified it.[62] Second, DP&L's agreement to that 12% threshold in ESP III was contingent upon the DMR being excluded from the SEET.[63] If the Commission were to include DP&L's DMR revenue in the SEET, then the 12% threshold would not be applicable.[64]

OCC points to the 2016 and 2017 DP&L SEET cases where Mr. Buckley filed testimony that contained a 12% threshold when DP&L's ESP I was in effect.[65] The 2016 and 2017 SEET cases, however, are distinguishable from the 2018 and 2019 SEET cases and are not controlling. On cross-examination, Mr. Buckley explained this difference:

> Q. So your testimony in this previous case was that 12 percent was the appropriate threshold for 2016 and 2017, correct?
>
> A. Correct.
>
> Q. And as we just established, for most of 2017 and at least part of 2016, ESP I was in effect correct, based on the timeline?

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62 *In re Ohio Power Co.*, 144 Ohio St.3d, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 24-26.
63 DP&L Ex. 7 (Dec. 23, 2020 Garavaglia Supplemental) at 21-22.
64 *Id.*
65 OCC Brief at 33-34.

> A. Correct.
>
> Q. And so your testimony in that case was that the 12 percent SEET threshold applied to ESP I.
>
> A. There wasn't -- there wasn't a SEET threshold that was inherently in ESP I. The 12 percent was what we had and what was agreed to so we -- we applied it backwards at the time but there wasn't anything specifically in ESP I that said that you need to use 12 percent. It was more of a stipulated number that we used to -- that we kind of borrowed from ESP III to apply backwards.[66]

Again, the ESP I does not contain any SEET threshold. Mr. Buckley further explains why the 12% threshold was used in the 2016 and 2017 SEET cases:

> Not being -- not being an attorney, I don't know how the laws look at it but in ESP I, there is no threshold established. But we used the threshold of 12 percent because it was agreed to. And obviously DP&L did not trip that. So that's -- that's why the 12 percent was used, because it was agreed to by all parties. But I do not believe it was in ESP I. So -- because we used it doesn't mean it's -- it was in the ESP I. It was just the number that we decided to use for the threshold at the time.[67]

The 2016 and 2017 SEET cases were unopposed stipulated cases where the 12% was agreed upon by all parties in the case. As explained above, the 12% threshold from the no-longer effective ESP III case is not controlling for this case. OCC's argument should be rejected.

OCC finally asserts that Staff's conclusion that no refund is appropriate at this time based on the AES Corporation's commitment to provide a capital contribution of $300 million to DP&L to improve its infrastructure and modernize its grid is unlawful.[68]

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66 Tr. Vol II at 373-374.
67 Tr. Vol. II at 376-377.
68 OCC Brief at 35-37.

OCC is incorrect. OCC argues that if the calculation shows significantly excessive earnings, the Commission "shall" require refunds. The SEET analysis, however, does not stop there. R.C. 4928.143(F) goes on to state that the Commission "also shall" consider DP&L's future committed capital investments. R.C. 4928.143(F) states that:

> with regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. In making its determination of significantly excessive earnings under this division, the commission shall, for affiliated Ohio electric distribution utilities that operate under a joint electric security plan, use the total of the utilities' earned return on common equity. *Consideration also shall be given to the capital requirements of future committed investments in this state*." (Emphasis added).[69]

Because statute uses the words "also shall," the Commission must consider future committed investments in addition to its comparison calculation to ultimately determine if excessive earnings exist and refunds are appropriate. The Staff did just that in its analysis. And OCC Witness Duann agreed that the Commission can consider future committed capital investments in deciding whether to require a utility to issue a refund.[70]

Furthermore, in evaluating what is significantly excessive, the Commission has stated that it considers additional factors, besides the earned return on equity (ROE) calculations.[71] The Commission considers certain factors, such as,

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69 R.C. 4928.143(F).
70 Tr. Vol. V at 904.
71 Staff Ex. 1 (Buckley Direct) at 4.

> the electric utility's most recently authorized ROE, the electric utility's risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to weather and economic risk; *capital commitments and future capital requirements*; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures/investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy.[72] (Emphasis Added).

Mr. Buckley states in his testimony in this case that Staff believes that DP&L or AES (DP&L's parent) have made capital commitments that should be given special consideration in these proceedings.[73] As outlined in the AES SEC 10-K report, DP&L is projecting to spend an estimated $621 million on capital projects from 2020 through 2022.[74] DP&L expects to finance this construction with a combination of cash on hand, short-term financing, long-term debt and cash flows from operations.[75] In December 2018, DP&L filed a Distribution Modernization Plan with the PUCO proposing to invest $576 million in capital projects over the next 20 years, which includes leveraging technologies to modernize and improve the sustainability of the grid, and enhancing customer experience and security, as well as to allow DP&L to leverage and integrate

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72 *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Senate Bill 221 for Electric Utilities,* Case No. 09-786-EL-UNC, (Opinion and Order) (June 30, 2010) at page 29.

73 Staff Ex. 1 (Buckley Direct) at 10.

74 *Id.*

75 *Id.*

distributed energy resources into its grid, including community solar, energy storage, microgrids and electric vehicle charging infrastructure.[76]

The AES Corporation provided a capital contribution of $150 million to DP&L on June 26, 2020 to enable DP&L to improve its infrastructure and modernize its grid while maintaining liquidity.[77] In addition, as more fully described in DP&L's June 17, 2020 8-K filing, AES has provided a statement of intent to contribute an additional $150 million to DPL or DP&L in 2021 to enable smart grid investment.[78]

As a result, Staff appropriately concluded that no refund is appropriate at this time based on the AES Corporation's commitment to provide a capital contribution of $300 million to DP&L to improve its infrastructure and modernize its grid. Staff's recommendation is lawful and OCC's argument should be rejected.

2. The Infrastructure Investment Rider

OCC argues, through its witness Williams, that DP&L's SGP violates ESP I and approval of the Stipulation would violate Ohio law as well as regulatory principles and practices. The Commission should reject the testimony of OCC Witness Williams.[79] DP&L's ESP I, that was previously approved by the Commission, lawfully includes the IIR and the Stipulation here lawfully provides that DP&L will recover costs of DP&L's SGP through the IIR.[80] OCC asserts that the IIR is an ESP III provision and not an ESP I

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76 *Id.*
77 *Id.*
78 *Id.* at 10-11.
79 OCC Brief at 78-85.
80 Joint Ex. 1 (Stipulation and Recommendation) at ¶ 3.b.

provision.[81] On the contrary, the ESP I Stipulation does include an IIR.[82] OCC claims that the IIR was never approved as part of ESP I and DP&L cannot simply change the name of the SGR (filed as part of ESP III) to IIR. As noted, the IIR was included and approved in ESP I, but there was not a zero-placeholder tariff filed at that time. The IIR was nonetheless authorized by the ESP I Stipulation and Order. OCC fails to identify any prejudice that OCC suffered as a result of the Commission's order approving the IIR as a zero-placeholder rider in its ESP I. If OCC did suffer prejudice from ESP I, it failed to file an application for rehearing on that issue in ESP I.[83]

OCC witness Williams' testimony lists items that he believes are unrelated to DP&L's SGP, including the electric vehicle rebate program, Smart Thermostat rebate program, and a new CIS.[84] On cross-examination, however, Mr. Williams admitted that those items were related to Smart Grid and that most of the other items on his list benefited customers.[85] Finally, Mr. Williams criticizes the Stipulation because it allows DP&L to recover costs through the IIR that were incurred before a Commission order approving the SGP.[86] But the ESP I Stipulation says that costs cannot be collected before a Commission order; the ESP I Stipulation is silent on when costs could be incurred.[87]

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81 OCC Brief at 79.

82 *In re The Dayton Power and Light Company*, Case No. 08-1094-EL-SSO, et al., ("ESP Case I")

83 Tr. Vol. V at 770-71.

84 OCC Brief at 84-85; OCC Ex. 6 (Williams Direct) at 6-8.

85 Tr. Vol. V at 752-60, 761-64.

86 OCC Brief at 82-83; OCC Ex. 6 (Williams Direct) at 26.

87 OCC Ex. 8 (ESP I Case, Stipulation and Recommendation) at ¶4.

CONCLUSION

The Stipulation meets all prongs of the three-part test. The Commission should adopt the Stipulation as its order in this case.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the following Parties of Record, this 5th day of March, 2021.

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Summary: Reply Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio electronically filed by Mrs. Kimberly M Naeder on behalf of PUCO