

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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

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

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

REPLY BRIEF OF THE KROGER CO.

I. INTRODUCTION

On October 23, 2020, The Dayton Power & Light Company (DP&L), with the support of the Staff of the Public Utilities Commission of Ohio (Commission) (Staff), and eighteen other Signatory Parties, including The Kroger Co. (Kroger),¹ filed a Stipulation and Recommendation (Stipulation) resolving multiple complex issues in the above-referenced consolidated proceedings.² The Office of the Ohio Consumers' Counsel (OCC), however, opposed and objected to the Stipulation. Pursuant to an Attorney Examiner Entry dated October 27, 2020, Kroger participated in an evidentiary hearing which commenced on January 11, 2021 and concluded on January 15, 2021.

Subsequently, Kroger filed its Initial Post-Hearing Brief, demonstrating record support that the Stipulation passes the Commission's three-part test for evaluating and approving stipulations.³ Kroger highlighted that serious bargaining led to the Stipulation,⁴ that the terms of the Stipulation on balance, benefit customers and the public interest,⁵ and that the Stipulation complies with regulatory principles and practice.⁶ OCC, in its initial post-hearing brief filed on February 12, 2021, requested that the Commission reject the Stipulation.⁷ However, OCC's arguments against the Stipulation fail for multiple reasons. Primarily, OCC's arguments do not conform to

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

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

³ See Initial Post-Hearing Brief of The Kroger Co. (Feb. 12, 2021) (Kroger Initial Brief).

⁴ Kroger Initial Brief at 7-11.

⁵ *Id.* at 11-14.

⁶ *Id.* at 14-15.

⁷ See Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel at 3 (Feb. 12, 2021) (OCC Initial Brief).

Commission precedent, misstate and misrepresent the nature of the Signatory Parties, and are based on faulty conclusions of law regarding the Rate Stabilization Charge (RSC).

For the reasons discussed herein, Kroger respectfully requests that the Commission reject the arguments OCC raised in its Initial Brief, and adopt and approve the proposed Stipulation filed on October 23, 2020 in its entirety and without modification.

II. LAW AND ARGUMENT

A. OCC's Initial Brief Does Not Conform with Commission Precedent and Ohio Law.

The Commission follows longstanding precedent in evaluating whether a stipulation is reasonable and warrants acceptance:⁸

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?⁹

The Commission has espoused on this precedent in several ways. While the first prong requires serious bargaining, between capable, knowledgeable parties, the Commission has clarified that “[t]he three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate [a] diversity of interest component . . .”¹⁰ Further, “[t]he Commission has repeatedly determined that [it] will not require any single party . . . to agree to a

⁸ See *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-26 (1992); see also Ohio Adm. Code 4901-1-30 (parties may enter stipulations subject to Commission review).

⁹ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (Mar. 31, 2016).

¹⁰ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposed to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 52 (Mar. 31, 2016).

stipulation, in order to meet the first prong of the three-prong test.”¹¹ Indeed, “it is the quality of the parties that is determinative, not quantity.”¹²

“[The] Commission notes that the second part of the test specifically requires that [it] evaluate the settlement as a package.”¹³ As such, the Commission values resolution of matters as a package as a way of efficiently and effectively bringing cases before the Commission to conclusion while avoiding costly and time consuming litigation.¹⁴ In turn, the Supreme Court of Ohio has “[endorsed] the [Commission’s] effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities.”¹⁵ Therefore, instead of individually evaluating each provision of a stipulation based on its costs or benefits, the Commission considers a stipulation’s costs and benefits as a package.¹⁶

Lastly, when determining whether or not a stipulation violates any regulatory principle, the Commission follows its own precedent.¹⁷ The Supreme Court of Ohio has “instructed the commission to ‘respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.’”¹⁸

¹¹ *Id.*

¹² *Id.*, Concurring Opinion of Commissioner Haque at 2 (emphasis in original).

¹³ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 77 (Mar. 31, 2016).

¹⁴ *Id.* at 77-78 (internal citations omitted).

¹⁵ *See Office of Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

¹⁶ *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) (“The question before the Commission is not whether there are other mechanisms that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest.”).

¹⁷ *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)

¹⁸ *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio*, Util. L. Rep. P 27,505, 2020-Ohio-5221, ¶ 29, citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975).

However, in arguing against Commission approval of the Stipulation, OCC presents a variety of arguments that depart from Commission precedent. Rather than taking issue with the Stipulation's compliance with Commission precedent and Ohio law, OCC takes issue with the stipulation process itself. In fact, OCC admits as much in the very first page of its Initial Brief, stating that "the [Commission's] settlement process is in desperate need of reform by the PUCO or the Ohio legislature."¹⁹ OCC seems more concerned with admonishing the Commission for its three-part test than it is in determining whether or not the Stipulation at hand passes that test. According to OCC, the Commission's "regulatory process, involving the three-prong test for adopting settlements provides the opportunity for redistributive coalitions."²⁰ As such, OCC's arguments generally fail to address the merits of the Stipulation altogether.

When arguing against the first prong of the Commission's three-part test, OCC repeatedly makes arguments regarding diversity of interests, and claims the Commission should not consider whether or not the Stipulation enjoys support from the Signatory Parties. According to OCC, "[the Commission], in concluding that settlements have broad support from many signatory parties, is getting it backwards. It should instead consider the millions of parties in Ohio that are *not* part of the [Stipulation]."²¹ OCC further claims that "[far] from representing broad, diverse interests, the redistributive coalition does precisely the opposite."²²

¹⁹ OCC Initial Brief at 1.

²⁰ *Id.* at 75-76.

²¹ *Id.* at 41.

²² *Id.* at 40-41.

However, as noted above, diversity is not a requirement of the Commission's three-part test. At any rate, however, the Signatory Parties *do* represent broad, diverse interests, as Kroger pointed out in its Initial Brief.²³ A witness testified that:

The Stipulation is supported by parties representing a wide range of interests, including the interests of DP&L, the largest municipality in DP&L's service territory (which represents itself and its residents), a representative of residential low-income customers, three state-wide organizations of large industrial customers, one large industrial customer, one of the largest supermarket chains in the country, a state-wide organization representing hospitals in DP&L's service territory, a large, local university, four environmental groups, a provider of competitive retail electric service, and four other parties that do business and represent interests in the smart grid field. In addition, the Commission's Staff signed the Stipulation.²⁴

OCC also makes a similar off-topic argument regarding the benefits of the Stipulation. OCC specifically requests that the Commission evaluate two of the cases involved in the Stipulation *entirely independently* of the Stipulation as a package. Designating these cases as the “side deal,” OCC claims the Commission “should consider them part of a separate settlement from the larger [Stipulation].”²⁵ Conveniently for OCC, when it considers these cases without the context of the greater Stipulation, OCC comes to the conclusion that the benefits do not pass the second part of the test. However, this flies in the face of precedent, as the Commission considers stipulations as a package. When considered as a package, the Stipulation results in an overall better outcome for customers than DP&L's original proposals.²⁶ OCC also ignores the benefits associated with avoiding costly and time consuming litigation for customers. From a practical

²³ Kroger Initial Brief at 8-9.

²⁴ DP&L Exhibit 4, Testimony of Sharon R. Schroder in Support of the Stipulation and Recommendation at 13 (Schroder Testimony).

²⁵ OCC Initial Brief at 44.

²⁶ See Post-Hearing Brief of the Ohio Energy Group at 3-5 (Feb. 12, 2021).

standpoint, OCC's argument could be applied to *any* settlement or stipulation where the resolution of a specific case or issue is not a fifty-fifty resolution between the parties' litigation positions.

Finally, OCC makes the convoluted argument that the Stipulation violates regulatory principles and practice because it is the product of Commission process,²⁷ which "is in desperate need of reform."²⁸ OCC claims that in "the [Commission] context, redistributive coalitions form through the PUCO's settlement process."²⁹ This argument simply does not logically follow. The Commission considers its own precedent when determining whether or not a stipulation complies with regulatory principles and practices. OCC argues that the Commission precedent is in need of reform, because it allegedly leads to redistributive coalitions. This argument therefore seemingly concedes that the Stipulation follows Commission precedent, as OCC argues that the Stipulation's flaws result from the Commission's flawed precedent.³⁰ OCC has not argued that the Stipulation does not follow regulatory principles or practices; OCC has argued about what it thinks those principles and practices *should be*.

At any rate, the Stipulation does comply with regulatory principles and practices.³¹ Data accessibility provisions in the Stipulation will "[encourage] cost-effective, timely, and efficient access to and sharing of customer usage data with customers and competitive suppliers to promote customer choice and grid modernization."³² The Stipulation will also provide economic development grants and incentives which facilitate Ohio's effectiveness in the global economy,³³

²⁷ OCC Initial Brief at 75-76.

²⁸ *Id.* at 1.

²⁹ *Id.* at 40.

³⁰ *See id.* at 75-76.

³¹ Kroger Initial Brief at 14-15.

³² Initial Brief of Mission:Data Coalition at 4-5 (Feb. 12, 2021) (Mission:Data Brief), *citing* R.C. 4928.02.

³³ Initial Post-Hearing Brief of the Dayton Power and Light Company at 66 (Feb. 12, 2021) *citing* R.C. 4928.02; Initial Brief of Industrial Energy Users-Ohio at 8 (Feb. 12, 2021).

and will provide protection for “at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.”³⁴

However, even ignoring the fact that OCC’s arguments fail for declining to follow Commission precedent, they are not accurate as a matter of fact. The Signatory Parties have not formed any redistributive coalition in the first place.

B. OCC Incorrectly Portrays the Signatory Parties as a “Redistributive Coalition.”

As discussed above, OCC believes that Commission precedent is flawed, “favors a small group of interests, by design,”³⁵ and therefore leads to the formation of redistributive coalitions through the settlement process.³⁶ In accordance with this argument, OCC accuses the Signatory Parties of forming such a redistributive coalition.³⁷ OCC uses this argument to assert that the Stipulation fails the Commission’s three-part test. OCC argues that since the Signatory Parties formed an alleged redistributive coalition, the Stipulation is not the product of serious bargaining,³⁸ does not benefit the public interest,³⁹ and violates regulatory principles and practice.⁴⁰ OCC also takes particular umbrage to Kroger’s participation in negotiations.⁴¹ However, even ignoring that OCC’s arguments do not follow Commission precedent, OCC’s self-identified definition of a

³⁴ Initial Post-Hearing Brief Submitted on Behalf of Staff of the Public Utilities Commission of Ohio at 26-27 (Feb. 12, 2021) (Staff Brief).

³⁵ OCC Initial Brief at 41.

³⁶ *Id.* at 40.

³⁷ *Id.* at 44.

³⁸ *Id.* at 47.

³⁹ *Id.* at 74-75.

⁴⁰ *Id.* at 75.

⁴¹ *See id.* at 44.

redistributive coalition is overly broad, unworkable, and not even applicable to the Signatory Parties to the Stipulation.

OCC and its witnesses define the specific concept of a redistributive coalition in a very vague, nebulous, and sometimes self-contradictory manner—a definition OCC could stretch as suited, to lambast the signatories of any stipulation it does not support. Apparently, one of the features of a redistributive coalition is that “parties [use] a political or regulatory process to ‘secure benefits that cannot be earned in the competitive market.’”⁴² Of course, as OCC’s witness acknowledges, the Commission regulates charges for distribution and transmission as well as utility distribution capital expenditures.⁴³ So theoretically, any stipulation in a Commission proceeding that secures a benefit for one side or the other would run afoul of this description of a redistributive coalition.

OCC also alternatively describes the parties to a redistributive coalition as both “[uniting] around the dominant objective...of the coalition’s organizer, providing the utility what it wants,”⁴⁴ and “not seeking a single, overarching public policy that is mutually shared.”⁴⁵ Witness Dr. Edward Hill states that in return, “money paid to the utility ... by other customers (including residential customers)” is redistributed to the members of the redistributive coalition.⁴⁶ Conveniently, OCC considers that even money paid by DP&L shareholders is actually paid by

⁴² OCC Initial Brief at 39.

⁴³ Tr. Vol. IV at 652-53 (Cross Examination of Hill).

⁴⁴ OCC Initial Brief at 40 (internal quotations omitted).

⁴⁵ *Id.* at 40.

⁴⁶ *Id.* at 40, *citing* OCC Ex. 3, Direct Testimony of Edward Hill at 10 (Hill Testimony).

customers.⁴⁷ According to OCC, when considering the Stipulation as a package,⁴⁸ since customers will pay the RSC for a time under the Stipulation,⁴⁹ any money paid by shareholders to any Signatory Parties actually originates with non-signatory parties.⁵⁰ Again, this argument is self-contradictory. Although the economic development grants and incentives are specifically earmarked as coming from shareholder funds, and not from the IIR or other rates,⁵¹ OCC's witness considers that "all money is fungible in a balance sheet."⁵² Apparently not *too* fungible however, as to prevent OCC from conveniently attributing these RSC payments to residential customers, who OCC claims are not Signatory Parties.⁵³ OCC ignores that commercial and industrial customers, including the Signatory Parties, are currently paying the RSC.⁵⁴ Furthermore, OCC's witness makes no claims that any of the Signatory Parties will receive more in economic development grants or incentives than they have already contributed under the RSC.⁵⁵ It is difficult to see how the RSC is responsible for redistributing money from residential customers to Signatory Parties if the money is specifically designated to come from shareholders, if the Signatory Parties have also paid the RSC, and if OCC cannot point to any Signatory Party which will receive more

⁴⁷ See OCC Initial Brief at 73-74 ("This is false. Customers—including residential customers—are paying the entire \$30 million.").

⁴⁸ OCC conveniently uses self-serving logic, considering the Stipulation as a package when beneficial to OCC's argument, but considering individual provisions of the Stipulation separately (*see supra* page 6) when that proves more advantageous.

⁴⁹ Kroger will address OCC's repeated false assertion that the Stipulation creates the RSC in Part II.C. *infra*.

⁵⁰ See OCC Initial Brief at 74 ("When considering the Settlement as a package—as the PUCO requires under its threepart test—there can be no doubt that residential customers and other non-signatories are funding the \$30 million in handouts to the signatory parties.").

⁵¹ See Stipulating Parties Exhibit 1, Stipulation at ¶ 15.

⁵² Tr. Vol. IV at 592 (Cross Examination of Hill).

⁵³ See OCC Initial Brief at 74 ("residential customers and other non-signatories are funding the \$30 million in handouts to the signatory parties").

⁵⁴ See Tr. Vol. IV at 614 (Cross Examination of Hill).

⁵⁵ See *id.* at 633 (Cross Examination of Hill).

than it has already paid under the allegedly redistributive RSC. OCC's distinction between residential customers and Signatory Parties,⁵⁶ is also questionable, given the fact that Signatory Parties such as OPAE and the City of Dayton represent residential customers who will receive benefits under the Stipulation.

Additionally, many of the alleged traits of a redistributive coalition simply do not apply to the Signatory Parties. OCC claims that a redistributive coalition “favors a small group of interests, by design, so that the small group gains a competitive advantage over the truly diverse parties that are not part of the coalition.”⁵⁷ The redistributive coalition allegedly receives benefits “paid for by others—those who are not in the coalition.”⁵⁸ This “increases some, but not all, customers’ utility bills”⁵⁹ while obtaining only limited benefits for the members of the coalition rather than all customers or the public at large.⁶⁰

A simple review of the facts reveals that none of these conditions apply to the Stipulation or the Signatory Parties. The Signatory Parties consist of a large group of entities representing an even larger group of interested parties with a variety of divergent interests.⁶¹ The Stipulation requires that DP&L shareholders—not customers—pay for economic development grants and incentives,⁶² and Witness Hill’s selective accounting fails to demonstrate otherwise. Furthermore, the Stipulation will not selectively raise the bills of only those parties not participating in the

⁵⁶ See OCC Initial Brief at 74.

⁵⁷ *Id.* at 40-41.

⁵⁸ *Id.* at 39.

⁵⁹ *Id.* at 77.

⁶⁰ Tr. Vol. IV at 583 (Cross Examination of Hill).

⁶¹ See DP&L Exhibit 4, Schroder Testimony at 13.

⁶² Stipulating Parties Exhibit 1, Stipulation at ¶ 15.

Stipulation. Signatory Parties, such as Kroger, are currently paying the RSC⁶³ and will pay the RSC and the IIR under the Stipulation.

The Stipulation will benefit parties regardless of whether they participated in this proceeding. By reducing the cost of DP&L's grid modernization proposals and by eliminating the RSC charges, the Stipulation secures the benefits of lower rates (as compared to DP&L's proposals) for *all* DP&L customers.⁶⁴ DP&L's investment in CIS, as well as no-cost data access, will also benefit the public at large.⁶⁵ Other terms of the Stipulation also benefit the public interest, providing customers with the advantages of grid modernization,⁶⁶ a time-of-use program,⁶⁷ a shareholder funded smart thermostat program,⁶⁸ and a low-income weatherization program and PIPP water heater pilot program.⁶⁹ These terms and others including economic development and essential service funding for the City of Dayton, and priority implementation for historically disadvantaged residential areas will specifically benefit at-risk residential consumers.⁷⁰

Lastly, Kroger cannot speculate as to why its competitors, such as Giant Eagle and Meijer,⁷¹ declined to intervene in the above-captioned cases—nor can OCC.⁷² OCC's witness also

⁶³ Tr. Vol. IV at 614, 633 (Cross Examination of Hill).

⁶⁴ *Id.* at 652-53 (Cross Examination of Hill).

⁶⁵ *See Id.* at 529 (Cross Examination of Alvarez); *see also* Mission:Data Brief at 2-6 (describing the benefits of data access to residential customers) *and* Initial Brief of Interstate Gas Supply, Inc. and IGS Solar, LLC at 4-7 (describing how the Stipulation will facilitate “development of innovative products and services in the competitive retail electric market”).

⁶⁶ Tr. Vol. V at 752 (Cross Examination of Williams).

⁶⁷ *Id.* at 784.

⁶⁸ *Id.* at 756-57; *see also* Initial Brief of the Environmental Law & Policy Center and the Ohio Environmental Council at 3-6 (Feb. 12, 2021).

⁶⁹ Tr. Vol. V at 762-63 (Cross Examination of Williams).

⁷⁰ Staff Brief at 26-27.

⁷¹ *See* OCC Initial Brief at 44.

⁷² Tr. Vol. IV at 675 (Cross Examination of Hill) (“I have no idea why any other grocery store did not participate in the proceedings.”); *see also* Tr. Vol. IV at 672, 675 (Cross Examination of Hill) (Dr. Hill notes that he did not speak to any nonparticipating grocery stores to determine why they did not intervene.).

acknowledges that the Commission did not prevent any of Kroger's competitors from intervening.⁷³ However, as chains with billions of dollars in revenue, it is unlikely that they did so for want of "money and knowledge to participate in PUCO proceedings," as OCC implies.⁷⁴

Furthermore, Kroger can affirmatively note that by committing its own time and resources to participate in this proceeding, it has secured benefits, such as grid modernization and lower rate impacts, for DP&L customers at large, including its competitors. OCC's witness states that Kroger secured only benefits which "do not flow to its competitors."⁷⁵ This is false. If Kroger did not intervene and participate in this case and if the Commission approved DP&L's applications as submitted, Kroger's competitors would have been stuck paying higher costs for grid modernization. Without the Stipulation, there would be no agreement in place to terminate the RSC, and Kroger and its competitors would continue paying this charge. OCC's witness Dr. Edward Hill agrees that lowering the costs passed through to customers through the IIR will benefit all customers, not just those that intervene.⁷⁶ Another OCC 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 those customers,⁷⁷ and that the Stipulation lowered the costs of grid modernization passed through to customers.⁷⁸ Kroger's intervention has helped secure lower costs for customers—which applies equally to Kroger's competitors, and not specifically to Kroger alone. On the other hand, without expending any of their own resources, Kroger's competitors have obtained a beneficial outcome.

⁷³ Tr. Vol. IV at 672 (Cross Examination of Hill).

⁷⁴ See OCC Initial Brief at 38.

⁷⁵ See Tr. Vol. IV at 673 (Cross Examination of Hill).

⁷⁶ *Id.* at 668-69 (Cross Examination of Hill).

⁷⁷ *Id.* at 792 (Cross Examination of Williams).

⁷⁸ *Id.* at 793.

Requiring Kroger to obtain more benefits specifically for its competitors, as OCC seems to suggest,⁷⁹ would punish Kroger for intervening while rewarding its competitors for doing nothing. OCC's witness acknowledges that this creates a free rider problem, when some parties obtain benefits from the actions of others without contributing themselves.⁸⁰ Such a situation would create a disincentive for participation by interested parties. As OCC takes issue with the level of participation afforded by the Commission's settlement process, creating such a disincentive seems counterproductive.

C. The Stipulation Does Not Create the RSC.

Lastly, OCC continues to repeat the false claim that the Stipulation subjects DP&L's customers to charges under the RSC that customers would not otherwise pay. According to OCC, the Stipulation requires customers "to ante up \$300 million" for the RSC.⁸¹ Although customers are already paying this charge and will continue to do so absent the Stipulation, OCC brazenly claims that "the [Stipulation] directly results in the continuation of the RSC and more than \$300 million in charges to customers."⁸²

In reality, the RSC originated in 2009—not under the Stipulation—in DP&L's original electric security plan (ESP).⁸³ The Commission reinstated the RSC in 2019,⁸⁴ after DP&L

⁷⁹ See OCC Initial Brief at 44.

⁸⁰ Tr. Vol. IV at 599 (Cross Examination of Hill).

⁸¹ OCC Initial Brief at 1.

⁸² *Id.* at 69.

⁸³ *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).

⁸⁴ DP&L Exhibit 12, *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶¶ 36-42 (Dec. 18, 2019).

withdrew its third ESP, following a Commission decision removing the distribution modernization rider from DP&L's third ESP.⁸⁵

While the Stipulation does not create the RSC, it does eliminate it. Pursuant to the Stipulation, DP&L has agreed to file an application for ESP IV by 2023, that does not contain any nonbypassable charge to customers related to provider of last resort risks, financial stability or integrity, or any other charge calculated based on credit ratings or performance of any parent or affiliate of DP&L.⁸⁶ This will eliminate the RSC, as well as potential replacement charges.⁸⁷ Additionally, no provision in the Stipulation *requires* that customers pay the RSC for the duration. Should the Commission otherwise act to remove the RSC, the Stipulation would not prevent them from doing so.

Absent the Stipulation, the RSC would continue unless and until the Commission determines otherwise. At this point, however, the Commission has not invalidated the RSC.⁸⁸ Without an agreement to terminate the RSC—such as the agreement contained in the Stipulation—the RSC will otherwise continue, unless the Commission or the Supreme Court of Ohio takes further action to remove it.⁸⁹ OCC's witnesses note that neither the Commission nor the Supreme Court of Ohio has taken such action.⁹⁰

⁸⁵ *Id.* at ¶¶ 8-9; *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395, et al., Supplemental Opinion and Order at ¶ 110 (Nov. 21, 2019).

⁸⁶ Stipulating Parties Exhibit 1, Stipulation at ¶ 20(a).

⁸⁷ *See* Tr. Vol. V at 914 (Cross Examination of Duann); Tr. Vol. IV at 630 (Cross Examination of Hill).

⁸⁸ *Id.* at 910-11 (Cross Examination of Duann).

⁸⁹ *Id.* at 912 (Cross Examination of Duann).

⁹⁰ Tr. Vol. III at 456 (Cross Examination of Kahal); Tr. Vol. IV at 616 (Cross Examination of Hill).

While Kroger has in the past petitioned the Commission for removal of the RSC,⁹¹ these arguments have not been adopted by the Commission. The Stipulation represents a continued effort to remove the RSC. That OCC would accuse Kroger, who has consistently advocated for the removal of the RSC, of authorizing the charge in a Stipulation that actually removes the charge, is disingenuous.

III. CONCLUSION

The Stipulation filed on October 23, 2020 is just, reasonable, and in the public interest. It also clearly satisfies all three criteria of the Commission's analysis for approving settlements as it is the product of serious bargaining among the parties; will create significant benefits for customers, and as a package; is in the public interest; and does not violate any regulatory principle or practice.

OCC advances a variety of arguments that conflict with longstanding Commission precedent, misstate and misrepresent the nature of the Signatory Parties, and are based on faulty conclusions of law regarding the RSC, in order to attempt to block the Stipulation. As such, the Commission should reject those arguments. Accordingly, for the foregoing reasons, Kroger respectfully requests that the Commission adopt and approve without modification the Stipulation that the Signatory Parties submitted for consideration in this proceeding.

⁹¹ See *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., Corrected Memorandum Contra DP&L's Motion to Withdraw by the Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Energy Group, the Kroger Co., and IGS Energy (Dec. 5, 2019); *id.*, Joint Application for Rehearing of the Ohio Manufacturers' Energy Group and the Kroger Co. (Jan. 17, 2020).

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 March 5, 2021 upon the parties listed below.

/s/ Angela Paul Whitfield
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Summary: Brief Reply Brief of The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.