BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid	: : :	CASE NO. 18-1875-EL-GRD
In the Matter of the Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2)	: :	CASE NO. 18-1876-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods	: :	CASE NO. 18-1877-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018	: : : :	CASE NO. 19-1121-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019	: : :	CASE NO. 20-1041-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)	: : :	CASE NO. 20-0680-EL-UNC

**POST-HEARING REPLY BRIEF OF
THE DAYTON POWER AND LIGHT COMPANY**

PUBLIC VERSION

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING 2

III. THE STIPULATION WILL BENEFIT CUSTOMERS AND THE PUBLIC INTEREST 10

A. DP&L'S SMART GRID PLAN WILL PROVIDE $413.3 MILLION NET BENEFITS TO CUSTOMERS 10

1. The CBA Accurately Accounts for Customer Costs 10

2. The CBA Accurately Accounts for Customer Benefits 12

3. The Stipulation Does Not Place 100% of the Risk on Customers 17

B. THE STIPULATION DOES NOT VIOLATE THE LAW 19

C. THE COMMISSION SHOULD NOT MAKE DP&L'S TARIFFS SUBJECT TO REFUND 19

D. THE COMMISSION SHOULD NOT LIMIT WHAT DP&L CAN SEEK IN ESP IV 21

E. THE ECONOMIC DEVELOPMENT INCENTIVES AND GRANTS IN THE STIPULATION ARE LAWFUL AND REASONABLE 22

IV. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE 24

A. DP&L DID NOT HAVE SIGNIFICANTLY EXCESSIVE EARNINGS IN 2018 AND 2019 24

1. The Commission Should Exclude the DMR from DP&L's Earnings 25

2. The Commission Should Include DP&L's Asset Impairments in Its Equity Balance 28

3. The Commission Should Adjust DP&L's Equity Balance Due to AES's Investments 30

4. OCC Does Not Challenge TCJA and RSC Adjustments 32

5. The Staff's Use of a Capital Structure from DP&L's Rate Case is Reasonable 32

6. The 12% SEET Threshold Is Not Applicable 34

7. The Staff's Approach to Evaluating Future Committed Capital is Reasonable 35

B. ESP I PASSES THE MFA TEST AND PROSPECTIVE SEET 37

1. ESP I Is More Favorable Than an MRO 37

2. ESP I Passes the Prospective SEET 44

3. The Stipulation Establishes What Should Happen if ESP I Fails Either Test under R.C. 4928.143(E) 45

C. THE RSC IS LAWFUL 46

1. The RSC Is Not at Issue in These Cases 47

2. OCC Ignores the Plain Language of the Governing Statute 47

3. Res Judicata and Collateral Estoppel Bar OCC's Arguments 49

4. OCC Ignores Two Rulings by the Court That the RSC Is Lawful 51

5. DP&L Still Provides POLR Service 53

D. ESP I INCLUDES THE IIR 57

E. THE STIPULATION IS CONSISTENT WITH THE ESP I STIPULATION 58

F. EV AND SMART THERMOSTAT PROVISIONS ARE REASONABLE 59

G. THE SETTLEMENT PROMOTES OHIO POLICIES 60

1. Ohio Policy Favors Demand Side Management Programs 60

2. The RSC Does Not Violate Ohio Policy 61

3. The Stipulation Does Not Subsidize AES 61

4. Refunds Are Not Required 61

5. The Stipulation Will Protect At-Risk Customers 62

6. The Stipulation Will Further the State's Effectiveness in the Global Economy 62

V. DP&L DID NOT WAIVE ANY TRADE SECRETS 62

VI. CONCLUSION 63

I. INTRODUCTION

The Stipulation and Recommendation ("Stipulation" or "Stip. Parties Ex. 1") in these cases will allow The Dayton Power and Light Company ("DP&L") to modernize its distribution grid (which will provide significant net benefits to customers) while allowing DP&L to maintain its financial integrity. The Stipulation is thus a significant "win" for customers, and it is not surprising that the Stipulation enjoys widespread support from a diverse group of Signatory Parties.

Briefs filed by the Signatory Parties to the Stipulation demonstrate that the Stipulation is the product of serious bargaining, benefits customers, and does not violate the law. DP&L's Initial Post-Hearing Brief ("DP&L's initial brief"), pp. 1-68 (addressing all three elements); Staff Post-Hearing Brief, pp. 1-38 (addressing all three elements); OEG's Post-Hearing Brief, pp. 1-6 (addressing all three elements); Kroger Post-Hearing Brief, pp. 1-16 (addressing all three elements); OMAEG Post-Hearing Brief, pp. 1-22 (addressing all three elements); IEU Post-Hearing Brief, pp. 1-9 (addressing all three elements); ELPC Post-Hearing Brief, pp. 1-11 (addressing benefits of the Stipulation); Mission:data Post-Hearing Brief, pp. 1-7 (addressing benefits of the Stipulation); IGS Post-Hearing Brief, pp. 1-8 (addressing benefits of the Stipulation and whether the Stipulation violates the law); OHA Post-Hearing Letter (supporting Stipulation).

Only one party opposes the Stipulation: The Office of the Ohio Consumers' Counsel ("OCC"). OCC's arguments are too numerous to summarize in this Introduction, but as demonstrated below, none of OCC's arguments have any merit.

II. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING

DP&L's initial brief (pp. 7-10) demonstrated that the Stipulation is the product of serious bargaining among knowledgeable parties. Among other points, DP&L's initial brief demonstrated that all parties were invited to participate in multiple bargaining sessions, the Stipulation was signed by a large, diverse group of intervenors, and DP&L made significant concessions in the Stipulation. Accord: Nov. 30, 2020 Direct Testimony of Sharon R. Schroder in Support of the Stipulation and Recommendation (DP&L Ex. 4), pp. 12-14.

OCC asserts (pp. 37-44) that the Signatory Parties constitute a "redistributive coalition" and that the Stipulation is not the product of serious bargaining because it provides benefits "only" to the Signatory Parties. Initial Brief for Consumer Protection by The Office of the Ohio Consumers' Counsel ("OCC Initial Post-Hearing Brief"), p. 38 (a redistributive coalition "fixes the problem only for those who agree to a settlement with the utility"); id. (providing benefits "only for signatory parties is bad public policy") id. at 40 (a redistributive coalition "benefit[s] a small group of coalition members and not the broader public") id. at 41 (a redistributive coalition will "only secure limited benefits for themselves and their members") id. at 42 (the Commission should "reject[] attempts by redistributive coalitions to secure benefits for only themselves").

However, as demonstrated in the following chart, OCC is wrong -- the Stipulation benefits all customers, not just the Signatory Parties:

Benefit	**Who Receives the Benefit**
I. Smart Grid Benefits	
1. DP&L's Smart Grid Plan ("SGP") will result in utility O&M savings of $52.7 million. Stip. Parties Ex. 1, Ex. 4.	All customers
2. DP&L's SGP will result in utility avoided capital expenditures worth $13.2 million. Id.	All customers
3. DP&L's SGP will result in utility billing process efficiencies of $31.1 million. Id.	All customers
4. DP&L's SGP will result in customer energy and demand savings of $75.7 million. Id.	All customers
5. DP&L's SGP will result in customer benefits of improved reliability of $90.6 million. Id.	All customers
6. DP&L's SGP will result in customer electric vehicle ("EV") savings of $83.6 million. Id.	All customers may purchase EVs
7. DP&L's SGP will result in societal benefits associated with reducing greenhouse gases of $13.5 million. Id.	All customers
8. DP&L's SGP will result in an economic impact of DP&L's investments of $336.8 million. Id.	All customers
9. DP&L agreed to accelerate certain portions of the SGP, such as CVR/VVO, thereby accelerating benefits to customers. Id.	All customers
10. By reducing miles driven by DP&L trucks, the SGP promotes safety. Nov. 30, 2020 Testimony of Sharon R. Schroder (DP&L Ex. 4), p. 20).	All customers, DP&L employees, DP&L contractors
II. Continuing ESP I	
1. The Stipulation provides that ESP I will continue. Stip. Parties Ex. 1, ¶ 19.c.i. DP&L needs ESP I to continue so that it can provide safe and reliable service. Apr. 1, 2020 Jeffrey Malinak (DP&L Ex. 1A), pp. 57-66.	All customers

Benefit	Who Receives the Benefit
III. Other benefits	
1. DP&L's Application in Pub. Util. Case Nos. 18-1875-EL-GRD, et al. sought Commission approval to make investments and operations and maintenance expenditures associated with its SGP totaling $866.9 million over 20 years. SmartGrid Application, ¶ 9. The Stipulation caps those expenditures at $267.6 million over four years. Stip. Parties Ex. 1, ¶ 2.	All customers
2. DP&L's SmartGrid Application proposed that a portion of estimated cost savings associated with grid modernization would be passed through to customers when DP&L filed future rate cases. The Stipulation now guarantees that the updated estimated amount of total savings, which includes all categories of operational savings, will be passed back to customers through the IIR, which will allow customers to benefit from those savings more quickly. Id. ¶ 3.b.	All customers
3. The Stipulation establishes stringent procedures for the auditing of DP&L's SGP Phase 1 investments and expenditures. Id. ¶ 5.a. There was no such requirement in DP&L's SmartGrid Application.	All customers
4. The Stipulation establishes procedures for DP&L to update the Commission and interested parties regarding the status of grid modernization. Id. ¶¶ 5.b, 5.c. There were no such procedures in DP&L's SmartGrid Application.	All customers
5. The Stipulation establishes a Smart Thermostat Program, which will be funded by DP&L with shareholder dollars and can help reduce energy and demand for customers. Id. ¶ 9. There were no such provisions in DP&L's SmartGrid Application.	All customers
6. DP&L's SmartGrid Application provided for recovery of investments and expenditures associated with a new Customer Information System ("CIS"). SmartGrid Application, ¶¶ 2.c, 13. The Stipulation provides that investments and expenditures associated with the CIS will be recovered through base rates instead of through the IIR like other SGP Phase 1 components. Stip.	All customers

Benefit	Who Receives the Benefit
Parties Ex. 1, ¶ 10.g. That provision will benefit customers because it will ensure that the CIS system is fully functional, prior to DP&L seeking recovery of invested dollars.	
7. The Stipulation contains detailed provisions regarding the appropriate and timely access of customer data to customers, CRES providers and third parties. Id. ¶ 11.	All customers, CRES and Third Parties
8. The Stipulation includes shareholder funding for a weatherization program for low-income customers, and a water heater pilot program directed at low-income residential customers. Id. ¶ 12.	Low-income residential customers
9. The Stipulation contains benefits for the City of Dayton, including but not limited to prioritization of the installation of the SGP in economically disadvantaged areas of the City; $350,000 in annual financial contributions of DP&L shareholder dollars to the PACE program, economic development, and low-income residents; and a commitment to provide support relating to an interconnection of net metering systems for two City of Dayton Solar Projects. Id. ¶¶ 13, 16.b. In addition, the Stipulation contains a waiver of fees for alternative feed service for City of Dayton accounts that have redundant service. Id. ¶ 13.a.iv.	City of Dayton, and its residential, commercial and industrial residents
10. The Stipulation contains a waiver of redundant fees for members of the Ohio Hospital Association. Id. ¶ 14.a.	The members of the Ohio Hospital Association benefit directly. All customers benefit from lower costs to hospitals and access to hospitals served by resilient electric service.
11. The Stipulation contains economic development incentives and grants for hospitals and manufacturers in DP&L's service territory. These benefits are intended to assist those organizations in responding to the financial consequences of COVID-19 and restarting Ohio's economy by supporting large employers that are key drivers of economic development in the region, thereby benefiting the region and State more broadly. Id. ¶ 15. DP&L will bear the cost of these incentives	The Signatory Parties listed in ¶ 15 benefit directly. All parties, customers, and the State of Ohio benefit from economic development incentives and grants and the quicker recovery from the

Benefit	Who Receives the Benefit
and grants and will not recover that cost from customers. Id.	financial consequences of COVID-19.
12. The Stipulation further provides $250,000 of support toward analyzing the technical aspects of an energy resiliency project in or near the Wright-Patterson Air Force Base. The project may include renewable energy and distributed energy resources, energy storage, advanced control systems, and reduction of energy consumption through lighting and water upgrades, and HVAC improvements. Id. ¶ 16.a. DP&L will also bear this cost and will not recover that cost from customers. Id.	Wright-Patterson Air Force Base, which is not a Signatory Party, benefits directly. All customers benefit from environmental expenditures. All parties, customers, and the State of Ohio benefit from a resilient, local Air Force Base, that is the largest single-site employer in the State.
13. The Stipulation further provides that DP&L will provide $1 million in shareholder dollars toward a solar project owned by IGS. Id. ¶ 16.c.	IGS benefits directly. All customers benefit from environmental expenditures.
14. The Stipulation further provides that DP&L's ESP I passes the SEET and MFA test in R.C. 4928.143(E) and the SEET in R.C. 4928.143(F), and the Signatory Parties agree not to challenge DP&L's right to operate under ESP I. Id. ¶¶ 19.a, 19.c.i., and 19.c.iii. These provisions reduce regulatory uncertainty, bolster DP&L's financial integrity and ability to provide safe and reliable service. The Stipulation further reduces litigation expense by consolidating these proceedings and narrowing the contested issues before the Commission.	All customers
15. The Stipulation provides that DP&L will file an application for approval of ESP IV by October 1, 2023, which will create a period of rate stability for DP&L. Id. ¶ 20. DP&L's rate plans and associated rates have been subject to significant changes in recent years: DP&L implemented ESP II in 2013; reverted to ESP I in 2016; implemented ESP III in 2017; and again reverted to ESP I in 2019. The Stipulation benefits customers and DP&L by creating a period of rate certainty until ESP IV is approved.	All customers
16. The Stipulation also benefits customers by providing that DP&L will file an application for an ESP, not an	All customers

Benefit	Who Receives the Benefit
MRO, in 2023. Id. The Commission repeatedly has found that ESPs were more favorable in the aggregate than MROs, so DP&L's commitment to file for an ESP benefits customers.	
17. The Stipulation further benefits customers by prohibiting DP&L from proposing in ESP IV a nonbypassable charge 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, thus eliminating customer exposure to such charges in DP&L's next electric security plan. Id.	All customers

OCC's assertion that the Stipulation was the product of a "redistributive coalition" that benefits "only" the Signatory Parties is thus demonstrably false. The Stipulation provides tremendous benefits to all of DP&L's customers and other stakeholders.

In addition, OCC entirely ignores the fact that Staff signed the Stipulation. Stip. Parties Ex. 1, p. 53. Staff must take into consideration the interests of all customers.

The Commission should also consider the fact that DP&L made significant concessions in the Stipulation. DP&L Ex. 4, pp. 30-32 (Nov. 30, 2020 Schroder Test). OCC's suggestions (pp. 40, 48) that the intervening Signatory Parties gave DP&L everything that it wanted in the Stipulation are thus false.

DP&L's initial brief (pp. 8-10) demonstrated that there were other significant flaws in OCC's "redistributive coalition" argument, including: (1) Commission proceedings are open to the public, so all customers had an opportunity to participate; (2) OCC witness Hill

admitted that he "does not make recommendations on how to change the PUCO's settlement proceedings" (Tr. Vol. IV, at 595); and (3) the Commission previously rejected identical arguments made by the same witness. DP&L will not repeat those arguments here.

The Stipulation provides that the Commission will approve DP&L's applications in the 2018-2019 Retrospective SEET case. Stip. Parties Ex. 1, ¶ 19c.iii. OCC asserts (pp. 44-47) that the paragraph is a "side deal" since the only Signatory Parties that intervened in the case are OMAEG, OEG, IEU and Kroger. OCC further asserts (pp. 45-46) that the Commission should reject that paragraph since no residential customers intervened in those cases. The Commission should reject OCC's arguments for the following reasons:

1. It is well settled that OCC does not have a veto power over Stipulations. In re Dominion Retail, Inc. v. The Dayton Power and Light Co., Case No. 03-2405-EL-CSS, et al., 2005 Ohio PUC LEXIS 43, Opinion and Order (Feb. 2, 2005), *42-43 ("The Commission will not alter its traditional application of this test. The Commission will not require OCC's approval of stipulations. Legal flaws and any lack of benefit conferred by a stipulation will be considered under the other two prongs of the test. In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred, and takes notice of the experience and sophistication of the negotiating parties. In these cases, it is clear that all parties participated in negotiations. Even OCC does not argue that it was kept away from the negotiating table. It only states that it was unwilling to sign the resultant stipulation. The signatory parties are all ones which routinely participate in complex cases before the Commission. The signatory parties are all represented by counsel who similarly practice before the Commission on a regular basis. It is clear that the first prong of the test is met by the stipulation."); In re Vectren Energy Delivery of Ohio, Inc., Case No. 13-1571-GA-ALT, 2014 Ohio PUC LEXIS 33, Opinion and Order (Feb. 19, 2014), *21-22 ("The Commission finds that the Stipulation appears to be the product of serious bargaining among capable, knowledgeable parties. It is uncontested that, as argued by Vectren and Staff, all parties engaged in multiple discussions and circulated proposals to each other and that the attorney examiner granted more time to the parties for discussions prior to holding the hearing. Additionally, in response to OCC's argument that the settlement does not reflect serious bargaining because no party representing residential customers signed the

Stipulation, the Commission notes that we have repeatedly held that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first prong of the three-prong test. See In re FirstEnergy, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 26, citing Dominion Retail v. Dayton Power & Light Co., Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18, Entry on Rehearing (Mar. 2005) at 7. Consequently, we find that, based upon the record, the first prong is satisfied and we will determine whether the Stipulation, as a package, benefits ratepayers and the public interest in our consideration of the second prong of the test below.").

2. OCC's position (p. 45) that Staff takes no position on the issue is belied by the fact that Staff filed testimony recommending that no refunds should be issued in those cases. Jan. 4, 2021 Testimony in Support of the Stipulation of Joseph P. Buckley (Staff Ex. 1), pp. 10-11.

3. OCC's assertion (p. 44) that that paragraph should be viewed as a "separate settlement" makes no sense. It is well settled that a Stipulation should be viewed as a "package." In re Columbus So. Power Co., Case No. 09-872-EL-FAC, et al., Order on Global Settlement Stipulation (Feb. 23, 2017) at ¶ 101. DP&L made significant concessions in the Stipulation (see DP&L Ex. 4, pp. 30-32 (Nov. 30, 2020 Schroder Test.), and one of the benefits to DP&L was that the Signatory Parties agreed not to oppose DP&L's applications in those cases. That paragraph cannot be viewed in isolation. The Commission has previously approved Stipulations in which parties either footnote out or do not oppose certain provisions, but there is no circumstance where those provisions have been treated as entirely different Stipulations. In re The Dayton Power and Light Company, Case No. 16-395-EL-SSO, et al., Amended Stipulation and Recommendation (Mar. 14, 2017) at p. 13 n. 6; In re Ohio Power Co., Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018) at ¶ 53, n. 11.

4. OCC's claim that that paragraph has limited support overstates the facts. The Signatory Parties who did not intervene in those cases agreed not to intervene and not to take a position on those cases. Stip. Parties Ex. 1, ¶ 19.c.iii. Parties abiding by the language to which they agreed should not be read out of context as their lack of support for the cases that were included in the Stipulation they signed.

OCC also asserts (p. 76) that Signatory Parties do not have equal bargaining power in ESP cases due to a utility's right to withdraw its application. The significant defects in that argument include: (1) the full Commission has not adopted that position; and (2) this is not an ESP proceeding.

III. THE STIPULATION WILL BENEFIT CUSTOMERS AND THE PUBLIC INTEREST

A. DP&L'S SMART GRID PLAN WILL PROVIDE $413.3 MILLION NET BENEFITS TO CUSTOMERS

The Stipulation includes a cost-benefit analysis ("CBA") that shows that DP&L's SGP will provide $413.3 million in net benefits to customers (on a present value basis). Stip. Parties Ex. 1, Ex. 4. The calculation of the amounts of those benefits was supported by the testimony of DP&L witness Schroder and detailed back-up schedules. DP&L Ex. 4, pp. 15-23 (Nov. 30, 2020 Schroder Test.); DP&L Ex. 5 (detailed schedules supporting the CBA).

OCC relies (pp. 49-68) on the testimony of OCC witness Alvarez to challenge that CBA. As demonstrated below, Mr. Alvarez's criticisms of the CBA have no merit.

1. The CBA Accurately Accounts for Customer Costs

OCC asserts (pp. 53-55) that the CBA fails to accurately estimate the costs that customers will incur under DP&L's SGP. That is not true.

1. Carrying Charges: OCC asserts (p. 53) that the CBA should have included carrying charges. However, Mr. Alvarez does not claim – much less show – that carrying charges are typically included in a CBA. Dec. 17, 2020 Direct Testimony of Paul J. Alvarez (OCC Ex. 7C), pp. 13-14. Cross-examination of Mr. Alvarez revealed that his calculation of carrying costs was badly flawed. Tr. Vol. III at pp. 489-93.

2. CIS: OCC asserts (p. 54) that DP&L's CBA ignores costs associated with a new CIS. The Stipulation provides that DP&L will not recover the costs of the CIS through the IIR, but instead, DP&L will recover the costs through a future distribution rate case. Stip. Parties

Ex. 1, ¶ 10.g. DP&L's CBA thus removed the costs and the significant benefits associated with the CIS from the CBA. Tr. Vol. III at 494.

Mr. Alvarez adds back the costs of the CIS (OCC Ex. 7C, p. 34 (Dec. 17, 2020 Alvarez Test.)), but failed to add back the benefits (Tr. Vol. III at 495-96). Adding back the costs of the CIS to the CBA but not the associated benefits makes no sense. The amount of those benefits is shown on page 43, line 15 of his confidential testimony. Id. at 495.

3. Book Value of Meters: OCC criticizes (p. 54) the CBA for not including $9 million associated with the undepreciated book value of meters to be replaced by smart meters. However, Mr. Alvarez admitted that this issue will be resolved in DP&L's next distribution rate case. Tr. Vol. III at 496. He also admitted that DP&L cannot recover its investment in its new CIS until DP&L files its next rate case (id. at 496-97), so DP&L has incentive to file a rate case once those investments are complete.

4. Operational Benefit Offset: The Stipulation includes an offset to the IIR that passes back to customers cost reductions that result from DP&L's SGP. Stip. Parties Ex. 1, ¶ 3.b. OCC asserts (pp. 55-58) that the operational benefit offset will expire after four years (when SGP Phase I ends), and that as a result, customers will not receive $85 million ($36.2 million NPV) associated with a rate case timing issue, and an additional $146.0 million ($60.0 million NPV) associated with discontinuing the operational benefit offset. OCC Ex. 7C, p. 34 (Dec. 17, 2020 Alvarez Test.). Mr. Alvarez admitted that those two items would not exist if the operating benefit offset was continued. Id. at 16-22, 34; Tr. Vol. III at 500-01.

DP&L's CBA assumes that the operational benefit offset will continue for the full 20-year projection period. Tr. Vol. III at 498. The obvious defect in Mr. Alvarez's analysis is

his assumption that the Commission will discontinue the operational benefit offset after four years. One of the principal benefits of Smart Grid is reducing utility costs over the long term, and Mr. Alvarez's assertion that the Commission would not ensure that benefits flow through to customers is neither realistic nor supported by any evidence.

Further, DP&L's IIR will continue only for as long as DP&L is under ESP I, and will need to be re-instituted as part of ESP IV, that will be filed no later than October 1, 2023. Stip. Parties Ex. 1, ¶ 20.a. The Commission will have the opportunity to review further IIR recovery by DP&L if DP&L does not continue to pass back savings, thereby undermining the assumptions set forth by OCC Witness Alvarez.

In addition, Mr. Alvarez's assertion that DP&L will not file another rate case for twenty years (OCC Ex. 7C, p. 20 (Dec. 17, 2020 Alvarez Test.)) is not reasonable. DP&L needs to file a rate case to recover the CIS investments that it committed to make. Stip. Parties Ex. 1, ¶ 10.g. It is thus irrational to assume that DP&L will not file a rate case until 2040.

2. The CBA Accurately Accounts for Customer Benefits

OCC also argues (pp. 58-64) that the Stipulation overstates customer benefits. The Commission should reject those arguments for the reasons below.

1. Smart Meters: OCC criticizes (pp. 58-59) DP&L's inclusion of smart meters benefits for twenty years because (according to OCC) smart meters do not last that long. Mr. Alvarez's conclusion is based on the fact that Duke's smart meters had to be replaced after five to seven years . Tr. Vol. III at 501. However, he claimed that Duke had installed meters that lacked needed communications and software systems, and admitted that he was not aware of any facts suggesting that DP&L would install similar meters. Id. at 501-02. Further, he has not

conducted any studies on the useful life of meters. Id. at 502. Mr. Alvarez also points to the fact that the Stipulation provides for a 15-year depreciation rate, but this was a negotiated depreciation rate for a group of assets such that the agreed upon book life is not necessarily the same as a single asset's useful life in the field. Further, many of the assets that DP&L will install as part of its SGP will have useful lives that exceed 20 years that will provide benefits that are not accounted for in the CBA.

2. Geographic Information System ("GIS"): OCC argues (p. 59) that a GIS that DP&L plans to install will not last twenty years. However, Mr. Alvarez admitted that the benefit at issue – enabling DP&L to bill for pole attachments of which it currently is not aware – would result from a field audit that DP&L would conduct of pole attachments to its system, and the information from that field audit would still be of value to DP&L even if it had to replace a GIS system. Tr. Vol. III at 502-04.

3. Working Capital: OCC asserts (p. 59) that DP&L overstates benefits associated with reducing working capital. However, Mr. Alvarez does not explain (much less prove) that reductions to working capital should be only a one-time adjustment. OCC Ex. 7C, at 23 (Dec. 17, 2020 Alvarez Test.).

4. Remote Disconnect: OCC further asserts (p. 59) that benefits associated with remote disconnect are overstated, since the Commission may not approve remote disconnect for DP&L. However, the Commission has granted similar waivers to other utilities (In re Ohio Power Co., Case No. 17-1381-EL-WVR, et al., Finding and Order (Apr. 11, 2018) at ¶ 1 (approving AEP Ohio's applications to indefinitely continue waiver of requirement of personal notice to residential customers on day of disconnection and to expand the waiver to the

company's Phase 2 gridSMART area); In re Duke Energy Ohio, Inc., Case No. 19-187-EL-WVR, Finding and Order (Sept. 26, 2019), at ¶ 1 (approving Duke Energy's request for waiver of requirement to provide residential customers with personal notice on the day of disconnection and to continue a program using an alternative notification process)), as Mr. Alvarez admitted (Tr. Vol. III at 505).

5. Indirect Costs: OCC asserts (p. 60) that the CBA should not include benefits associated with EVs, greenhouse gas emissions and economic benefits associated with DP&L's SGP, without also considering "indirect costs" associated with customers paying for the SGP. As an initial matter, there is no logical reason to disregard benefits associated with EVs and greenhouse gases due to amounts customers pay for the SGP. After all, they are included as part of the grid modernization plan and Stipulation. There is no direct relationship between those benefits and the "indirect costs" that OCC identifies.

Further, OCC's assertion (p. 60) that paying for the SGP will result in "reduced food or medical purchases, reduced health and productivity and a reduction in quality of life" for customers is hyperbole that is not supported by any evidence. The rate impacts of the IIR are projected to be less than $2 a month for a typical residential customer. DP&L Ex. 4, pp. 29-30 (Nov. 30, 2020 Schroder Test.). OCC does not offer any specific evidence showing that such dire consequences would flow from such a modest cost. And OCC ignores the value of the increased jobs, tax revenue, and economic development that will benefit all customers throughout the Company's service territory.

6. Indirect Benefits: OCC argues (p. 60) that "indirect benefits are nice for customers" but should not be included in the CBA because they are not direct benefits. This

argument is misguided, for two reasons. First, as OCC admits (p. 60), the EV benefits are associated with fuel savings. See DP&L Ex. 4, p. 22 (Nov. 30, 2020 Schroder Test.). Fuel savings are a direct benefit for customers. Second, if the value of an indirect benefit can be calculated with reasonable accuracy, it should be included in a CBA. DP&L submitted evidence that reasonably estimated the benefits flowing from reduced greenhouse gases and economic benefits results from its SGP investments, and those benefits should thus be considered. Id. Notably, as shown in Stip. Parties Ex. 1, Ex. 4, even if the reduced GHG and economic impact benefits were not considered, the SGP has a positive cost-benefit ratio of 1.2.

7. EVs: OCC also asserts (pp. 60-61) that benefits from DP&L's EV program should be excluded from the CBA because DP&L's EV rebate program "is not likely to be a significant driver of EV adoption." However, Mr. Alvarez admitted that prospective EV owners may be reluctant to buy EVs due to a lack of publicly-available charging stations. Tr. Vol. III at 505. He also admitted that there was a "chicken and egg problem," because businesses may be reluctant to install charging stations when customers do not own EVs. Id. at 505-06. DP&L's rebate program – which will encourage the installation of publicly-available charging stations – is a benefit that helps alleviate that issue. Further, DP&L conservatively estimates that its EV rebate program will result in a 7.2% increase in EV purchases (DP&L Ex. 5, WPB, Lines 170-71), so DP&L is not claiming that the program will be the primary driver of EV acceptance, but it would certainly provide benefits.

8. Greenhouse Gases: OCC asserts (p. 62) that estimated benefits associated with greenhouse gases should be excluded because Mr. Alvarez opines that the estimates are "unreliable." OCC Ex. 7C p. 27 (Dec. 17, 2020 Alvarez Test.). However, Mr. Alvarez admitted that reducing greenhouse gases is a real benefit of DP&L's SGP (Tr. Vol. III at 508), and the

Commission should not disregard that benefit simply because Mr. Alvarez claims the estimates are "unreliable." That is particularly true when all he did was assert that the projections were "unreliable" – he did not claim (much less prove) that any of the assumptions or calculations in those projections were flawed or unreasonable. OCC Ex. 7C, p. 27 (Dec. 17, 2020 Alvarez Test.). Further, as discussed above and shown in Stip. Parties Ex. 1, Ex. 4, even if the reduced GHG benefits were not considered, the SGP still has a positive cost-benefit ratio.

9. Reliability Improvements: OCC contends (p. 63) that DP&L will not be able to achieve the reliability improvements that DP&L's engineers project. However, Mr. Alvarez admitted that every utility system was "unique," and he made no effort to inspect DP&L's system or review technical information about DP&L's system. Tr. Vol. III at 485. Mr. Alvarez's criticisms of estimates of reliability improvements by DP&L's engineers are thus without basis, as shown in more detail in the following section.

Further, DP&L committed to specific reliability SAIFI and SAIDI targets based upon its projected reliability improvements. Sig. Parties Ex. 1, ¶ 17.a.

10. DOE ICE Model: OCC challenges (p. 64) DP&L's estimates of reliability improvements because Mr. Alvarez believes the Department of Energy "ICE" model is flawed. However, Mr. Alvarez admitted that he has used the DOE ICE model himself to estimate the benefits of improved reliability without asserting that the model was flawed. Tr. Vol. III at 514-20. OCC claims (p. 64) that the DOE ICE model "was never intended to estimate the economic impact of outages over a defined geography"; however, Mr. Alvarez admitted that DP&L had used the ICE model consistent with how the DOE intended the model to be used. Id. at 514.

3. The Stipulation Does Not Place 100% of the Risk on Customers

OCC asserts (p. 64) that the Stipulation is not in the public interest "because customers will bear 100% of the risk of DP&L's [Smart Grid Plan] 1 investments." The Commission should reject that argument for the following reasons.

First, OCC's claim that customers will bear 100% of the risk is simply false, because: (1) DP&L can recover only its "prudently incurred" investments (Stip. Parties Ex. 1, ¶ 3.a); (2) DP&L's expenditures are subject to an extensive audit (id. ¶ 5.a); and (3) DP&L committed to updating its reliability targets based upon projected reliability improvements (id. ¶ 17.a), and a failure to achieve those targets subjects DP&L to possible penalties. O.A.C. 4901:1-10-30; and (4) DP&L has guaranteed to return specific O&M savings based upon the estimate of improved reliability, irrespective of whether they are achieved. (Stip. Parties Ex. 1, ¶ 3.b.) OCC's claim that customers bear 100% of the risk of the SGP is thus plainly false.

Second, Mr. Alvarez admitted that the process used to arrive at a Stipulation in this case was much better for customers than what would happen if DP&L had made its planned $866 million investments from its application, and then sought recovery of those expenses through a distribution rate case. Tr. Vol. III at 521-26. Specifically, in negotiations in this case, customers were able to significantly reduce the size of DP&L's SGP, while adding significant benefits for customers. Id.

OCC's assertion (p. 65) that the reliability metrics should be updated on an incremental basis before five years ignores the reality of the SGP. DP&L's SGP Phase I is an integrated plan with many inter-dependencies amongst technologies and projects that will take

four years to install. Stip. Parties Ex. 1, Ex. 1. It is thus reasonable to update the reliability metrics only after the SGP Phase I investments have been made and are fully integrated.

OCC also complains (pp. 65-66) that the Stipulation has inadequate performance metrics and that there are not "quantified targets." The Commission should reject that argument for the following reasons. First, OCC's claim that there are no quantified targets is false. The Stipulation requires DP&L to update its SAIFI and SAIDI targets to account for expected increases in reliability. Stip. Parties Ex. 1, ¶ 17.a. Second, there is no requirement that a Stipulation have any performance metrics, and Mr. Alvarez does not identify any additional metrics that should have been included. OCC Ex. 7C, pp. 41-42 (Dec. 17, 2020 Alvarez Test.). He did concede that having some metrics was better than having no metrics. Tr. Vol. III at 523. Third, the metrics set forth on Exhibit 3 will be reviewed as part of the audit set forth in the Stipulation. Fourth, the metrics in the Stipulation are substantially identical to the metrics in FirstEnergy's Stipulation, which the Commission approved. In re Ohio Edison Co., et al., Case No. 16-481-EL-UNC, et al., Opinion and Order (July 17, 2019) at ¶ 43 (adopting performance metrics to measure the status of deployment and related impacts of grid modernization investments reflected in Nov. 9, 2018 Stipulation and Recommendation, p. 22 and Ex. C, filed in that proceeding).

OCC also asserts (pp. 66-68) that the Commission should evaluate Phase I of DP&L's SGP before the Commission approves Phase II of DP&L's SGP. That argument is premature and overlooks the fact that DP&L has not filed an application for Phase II, and does not know what Phase II will contain. When DP&L files an application for Phase II, the Commission may conclude that no evaluation of Phase I is needed. Regardless, when DP&L files an Application for Phase II, DP&L will have the burden of proof, interested parties will

have ample opportunity to raise concerns, and the Commission will have approval authority. Nothing in the Stipulation allows DP&L to charge for Phase II investments before the Commission approves Phase II. There is no reason to decide now that SGP Phase I needs a detailed evaluation before SGP Phase II can be approved.

B. THE STIPULATION DOES NOT VIOLATE THE LAW

OCC argues (pp. 68-69) that the Stipulation does not benefit customers because it unlawfully denies customers a refund under R.C. 4928.143(F), and resolves the MFA test and SEET in R.C. 4928.143(E). DP&L demonstrates that the Stipulation is lawful in Section IV of this Reply Brief addressing whether the Stipulation violates any important regulatory principle or practice.

C. THE COMMISSION SHOULD NOT MAKE DP&L'S TARIFFS SUBJECT TO REFUND

OCC argues (pp. 70-71) that the Commission should order DP&L to implement its tariffs with language identifying the IIR and RSC as "subject to refund." As an initial matter, the Commission should reject OCC's argument for two reasons: (1) the IIR and RSC were approved by the Commission in its In re The Dayton Power and Light Company, Case No. 08-1094-EL-SSO, et al. ("ESP I Case"), Second Finding and Order (Dec. 18, 2019) at ¶¶ 29-35, and that is the case in which OCC should make arguments relating to the IIR and RSC; and (2) after DP&L withdrew from ESP III, the Commission was required to ("shall") implement the "provisions, terms and conditions" of ESP I (R.C. 4928.143(C)(2)(b)), and since the IIR[1] and RSC were not subject to refund under ESP I, they cannot be subject to refund now.

[1] DP&L expects that the IIR will be subject to reconciliation based upon the results of audits as approved and ordered by the Commission.

In addition, refunds are discouraged as against public policy by long-standing precedent by the Supreme Court. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2 ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."). Accord: Id. at 257 ("Under [R.C. 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.") (emphasis added).

Moreover, a refund would violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

Making DP&L's rates subject to refund would violate the important public policies of rate stability for customers of utilities. Rates collected by a utility are used either to pay its costs, pay debt, or issue dividends to shareholders. Requiring a utility to refund amounts that it has already expended would create uncertainty and unnecessary financial stress on a utility, jeopardizing a utility's ability to provide safe and reliable service to its customers. Allowing rates to be subject to refund would also make the utility a much more risky entity, which would increase its cost of capital, and ultimately lead to higher rates for customers. Accord: In re Application of Ohio Edison Co., Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 209 (rejecting argument that rate should be subject to refund because doing so would "impose additional risks on the Companies").

The Supreme Court has discussed why the no-refund rule is sound policy:

> "It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

Keco Industries, Inc., 166 Ohio St. at 259 (quoting trial court). The Commission should not make DP&L's tariffs subject to refund.

D. THE COMMISSION SHOULD NOT LIMIT WHAT DP&L CAN SEEK IN ESP IV

In the Stipulation, DP&L agreed to the following limitations on ESP IV:

> "DP&L's ESP IV Application 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. By way of example, the Signatory Parties agree that this limitation does not prevent DP&L from proposing in the future riders that recover actual costs that DP&L has incurred or will incur, distribution or transmission related revenue that DP&L has foregone or will forego, or distribution or transmission related investments (including a return on and of the investments) that DP&L has made or will make."

Stip. Parties Ex. 1, ¶ 20.a.

OCC asks the Commission (pp. 72-73) to modify the Stipulation and impose additional restrictions on what DP&L can seek in ESP IV, including that DP&L be barred from seeking bypassable charges like the RSC in that case. The Commission should not further restrict what DP&L can seek in ESP IV beyond the concessions DP&L agreed to as part of the Stipulation. If the facts and the law allow DP&L to implement a charge in ESP IV, then the Commission should approve such a charge in that case. Now is not the time for the Commission to decide whether it is lawful and reasonable for ESP IV to contain particular bypassable charges.

E. THE ECONOMIC DEVELOPMENT INCENTIVES AND GRANTS IN THE STIPULATION ARE LAWFUL AND REASONABLE

Ohio law allows the Commission to approve economic development benefits to customers. R.C. 4905.31(E); 4928.143(b)(2)(i). The Stipulation recommends that the Commission approve economic development incentives and grants to large employers in DP&L's service territory to help those employers to remain in business:

> "To assist Ohio businesses and healthcare providers with their expenses so that they are better able to respond to financial consequences of COVID-19 and restart Ohio's economy in DP&L's service area, and to further State policies and to enhance the State's competitiveness in the national and global economies, DP&L will offer several different economic development incentives and grants to large customers that are Signatory Parties, successor to Signatory Parties, and/or members of Signatory Parties and that qualify for the incentives. The costs of these incentives and grants will be funded by DP&L with shareholder dollars and not recovered through the IIR or other rates."

Stip. Parties Ex. 1, ¶ 15.

Significantly, those payments are to be made by DP&L and are not recoverable from customers. Id. DP&L witness Schroder explains the benefits associated with those economic development incentives and grants:

> "The Stipulation contains additional economic development incentives and grants for hospitals and manufacturers in DP&L's service territory. These benefits are intended to assist those organizations in responding to the financial consequences of COVID-19 and restarting Ohio's economy by supporting large employers that are key drivers of economic development in the region, thereby benefiting the region and State more broadly. [Sig. Parties Ex. 1, ¶ 15.] Moreover, DP&L will bear the cost of these incentives and grants and will not recover that cost from customers. [Id.]"

DP&L Ex. 4, p. 27 (Nov. 30, 2020 Schroder Test.). DP&L estimates that it will provide $30 million in economic development incentives and grants to customers. Dec. 17, 2020 Testimony Opposing the Settlement and Making Consumer Recommendations of Edward W. Hill, Ph.D. (OCC Ex. 3), p. 16.

While OCC challenges those economic development incentives and grants, OCC does not contest that the parties receiving the incentives and grants are large Ohio employers. Nor does OCC contest that the incentives and grants will help those entities to stay in business and provide jobs in Ohio. Nor does OCC contest that those parties have been harmed by COVID-19.

Despite the fact that Stipulation ¶ 15 specifically states that DP&L will not seek to recover the costs of the economic development incentives and grants from customers, OCC argues (pp. 73-74) that all customers are paying the economic development incentives and grants because the customers are paying the RSC. However, as the Commission knows, most utility investments and expenses can be recovered from customers in rates (assuming prudency, etc.).

Unlike those other items, the economic development incentives and grants cannot be recovered from customers. Stip. Parties Ex. 1, ¶ 15. The Commission should thus conclude that customers are not paying for the incentives and grants. (For example, if an employer pays a salary to an employee, and that employee uses some of that money to buy a car, that does not mean that the employer bought the car.)

OCC also claims (p. 74) that DP&L witness Garavaglia admitted that the RSC was "an explicit quid pro quo for the $30 million." Not true. Mr. Garavaglia was asked whether the economic development benefits would be provided if the RSC was eliminated, and he responded "if the RSC is eliminated, there is no Stipulation, right? And there is no $30 million." Tr. Vol. II at 326. Mr. Garavaglia's testimony thus makes the unremarkable points that: (a) DP&L would withdraw from the Stipulation if the RSC was terminated; and (b) if DP&L withdraws from the Stipulation, there are no economic development incentives or grants. But if DP&L withdraws from the Stipulation, there would also be no SGP, no EV rebate program, etc. Mr. Garavaglia's testimony does not establish that the RSC was a "quid pro quo" for the economic development incentives and grants.

IV. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE

A. DP&L DID NOT HAVE SIGNIFICANTLY EXCESSIVE EARNINGS IN 2018 AND 2019

As demonstrated in DP&L's initial brief (pp. 31-52), the Commission should conclude that DP&L did not have significantly excessive earnings in 2018 or 2019, and thus passes the Retrospective SEET in R.C. 4928.143(F). In particular, DP&L's initial brief demonstrated that DP&L would pass the Retrospective SEET under five different scenarios:

1. Base Case: DP&L would pass the Retrospective SEET if all of the adjustments (listed in paragraphs 2-5 below) were made. DP&L believes that all of those adjustments should be made, and DP&L would pass the Retrospective SEET if they were all made. See DP&L Ex. 3, Schedule 1, 6.

2. DMR Excluded: DP&L would also pass the Retrospective SEET if the only adjustment the Commission made was to exclude the DMR from DP&L's earnings. See DP&L Ex. 3, Schedules 2, 7.

3. Asset Impairments: DP&L would also pass the Retrospective SEET if the only adjustment the Commission made was to include prior asset impairments in its equity balance. See DP&L Ex. 3, Schedules 3, 8.

4. AES Investments and Tax Adjustments: DP&L would also pass the Retrospective SEET if the only adjustments that the Commission made were to include AES investments in DP&L's equity balance and for certain tax adjustments. See DP&L Ex. 3, Schedules 4, 9.

5. DMR to RSC: DP&L would also pass the Retrospective SEET if the only adjustment the Commission made was to include DP&L's DMR earnings but to exclude the RSC. See DP&L Ex. 3, Schedules 5, 10.

In OCC's initial brief (pp. 24-37), OCC challenged some (but not all) of those adjustments. The Commission should reject OCC's arguments for the following reasons:

1. The Commission Should Exclude the DMR from DP&L's Earnings

DP&L's initial brief (pp. 33-40) demonstrated that the Commission should exclude the DMR from DP&L's earnings for three separate and independent reasons:

1. The DMR did not constitute an "earned return" under R.C. 4928.143(F);

2. The DMR was a non-recurring and extraordinary item that should be excluded from DP&L's earnings; and

3. The DMR was a capital charge and not earnings.

OCC argues (pp. 24-27) that the Supreme Court's ruling that FirstEnergy's DMR was subject to the SEET establishes that DP&L's DMR is also subject to the SEET. However,

OCC ignores the fact that DP&L's DMR was very different from FirstEnergy's DMR. Those critical differences were explained by DP&L witness Garavaglia:

> **"Q. Were the DMR proceeds similar to other revenue that is typically earned by utilities?**
>
> A. No. Utilities are typically free to use the revenue that they earn for any lawful purpose. Utilities can dividend their revenue to shareholders; utilities can use their revenue to invest in infrastructure or to pay expenses. The DP&L DMR however, had restrictions on its use such that it could not be used for these purposes; instead, it was restricted to be used only to pay and reduce debt obligations. ESP III Stipulation at pp. 3-4. Therefore, the DMR proceeds were not similar to revenue that is typically earned by utilities.
>
> **Q. Was the DMR an 'earned return on common equity' (R.C. 4928.143(F)?**
>
> A. No. As discussed above, DP&L could not dividend or otherwise provide the DMR proceeds to AES or its shareholders. Instead, DP&L was required to use the DMR proceeds to make interest and principal payments at DP&L and DPL Inc. The DMR proceeds thus were not an 'earned return' because DP&L's use of those funds was significantly restricted, and those proceeds could not be provided to AES or its shareholders.
>
> **Q. Do the restrictions in the ESP III Stipulation on making dividend or tax sharing payments to AES affect whether the DMR was an earned return?**
>
> A. Yes. The provisions in ESP III Stipulation, pp. 3-4 that precluded DP&L and DPL Inc. from making dividend or tax sharing payments to AES further confirm that the DMR was not an earned return. Specifically, the purpose of those provisions was to prevent DP&L from using DMR proceeds to pay debt while using other proceeds to make payments to AES. The prohibitions against making payments to AES thus reinforced the prohibition against providing DMR proceeds to AES, further confirming that the DMR proceeds were not an 'earned return.'"

Dec. 23, 2020 Direct Testimony of Gustavo Garavaglia M. (DP&L Ex. 7), pp. 10-11.

DP&L witnesses Malinak also testified that DP&L's DMR revenue did not constitute an "earned return" under R.C. 4928.143(F) due to the significant restrictions on DP&L's use of its DMR revenue. Dec. 23, 2020 Supplemental Direct Testimony of R. Jeffrey Malinak (DP&L Ex. 2), pp. 11-13. FirstEnergy's DMR revenue was not restricted (In re Application of Ohio Edison Co., Cleveland Elec. Illuminating Co., and Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan ("In re FirstEnergy"), 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 19), so FirstEnergy could not and did not make this argument in its SEET case. The issue is thus open for the Commission to decide in this case.

OCC also ignores the fact that the Supreme Court expressly declined to decide whether FirstEnergy's DMR revenue should be excluded from the SEET due to (1) the DMR being an extraordinary item; or (2) the DMR being a capital charge, given the state of the record below. In re Determination of Existence of Significantly Excessive Earnings for 2017 under Elec. Sec. Plan of Ohio Edison Co., ("In re FirstEnergy SEET Application"), 2020-Ohio-5450, ¶ 33-36, 39-50. The Commission is thus free to decide those issues here where they were properly raised.

OCC also argues (pp. 25-26) that the Commission's prior ruling that DP&L's DMR was unlawful establishes that DP&L's DMR revenue is subject to the Retrospective SEET. Not so. Whether DP&L's DMR was lawful and whether DP&L's DMR revenue is subject to the Retrospective SEET are entirely different questions under entirely different statutory provisions that require entirely different analyses.

Specifically, in the case upon which OCC relies, the Commission held that DP&L's DMR was not lawful because the Court had held that "nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful." In re The Dayton Power and Light Company, Case No. 16-0395-EL-SSO, et al. ("ESP III Case"), Supplemental Opinion and Order (Nov. 21, 2019) at ¶ 108. The question whether a nonbypassable financial integrity charge is lawful is entirely unrelated to the questions of: (1) whether DP&L's DMR constitutes an earned return; (2) whether the DMR was an extraordinary item; and (3) whether the DMR was a capital charge. The Commission's decision that whether DP&L's DMR was lawful is thus not relevant to the issues here.

Significantly, as to the merits, OCC did not dispute in its brief the following points: (1) the significant restrictions on DP&L's use of DMR revenue establish that the DMR was not an earned return; (2) the DMR was a non-recurring and extraordinary item; and (3) the DMR was a capital charge. OCC's legal challenges have no merit, and given that OCC did not address the factual issues, the Commission should exclude DP&L's DMR revenue from the Retrospective SEET.

2. The Commission Should Include DP&L's Asset Impairments in Its Equity Balance

In conducting the Retrospective SEET, the Commission may make "such adjustments for capital structure as may be appropriate." R.C. 4928.143(F). DP&L's initial brief (pp. 41-44) demonstrated that it is "appropriate" for the Commission to consider all of the investments that DP&L's shareholders made in DP&L because doing so more accurately reflects the return that DP&L's shareholders actually earned on their investments. Financial experts

agree that including asset impairments in equity balance gives a more accurate view of the ROE earned by shareholders:

> "'Extraordinary and one-time charges and income often skew both earnings and invested capital measures at firms. As a general rule, the income that is used to compute returns on equity and capital should reflect continuing operations and should not include any items that are one-time or extraordinary. Extraordinary charges also reduce invested capital and throw off return on capital computations. In fact, firms with mediocre investments can report healthy returns on capital by writing off significant amounts of the capital over time.'"

DP&L Ex. 2, pp. 15-16 (Dec. 23, 2020 Malinak Test.) (emphasis in original) (quoting Damodaran, Aswath, Return on Capital ("ROC"), Return on Invested Capital ("ROIC") and Return on Equity ("ROE): Measurement and Implications, July 2007, p. 37) (footnotes omitted).

Before turning to OCC's arguments, it is worth noting that OCC does not dispute DP&L's core point on this issue – namely, that including the asset impairments in DP&L's equity balance provides a more accurate view of the actual return earned by DP&L's shareholders.

OCC argues (pp. 30-31) that the write offs should not be included because they were made before the years in question. However, OCC ignores the fact that DP&L's shareholders actually invested $1 billion in DP&L. OCC witness Duann admitted that one of the purposes of the SEET is to ensure that DP&L's shareholders do not have excessive returns. Tr. Vol. V at 888. In evaluating whether DP&L's shareholders had an excessive return, it is "appropriate" (R.C. 4928.143(F)) for the Commission to consider all amounts that were invested by those shareholders, not just a portion of those investments.

OCC asserts (p. 30) that the Commission should not include DP&L's assets or write offs since the Commission has not done so in the past. However, the Commission has not considered the issue previously, so past precedent is not on point.

3. **The Commission Should Adjust DP&L's Equity Balance Due to AES's Investments**

The Retrospective SEET statute provides that "Consideration also shall be given to the capital requirements of future committed investments in this state." R.C. 4928.143(F). DP&L's initial brief (pp. 44-46) demonstrated that the "capital requirements" of DP&L's "future committed investments in this state" included $300 million in investments that AES has made or plans to make in DP&L to enable SmartGrid. That amount should thus be included in DP&L's equity balance.

OCC states (p. 27), "[i]t is hard to believe that OCC must explain that a company's 2018 and 2019 profits cannot possibly be affected by equity investments made in 2020 and 2021. Yet here we are." OCC goes on to say that "[a]dopting DP&L's approach of adding equity based on investments made after the end of the year in review would set a dangerous precedent and fundamentally conflicts with the purpose of the retrospective review." Id. at 29.

However, OCC entirely ignores that the Commission is required ("shall") to consider "future" investments by the Retrospective SEET statute. R.C. 4928.143(F). OCC did not quote that sentence in its argument on this issue; OCC does not attempt to explain why that sentence is not applicable. OCC must ignore the plain language of R.C. 4928.143(F) because the statute is inconsistent with OCC's argument.

Further, OCC ignores the fact that DP&L was "committed" to making capital investments in this state in 2018 and 2019. Specifically, the March 14, 2017 ESP III Stipulation provided that DP&L "will file a comprehensive" Smart Grid Plan. OCC Ex. 10, ¶ 3.a. Consequently, DP&L filed its application to implement Smart Grid in 2018 in Case No. 18-1875-EL-GRD. DP&L thus had "future committed investments in this state" in 2018 and 2019.

The statute provides that the Commission "shall" consider "the capital requirements" of "future committed investments," and it is thus reasonable to include those capital requirements (the AES $300 million investments) in DP&L's equity balance for purposes of calculating the Retrospective SEET. DP&L Ex. 7, pp. 13-18 (Dec. 23, 2020 Garavaglia Test.).

OCC also asserts (p. 37) that the AES investments should not be added to DP&L's equity balance for the Retrospective SEET since a prior version of R.C. 4928.143(F) precluded the Commission from considering "revenue, expenses, or earnings" in conducting the test. The glaring problems with that argument include: (1) the statute requires the Commission to consider "capital requirements of future committed investments," and OCC does not dispute that AES's investments are such capital requirements; and (2) AES's investments in DP&L are not "revenue, expenses, or earnings" – they are capital investments.

OCC argues (p. 29) that DP&L did not make this adjustment in the testimony filed with DP&L's initial applications in the 2018 and 2019 Retrospective SEET cases, and that DP&L is now somehow barred from proposing those adjustments because DP&L agreed to "stand[] behind those applications" in the Stipulation. OCC makes identical arguments (pp. 31, 33, 34) regarding other adjustments proposed by DP&L. However, the Stipulation simply says

that the Commission will "approve" DP&L's applications in those cases. Stip. Parties Ex. 1, ¶ 19.c.iii. The Stipulation does not bar DP&L from proposing alternative or additional reasons for approving the Applications. Further, one of the Attorney Examiners in this case ordered the parties to file testimony regarding whether the Supreme Court's decision in the FirstEnergy DMR case impacted how this case "should be conducted" In re The Dayton Power and Light Company, Case No. 18-1875-EL-GRD, et al., Entry Dec. 4, 2020) at ¶ 16. DP&L's testimony complied with that order. Tr. Vol. I, pp. 22-24.

4. OCC Does Not Challenge TCJA and RSC Adjustments

DP&L's initial brief demonstrated that the Commission should make adjustments associated with the Tax Cuts and Jobs Act (p. 46) and should subtract the RSC from DP&L's earnings (pp. 46-47). OCC did not contest either point in its brief. Notably, DP&L passes the Retrospective SEET if the RSC is excluded from DP&L's earnings. DP&L Ex. 3, Schedules 5, 10.

5. The Staff's Use of a Capital Structure from DP&L's Rate Case is Reasonable

The Stipulation in DP&L's 2015 distribution rate case establishes a capital structure of 52.48% debt and 47.82% equity for DP&L. Staff Ex. 1, p. 6 (Jan. 4, 2021 Buckley Test.). OCC signed that Stipulation. In re DP&L Rate Case, Case No. 15-1830-EL-AIR, et al., Stipulation and Recommendation (June 18, 2018), p. 17. Staff witness Buckley used that capital structure in his Retrospective SEET analysis. Staff Ex. 1, pp. 6-9 (Jan. 4, 2021 2020 Buckley Test.).

OCC argues (p. 32) that "on cross-examination, [Mr. Buckley] admitted that he only made this adjustment to try to lower the utility's profits (on paper), not because there is

some principled basis for making the adjustment." That argument grossly misstates the record. On the page of Mr. Buckley's testimony to which OCC cites, Mr. Buckley explained that he stops his Retrospective SEET analysis if the "FERC or SEC filed numbers . . . are below that SEET threshold." Tr. Vol. II at 378. However, if those initial numbers are above the SEET threshold, he considers other adjustments that "the statute allows." Id. That is a logical course of action, since there is no need to consider other adjustments if the utility passes the Retrospective SEET with the unadjusted numbers. Id. OCC does not claim that there were required statutory adjustments that would have led to a higher ROE for DP&L that Mr. Buckley failed to make. OCC's claim that Mr. Buckley admitted that he made that adjustment to "try to lower" DP&L's ROE without a "principled basis" is a misstatement of Mr. Buckley's testimony.

Further, the Retrospective SEET statute imposes "asymmetric risks" on utilities, since a utility may have to provide refunds if it has significantly excessive earnings, but the utility cannot receive additional revenue if its earnings are very low. DP&L Ex. 2, pp. 31-32 (Dec. 23, 2020 Malinak Test.). To offset that asymmetric risk, it was thus reasonable for the General Assembly to include adjustments that would lower the risks of issuing refunds and mitigate that asymmetric risk. Id. That conclusion is consistent with the policy against refunds in Ohio. Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). Accord: Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2, 257. The Commission should, thus, enforce those adjustments liberally and award refunds only where a utility clearly has significantly excessive earnings.

Significantly, despite OCC's criticism of Mr. Buckley's approach, OCC does not dispute that Mr. Buckley's capital structure adjustment was lawful and reasonable.

OCC asserts (p. 31) that "there is no precedent for" Staff's approach. However, the Commission has never considered the argument before, so it is free to do so now.

6. The 12% SEET Threshold Is Not Applicable

The Commission should reject OCC's argument (pp. 33-35) that a 12% Retrospective SEET threshold should apply for the following reasons.

First, that argument is directly contrary to the Retrospective SEET statute. The statute requires the Commission to set the SEET threshold based upon "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." R.C. 4928.143(F). OCC entirely ignores the statutory requirement for setting a SEET threshold.

Indeed, OCC's witness did not identify a comparable group and did not contest the comparable group identified by DP&L's witness. Tr. Vol. V at 873; Dec. 17, 2020 Direct Testimony of Daniel J. Duann, Ph.D. (OCC Ex. 4), pp. 1-26. The evidence as to an appropriate comparable group – and thus the appropriate SEET threshold – by DP&L witness Malinak is thus uncontested. DP&L Ex. 2, pp. 51-58 (Dec. 23, 2020 Malinak Test.).

Second, that 12% SEET threshold was established in DP&L's ESP III Stipulation (ESP III Case, Amended Stipulation and Recommendation (Mar. 14, 2017) at ¶ II.2.E.), which has now been terminated (ESP III Case, Finding and Order (Dec. 18, 2019), ¶ 1). It thus can no longer be enforced.

OCC also asserts (p. 34 and n.127) that the Commission previously applied the 12% threshold to revenue that DP&L earned while ESP I was in effect. The defect in that

argument is that ESP III (including the 12% SEET threshold) was in effect at the time that the Commission issued that order. In re The Dayton Power and Light Company, Case No. 17-1213-EL-UNC, et al. Opinion and Order (July 31, 2019). Further, there was no dispute in those cases that DP&L passed the SEET, so those cases did not warrant the depth of analysis that is warranted in these cases. See Tr. Vol. II at 378 (Buckley Test.); DP&L Ex. 7, p. 5 (Dec. 23, 2020 Garavaglia Test.).

In fact, the Commission has previously approved stipulations that adopted SEET thresholds in excess of 17%. In re Ohio Power for Administration of the Significantly Excessive Earnings Test Pursuant to R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10, Opinion and Order (Feb. 27. 2019) at ¶ 19(e)3.

7. The Staff's Approach to Evaluating Future Committed Capital is Reasonable

One of the adjustments that the Commission is required ("shall") to consider is the "capital requirements of future committed investments in this state." R.C. 4928.143(F). Staff witness Buckley explained how he applied that language:

> "Q. As stated in the Commission's June 30, 2010 order in Case No. 09-786-EL-UNC, shown above, the Commission will give due consideration to capital commitments and future capital requirements among other things. Have DP&L or AES (DP&L's parent) made any capital commitments that Staff believes should be given special consideration?
>
> A. Yes, 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. 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. 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 distributed energy resources into its grid, including community solar, energy storage, microgrids and electric vehicle charging infrastructure.
>
> 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. 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.
>
> * * *
>
> 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. 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."

Staff Ex. 1, pp. 10-11 (Jan. 4, 2021 Buckley Test.).

Significantly, OCC Witness Duann agreed that "the Commission can consider future committed capital investments in deciding whether to require a utility to issue a refund." Tr. Vol. V at 904.

OCC argues (p. 35) that the statute says that a utility "shall" issue refunds if a utility has significantly excessive earnings. That is true. However, OCC conceded (pp. 36-37) that the Commission has "some discretion" in applying the "capital requirements of future committed investments" clause and can "make adjustments to the calculation of significantly excessive profits in light of the utility's future committed capital investments." The testimony of

Staff witness Buckley shows that he did exactly that. Staff Ex. 1, pp. 10-11 (Jan. 4, 2021 Buckley Test.). Based upon the capital requirements of DP&L's future committed investments, Mr. Buckley concluded that DP&L did not have significantly excessive earnings and thus recommended that DP&L not be required to issue a refund. Id.

OCC also cites (p. 36) to Commission precedent in which the Commission applied the "capital requirements of future committed investments" clause to increase an ROE threshold for a utility. However, the statute does not require the Commission to use that same approach here. The statute requires the Commission to "[c]onsider[]" the capital requirements of future committed investments, which is a very broad grant of authority. The testimony of Staff witness Buckley shows that the Commission should consider the capital requirements of DP&L's future committed investment and conclude that DP&L will not have significantly excessive earnings. That approach is reasonable, and the Commission should adopt it.

.

B. ESP I PASSES THE MFA TEST AND PROSPECTIVE SEET

1. ESP I Is More Favorable Than an MRO

DP&L's initial brief (pp. 52-60) demonstrated that DP&L's ESP I passed the MFA test in R.C. 4928.143(F), for the following reasons:

a. The Commission would approve an FIC under an MRO that exceeded the RSC.

b. The statutory MRO blending requirement is no longer feasible to implement in an MRO.

c. ESP I has numerous qualitative benefits over an MRO.

In addition to those reasons, OCC witness Hill testified that DP&L would provide $30 million in benefits to Signatory Parties under the Stipulation in the form of economic development credits and other benefits. OCC Ex. 3, p. 16 (Dec. 17, 2020 Hill Test.) That is yet another benefit of the Stipulation that would not be available under an MRO.

The Commission should reject OCC's arguments listed below for the following reasons:

1. A [redacted] Million FIC: DP&L witness Garavaglia explained that one of the reasons that AES was willing to invest in DP&L was that AES could receive an accelerated recovery of that investment through the IIR. Apr.1, 2020 Direct Testimony of Gustavo Garavaglia M. (DP&L Ex. 6A), pp. 26-27. An MRO does not include provisions allowing for the accelerated recovery of investments, so AES would not invest $150 million in 2022 in DP&L under an MRO. Id.

The testimony of DP&L witness Malinak demonstrated that DP&L's financial condition during the 2020-2023 forecast period (with the RSC) would be "fragile," that DP&L would have below average credit ratings, and DPL Inc. would violate debt covenants (even assuming that AES made the full $300 million in investments). DP&L Ex. 1A, pp. 10-11 (Apr. 1, 2020 Malinak Test.) It is reasonable to assume that under an MRO, at a minimum, the Commission would want to maintain DP&L in the same financial condition that it would be in under ESP I. Id. at 53. DP&L would need a financial integrity charge of [redacted] million under an MRO to do so. Id.

OCC asserts (p. 10) that AES is attempting to "hold the PUCO hostage" by stating that AES would not invest $150 million in DP&L in 2021 under an MRO. There is no

requirement that AES invest any money in DP&L. The availability of accelerated recovery of investments under an ESP but not an MRO makes it rational that AES would be more willing to invest under an ESP. There is no hostage here.

The $150 million AES investment in DP&L in 2021 is a significant benefit of ESP I over an MRO, and a lack of that investment under an MRO means that an FIC under an MRO would need to be higher than the RSC. DP&L Ex. 1A, p. 53 (Apr. 1, 2020 Malinak Test.).

2. DP&L Returns: OCC also asserts (p. 11) that the FIC leads to what OCC believes are unreasonably high returns under an MRO. The Commission should reject that argument for two reasons.

First, the argument ignores the economic reality of DP&L's financial situation. DP&L would need a [redacted] million FIC under an MRO to pay its expenses, make needed investments and to pay debt at DP&L and DPL Inc. DP&L Ex. 1A, pp. 50-53 (Apr. 1, 2020 Malinak Test.). OCC witness Kahal conceded that DPL Inc. and DP&L are financially intertwined, and that it is important for DPL Inc. be able to pay its debts. Tr. Vol. III at 432-33. DP&L would not be able to make those payments without an FIC under an MRO. DP&L Ex. 1A, pp. 50-51 (Apr. 1, 2020 Malinak Test.).

Second, OCC witness Kahal did not include write offs associated with DP&L's generation assets in calculating his ROE figures. Oct. 22, 2020 Direct Testimony of Matthew I. Kahal (OCC Ex. 1C), pp. 34-35 . DP&L witness Malinak explains that including those write offs gives a more accurate reflection of the actual return earned by DP&L's shareholders, a point that OCC never disputes. DP&L Ex. 1A, p. 17 n.16 (Apr. 1, 2020 Malinak Test.). DP&L's

return would be 4.2% during the forecast period if those write offs are included in DP&L's equity balance. Id.

3. A [redacted] Million FIC: DP&L witness Malinak calculated a high-end FIC of [redacted] million, which would be necessary to allow DP&L "to cover planned capital expenditures, debt service at DP&L and interest expenses at DPL." DP&L Ex. 1A, p. 54 (Apr. 1, 2020 Malinak Test.). An FIC at that level would give DP&L a credit rating more consistent with its peers. Id.

OCC asserts (p. 11) that an FIC at that level would be "unreasonable and unfair." However, DP&L needs to invest in its system (its reliability metrics are already declining), and pay its creditors and DPL Inc.'s creditors. Indeed, as mentioned above, OCC witness Kahal conceded that DPL Inc. and DP&L are financially intertwined, and it is important that DPL Inc. be able to pay its debts. Tr. Vol. III, at 432-33. It is thus reasonable to conclude that the Commission would approve an FIC that would allow DP&L to make its planned capital expenditures, pay its debts and pay the interest on DPL Inc.'s debts.

OCC asserts (p. 12) that if there were to be an FIC under an MRO, it should be limited to the interest expense at DPL Inc., which OCC claims is $36 million per year. As explained above, DP&L witness Malinak calculated a [redacted] million FIC as "the amount that would be necessary to cover planned capital expenditures, debt service at DP&L and interest expense at DPL." DP&L Ex. 1A, p. 54 (Apr. 1, 2020 Malinak Test). The payment of DP&L's capital requirements and debt obligations should be included in any FIC under an MRO as they are necessary to maintain safe and reliable service.

4. Bypassable FIC: OCC asserts (p. 12) that a bypassable FIC would be unreasonable. OCC appears to be of the opinion that DP&L could in no way get a bypassable financial integrity charge under an MRO despite R.C. 4928.142(D)(4) clearly allowing for such a mechanism. DP&L agrees, however, that a bypassable FIC under an MRO could lead to a small group of customers paying a high FIC, which is another reason that ESP I is more favorable than an MRO. DP&L Ex. 1A, p. 82 (Apr. 1, 2020 Malinak Test.).

5. Rate Case and AES Payments: OCC asserts (p. 12) that there is no need for an FIC under an MRO because DP&L could file a rate case or AES could pay DPL Inc.'s debts. The Commission should reject that argument for the following reasons:

First, regarding a rate case, OCC witness Kahal claimed that DP&L's projections did not include a rate case for the 2020-2023 forecast period, and the fact that DP&L filed for a rate case in 2020 was a "key reason" that DP&L would not need an FIC under an MRO. Tr. Vol. III at 408. However, DP&L's projections include the rate case that was filed in 2020. DP&L Ex. 6A, p. 28 (Apr. 1, 2020 Garavaglia Test.). Second, regarding OCC's request that AES pay DP&L Inc.'s debts, AES has already made significant financial investments in DP&L and DPL Inc., including:

1. AES has not received any dividend payments since 2012.
2. AES has not received any tax sharing payments since 2012.
3. AES used $391 million in proceeds from asset sales to pay debt at DPL Inc.
4. AES invested $150 million in DP&L in 2020.
5. AES plans to invest $150 million in DP&L in 2021.

DP&L Ex. 6A, pp. 22-25 (Apr. 1, 2020 Garavaglia Test.). OCC witness Kahal admitted that those were all positive items. Tr. Vol. III at 435-37.

OCC also asserts (p. 13) that DP&L has not shown that an "emergency" exists under R.C. 4928.142(D)(4) because "AES has numerous paths" to avoid an emergency under an MRO. However, as explained above, AES has already made significant financial investments and commitments in DP&L.

DP&L's initial brief (pp. 58-60) demonstrated that ESP I has at least five qualitative benefits over an MRO. The Commission should reject OCC's arguments on those issues for the following reasons:

1. AES Investment: As shown above, due to the ability to recover investments on an accelerated basis under an ESP but not under an MRO, AES plans to invest $150 million in 2021 under ESP I, but would not make that investment under an MRO. DP&L Ex. 6A, at 26-27 (Apr. 1, 2020 Garavaglia Test.). OCC asserts (p. 14) that AES is "hold[ing] a gun to the PUCO's head" by providing an investment under ESP I but not under an MRO. Again, the assertion is not true, and the Ohio General Assembly included accelerated recovery of investments in an ESP but not under an MRO. The General Assembly had to know that investors would thus be more willing to invest in a utility that was operating under an ESP.

2. Refunds: Another qualitative benefit of ESP I over an MRO is that a refund is available under an ESP if the utility has significantly excessive earnings. R.C. 4928.143(F). While DP&L does not project to have significantly excessive earnings during the 2020-2023 forecast period, it is possible that DP&L would have such earnings in future years. Such a protection is certainly not "illusory" as OCC argues, for the Commission has

actually ordered a refund when AEP Ohio failed the SEET in 2009. In re Columbus S. Power Co., Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011), p. 36 (finding that Columbus Southern Power Company had significantly excessive earnings for 2009).

3. Future ESP: Another qualitative benefit of an ESP over an MRO is that once an MRO has been approved, DP&L can never operate under an ESP in the future. R.C. 4928.1429(F). The Commission repeatedly has found that ESPs are more favorable than MROs. E.g., In re Ohio Power Co., Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018) at ¶ 270; In re Duke Energy Ohio, Inc., Case No. 14-841-El-SSO, et al., Opinion and Order (Apr. 2, 2015) at pp. 96-97. The Commission would thus lose the option of approving future beneficial ESPs if it approved an MRO for DP&L. DP&L Ex. 1A, p. 81 (Apr. 1, 2020 Malinak Test.). OCC asserts (p. 15) that "by this logic, every ESP would necessarily be more favorable than an MRO." That argument is unpersuasive. It is true that this factor will always weigh in favor of an ESP by design of the statute, but other factors could weigh in favor of an MRO and tip the balance.

4. Bypassable FIC: Another qualitative benefit of ESP I over an MRO is that the RSC is nonbypassable, while an FIC under an MRO would be bypassable (R.C. 4928.142(D)(4)). OCC does not dispute (p. 15) that this is a benefit of an ESP over an MRO. (OCC does argue that no FIC should be approved under an MRO, a point to which DP&L responded above.)

5. Gradualism: Yet another benefit of ESP I is gradualism, since rate increases would be less "lumpy" under an ESP. OCC asserts (p. 16) that this argument is a "collateral attack o[n] traditional ratemaking," and there is no evidence that customers prefer

smoother rate increases. However, avoiding rate shock has long been a goal of the Commission, which an ESP helps to avoid. OCC also asserts that this factor would lead to every ESP passing the MFA test, but that is not true; gradualism is a benefit of an ESP that could be outweighed by other factors.

2. **ESP I Passes the Prospective SEET**

OCC asserts (pp. 16-18) that ESP I fails the Prospective SEET in R.C. 4928.143(E). The Commission should reject that argument for the following separate and independent reasons.

First, OCC asserts (pp. 16-17) that the ROE threshold for the Prospective SEET should be 12%, which was the threshold established in the ESP III Stipulation. ESP III Case, Amended Stipulation and Recommendation (Mar. 14, 2017), ¶ II.2.e. However, that Stipulation has been terminated. ESP III Case, Finding and Order (Dec. 18, 2019), ¶ 1.

Second, the statute requires that the SEET threshold be set by looking at "publicly traded companies, including utilities, that face comparable business and financial risk." R.C. 4928.143(E). OCC witness Kahal did not include a comparable group in his testimony, and does not challenge the comparable group used by DP&L witness Malinak. Tr. Vol. III at 442.

Third, OCC witness Kahal did not prepare his own projections in that case. OCC Ex. 1C, pp. 1-52 (Oct. 22, 2020 Kahal Test.). Further, he asserted that DP&L failed to include a rate increase in its projections (id. p. 39), but that was not true. DP&L Ex. 6A, p. 28 (Dec. 23, 2020 Garavaglia Test.).

Fourth, ESP I would pass the Prospective SEET even if 12% was the threshold, since DP&L's ROE is projected to average [redacted] over the forecast period. DP&L Ex. 1A, at p. 88 (Apr. 1, 2020 Malinak Test.). OCC witness Kahal asserts that DP&L's projections for the 2020-2023 forecast period fail to include a distribution rate case that DP&L filed in 2020, and DP&L's projections thus understate DP&L's projected earnings. OCC Ex. 1C, p. 51 (Oct. 22, 2020 Kahal Test.). However, Mr. Kahal is mistaken – DP&L's projections do include a distribution rate case. DP&L Ex. 6A, p. 28 (Apr. 1, 2020 Garavaglia Test.). See Initial Brief of DP&L, pp. 62-63.

3. The Stipulation Establishes What Should Happen if ESP I Fails Either Test under R.C. 4928.143(E)

The Stipulation states:

> "if the Commission finds that DP&L's ESP I fails to satisfy either prospective test, then the Commission has the authority to approve 'the transition . . . to the more advantageous plan.' This Stipulation provides for an orderly transition to such a plan, as DP&L has committed to filing a new ESP application (ESP IV) by October 1, 2023 that will not contain charges as identified in Paragraph 20(a) of this Stipulation. Moreover, DP&L has committed to partnering with and assisting low income customers, local government, manufacturers, and hospitals during the transition, and DP&L and the Signatory Parties have set forth a SGP that reasonably pairs with this transition. All of these items provide for a reasonable and lawful transition to ESP IV that satisfy the requirements of R.C. 4928.143(E)."

Stip. Parties Ex. 1, ¶ 19.a.

OCC argues (pp. 18-20) that that paragraph violates R.C. 4928.143(E). Specifically, if ESP I fails the MFA test or Prospective SEET , that section requires the Commission to switch DP&L to "the more advantageous alternative." OCC concludes that the word "the" in that the phrase "the more advantageous alternative" establishes that "the more

advantageous alternative" must mean an MRO. OCC thus concludes that ¶ 19 of the Stipulation, which provides that an ESP will exist if DP&L fails either test, is unlawful.

The most obvious defect in that argument is that if the General Assembly had intended to require a utility to file an MRO if it failed either test, then the General Assembly would have cited to the MRO statute (R.C. 4928.142) in subsection (E). The General Assembly did cite specifically to R.C. 4928.142 in several sections. E.g., R.C. 4928.143(C)(2)(a); R.C. 4928.143(F). If the General Assembly had intended to require a utility to file an MRO upon failing either test under (E), the General Assembly would have referred to "R.C. 4928.142" (as it did several other times in other sections) and not to "the most advantageous alternative." The Commission should thus conclude that "the more advantageous alternative" can be an ESP or an MRO.

C. THE RSC IS LAWFUL

OCC argues (pp. 7-9) that the RSC is a financial integrity charge that is unlawful. As demonstrated below, the Commission should reject that argument for the following separate and independent reasons:

a. Whether the RSC is lawful is not at issue in these cases.

b. The Commission was required by R.C. 4928.143(C)(2)(b) to implement the RSC after DP&L terminated ESP III.

c. OCC is barred by res judicata and collateral estoppel from challenging the RSC.

d. The Supreme Court has twice ruled that the RSC is lawful.

e. The RSC is a lawful Provider of Last Resort ("POLR") charge, and is not a financial integrity charge.

1. The RSC Is Not at Issue in These Cases

The issues in these cases are:

1. Should the Commission approve the SGP?

2. Did DP&L have significantly excessive earnings in 2018 or 2019 under R.C. 4928.143(F)?

3. Does ESP I pass the MFA test and Prospective SEET in R.C. 4928.143(E)?

The RSC was approved by the Commission in DP&L's ESP I case, and there is no issue in any of these cases as to whether the RSC is lawful.

2. OCC Ignores the Plain Language of the Governing Statute

Assuming the Commission considers the issue in this case, the principal defect in OCC's argument that the RSC is unlawful is that OCC ignores the plain language of R.C. 4928.143(C)(2)(b), which establishes what the Commission was required ("shall") to do after DP&L exercised its right to terminate ESP III:

> "If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." (Emphasis added.)

The Commission implemented ESP I (including the RSC) after DP&L terminated ESP III. ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶¶ 26, 29-35 (holding that DP&L had right under R.C. 4928.143(C)(2)(b) to implement the RSC). Accord: In re The Dayton Power and Light Company, Case No. 12-426-EL-SSO, et al., Finding and Order (Aug.

26, 2016) at ¶ 14 ("The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to . . . accept the withdrawal of ESP II.").

"Shall" is mandatory. E.g., Dorrian v. Scioto Conservancy Dist., 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971). The Commission did what the statute required after DP&L terminated ESP III -- issue a new Order continuing the provisions, terms, and conditions of ESP I (including the RSC). ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶¶ 9, 26-40.

OCC ignores the mandatory language of R.C. 4928.143(C)(2)(b). It does not contest that the RSC was a term of DP&L's prior SSO. It does not contest that the word "shall" is mandatory or explain how or why the Commission could have ignored that word. In fact, OCC filed a motion in ESP I asserting that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" required the Commission "to implement ESP I after withdrawal." ESP I Case, Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates (Dec. 4, 2019) at p. 13.

In addition, OCC admitted in a Supreme Court brief that R.C. 4928.143(C)(2)(b) required the Commission to implement ESP I. Specifically, in OCC's Merit Brief that it filed with the Supreme Court in DP&L's ESP II case (Supreme Court Case No. 2017-241), OCC told the Court:

> "The language in the statute is not optional. The word 'shall' is to be construed as mandatory, unless clear and unequivocal legislative intent connotes that it receives a construction other than its ordinary usage.
>
> With no evidence that the legislative intent was for a different construction, the court must construe 'shall' as mandatory. The General Assembly used the word 'shall' leaving the PUCO no choice but to return to 'the utility's most recent standard service offer.'"

In re The Dayton Power and Light Company, Sup. Ct. Case No. 2017-241, Merit Brief of Appellant The Office of the Ohio Consumers' Counsel (May 16, 2017) at p. 19 (citations omitted) (emphasis added). That argument was exactly right -- the Commission had no discretion but to return to DP&L's most recent SSO, which included the RSC.

OCC also ignores the fact that after DP&L initially withdrew ESP II and reverted to ESP I, the Commission held that it was obligated to implement the terms of ESP I, including the RSC. ESP I Case, Finding and Order (Aug. 26, 2016) at ¶ 23; Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 31-35.

3. Res Judicata and Collateral Estoppel Bar OCC's Arguments

The Commission also has held that intervenors were barred by R.C. 4903.10 and the doctrines of res judicata and collateral estoppel from challenging the RSC. ESP I Case, Second Finding & Order (Dec. 18, 2019) at ¶ 34. Specifically, on February 24, 2009, DP&L filed a Stipulation with the Commission in ESP I, which was signed by OCC (among others). ESP I Case, Stipulation and Recommendation (Feb. 24, 2009) at pp. 21-22. That Stipulation contained the RSC. Id. at ¶ 3. The Commission approved that Stipulation. ESP I Case, Opinion & Order (June 24, 2009) at p. 13.

Section 4928.143(C)(2)(b) was enacted in 2009 when OCC signed that ESP I Stipulation. OCC was on notice that DP&L had the right to terminate a future ESP and reinstate ESP I if the Commission were to modify and approve future ESPs.

OCC did not seek rehearing of the Commission's decision approving the ESP I Stipulation, and OCC did not appeal that decision. A party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B) ("No cause of action arising out of any

order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

OCC is also barred from challenging the lawfulness of the RSC by the doctrines of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. . . . Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id. (emphasis added) (citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. . . . Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (citation omitted). "[T]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (citation omitted). Accord: Nat'l Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'") (citation omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982) (emphasis added).

Here, the Commission has held that intervenors are barred by *res judicata* and collateral estoppel from challenging DP&L's right to implement the RSC after terminating ESP III. ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶ 32.

4. OCC Ignores Two Rulings by the Court That the RSC Is Lawful

Continuing its pattern of ignoring controlling law that is adverse to its position, OCC also ignores the two Supreme Court cases that have held that DP&L's RSC is lawful. Constellation NewEnergy, Inc. v. PUC, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39-40; Ohio Consumers' Counsel v. PUC, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 17-26.

Specifically, the RSC (also called the Rate Stabilization Surcharge ("RSS") in earlier cases) was established six years and two cases before the ESP I case. In 2003, it was included in a Stipulation and Recommendation that was approved by the Commission. In re The Dayton Power and Light Company, Case No. 02-2779-EL-ATA, et al., Stipulation and Recommendation (May 28, 2003) at ¶ IX.E. That Stipulation provided that the RSC would be implemented in a subsequent case. Id. An intervenor in that 2003 case appealed that Commission decision to the Supreme Court, and argued that the RSC was not lawful. The Court rejected that argument:

> "The commission specifically found: 'An RSS is reasonable and legally sustainable * * *. As to the issue of whether the RSS should apply to all customers, whether or not they purchase their generation from DP&L, the Commission would note, initially, that representatives of all customer groups agreed, in the stipulation, with charging the RSS to all customers. In addition, the Commission finds it is reasonable for DP&L to argue that it will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the

RSS. While the Commission is not finding that the costs specified in the stipulation as the basis for the RSS are POLR costs, the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers.'

Constellation disputes both of the justifications the commission gave for approving the RSS mechanism. However, Constellation's arguments lack substance and are unconvincing. The record supports the commission; it does not support Constellation. Thus, we find no error in the commission's findings as to the RSS mechanism."

Constellation, 2004-Ohio-6767 at ¶ 39-40 (emphasis added).

The RSC was later implemented in a 2005 Commission case, which was also resolved via a Stipulation and Recommendation that was approved by the Commission. In re The Dayton Power and Light Company, Case No. 05-276-EL-AIR, et al., Stipulation and Recommendation (Nov. 3, 2005) at ¶ I.C. OCC appealed that Commission decision to the Supreme Court, but the Court again held that the RSC was lawful:

"OCC maintains that the commission erred when it approved a distribution-service rate increase to compensate DP&L for costs that are purely generation-service costs. The commission's approval of the rate and amount is in conformity with applicable law. . . .

In the MDP-extension stipulation in 2003, DP&L proposed a rate-stabilization surcharge, which was intended to allow DP&L to increase rates in order to recover increases in generation-related costs for fuel, for actions taken in compliance with environmental and tax laws and for physical security and cyber security. These increased costs were to be collected from all customers, whether they purchased generation service from DP&L or from another supplier. With respect to those customers who do not take generation service from DP&L, the rate-stabilization surcharge would compensate DP&L for the risks and costs that DP&L will incur as a POLR. See R.C. 4928.14(C).

* * *

> . . . Accordingly, the PUCO's order is affirmed with regard to the amount of the charge . . ."

Ohio Consumers' Counsel, 2007-Ohio-4276, ¶¶ 17-18, 26 (emphasis added).

5. DP&L Still Provides POLR Service

OCC asserts (pp. 7-8) that the RSC is a financial integrity charge, not a POLR charge. OCC also asserts (p. 88) that DP&L is no longer subject to POLR risks and costs. The Commission should reject those arguments for the following reasons:

First, OCC cites (pp. 7-8) to testimony of DP&L's witnesses that DP&L's financial integrity would be in jeopardy if the RSC was invalidated. It is true that DP&L's financial integrity (and its ability to provide safe and reliable service) would be at risk without the RSC. However, DP&L also needs its distribution and transmission revenue to maintain its financial integrity. The fact that DP&L needs the RSC to maintain its financial integrity does not mean that the RSC is a financial integrity charge. Moreover, OCC seems to conflate testimony of DP&L witnesses that necessarily had to address financial integrity because the MFA test requires a comparison between the current ESP I that includes the RSC to a hypothetical MRO that would include a financial integrity charge.

Second, contrary to OCC's assertions, DP&L is still subject to POLR risks and costs. In fact, when DP&L withdrew its ESP II application under R.C. 4928.143(C)(2)(a), the Commission rejected that exact argument because DP&L was still subject to POLR risk:

> "The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. . . . R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail

> electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of ESP I. The Commission stated in its December 19, 2012, Entry in this case, '[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.' ESP I Case, Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of ESP I. ESP I Case, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of ESP I; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

ESP I Case, Finding and Order (Aug. 26, 2016) at ¶ 23.

In addition to the reasons cited by the Commission, DP&L is still subject to POLR risk for the following reasons.

First, the SSO auctions are conducted periodically, and there is no guarantee that they will continue or that any suppliers will bid. DP&L thus bears a POLR risk that it will have to provide generation service to some or all of its customers if there are not enough bidders at auction.

Second, a significant weather event could cause winning bidders to default on their obligation to provide generation service to SSO customers. Generation service within the SSO is provided to customers at a fixed price, and there is a risk that winning bidders will default when demand and market prices spike. DP&L would then be required by R.C. 4928.141(A) to

supply generation to those customers, which imposes a POLR risk on DP&L. (The collateral posted by winning bidders may be inadequate because it is only for 30 days, and because the winning bidders could default when market prices are at an extreme peak.)

For example, the recent events in Texas demonstrate that weather events can cause wide swings in the price of generation and cause providers to default. Indeed, the weather events in Texas have caused a CRES to default in Ohio. In re Entrust Energy East Inc., Case No. 12-2854-EL-CRS, Entry (Mar. 3, 2021) at ¶¶ 2-6.

OCC witness Kahal admitted that there was still POLR risk for DP&L:

> "Q. What would happen if one of the winning bidders at the auction were to default and not provide generation service?
>
> A. * * *
>
> They can involve a lot of things. First of all, I think – as your question suggests, Standard Service Offer still has to be provided. That is, the Standard Service Offer customers have to be served. Sometimes this is done by shifting the load onto other suppliers, that is, other winning bidders in the auction.
>
> Sometimes the utility – if that's not done, sometimes the utility goes in the market directly and procures the power that's no longer being supplied by the – by the supplier that defaulted so there are procedures for dealing with that, but at the end of the day, the customers will be served, and they have to be served one way or the other."

Tr. Vol. III, at 431-32.

Third, for customers that have switched -- i.e., do not take SSO service -- they have the right to return to SSO service. R.C. 4928.141(A). They are likely to exercise that right if market prices are high and they are unable to sign a favorable contract with a competitive supplier or are on a variable rate with a competitive supplier; in that instance, it may be cheaper

for them to return to the fixed-price generation service under the SSO. Those customers should then be served by the winning bidders from prior auctions, but as demonstrated in the prior two paragraphs, there are risks that (a) there will be no such winning bidders; or (b) the winning bidders will not be able or willing to supply the additional generation required for the returning customers, or will default on their obligations. In those instances, DP&L would be obligated to procure generation to serve those customers, which imposes POLR risks upon DP&L.

The Supreme Court of Ohio has acknowledged that POLR obligations impose risks on a utility. Constellation NewEnergy, Inc., 2004-Ohio-6767 at ¶ 39, n. 5 ("POLR costs are those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [the utility] for generation service") (emphasis added); In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 23. ("Under Ohio law, customers may purchase generation service from a competitive supplier. If such a supplier fails to provide service, 'the supplier's customers * * * default[] to the utility's standard service offer * * * until the customer chooses an alternative supplier.' R.C. 4928.14. This obligation to stand ready to accept returning customers makes the utility the 'provider of last resort,' or 'POLR.'") (citations omitted).

OCC argues (p. 88) that DP&L is no longer subject to POLR risk since it no longer owns generation assets, but that argument demonstrates a fundamental misunderstanding of POLR risk. As demonstrated above, a POLR risk exists because DP&L has a statutory obligation to provide generation if there are no other providers. R.C. 4928.141. DP&L has POLR risk whether it owns generation assets or not. Indeed, DP&L's POLR risk is higher now that it no longer owns generation assets, since DP&L cannot access that generation to satisfy its

statutory obligations if a winning bidder or CRES defaults, or use that generation as a hedge to offset the risk.

The Commission should thus reject the argument by OCC that DP&L no longer has a POLR obligation and risk.

D. ESP I INCLUDES THE IIR

The Stipulation provides that DP&L will recover its SGP expenditures through the IIR. Stip. Parties Ex. 1, ¶ 3.a. OCC makes the puzzling argument (p. 79) that "the IIR was not approved by the PUCO as part of ESP I" and that "the IIR is an ESP III concept."

However, the IIR was established in ¶ 4.c. of the ESP I Stipulation. OCC Ex. 8, ¶ 4.c. The Commission specifically identified the IIR as a component of the ESP I Stipulation, and approved the Stipulation without modification. ESP I Case, Opinion and Order (June 24, 2008) at pp. 5, 13.

Further, after DP&L withdrew ESP III and reverted to ESP I, DP&L filed revised tariffs that included the IIR. OCC Ex. 21, at p. 9. In its order, the Commission approved those tariffs (with modifications not relevant here). ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶ 10, 44.

OCC nevertheless asserts (pp. 79-81) that ESP I does not include the IIR because the tariffs that DP&L filed on June 29, 2009, after the Commission approved the ESP I Stipulation, did not include an IIR. The Commission should reject that argument for two reasons.

First, as demonstrated above, the IIR was established by the ESP I and approved by the Commission. The fact that DP&L did not file a tariff stating that the IIR was set at zero does not change the fact that the IIR was an existing component of ESP I at that time. There is no requirement that DP&L file a tariff for a rider that is set at zero.

Second, as also demonstrated above, DP&L's current tariffs contain an IIR, which have been approved by the Commission in the ESP I case. ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶ 29-35. In that case, OCC did not seek rehearing on the ground that DP&L was not entitled to implement an IIR, so OCC has waived the issue. Tr. Vol. V at 770-71.

E. THE STIPULATION IS CONSISTENT WITH THE ESP I STIPULATION

OCC asserts (p. 82) that the Stipulation violates the ESP I Stipulation because it included a single CBA for AMI and Smart Grid. That argument misconstrues the ESP I Stipulation.

Specifically, the ESP I Stipulation states that "DP&L will develop independent business cases for both its AMI and Smart Grid proposals" and that "[t]he AMI and Smart Grid business cases that demonstrate a positive benefit cost analysis will be filed in this docket." OCC Ex. 8, ¶ 4.a., 4.b. DP&L was thus required to file "business cases" (plural) for AMI and Smart Grid, but to file a "benefit cost analysis" (singular) for AMI and Smart Grid. There was thus no requirement that DP&L file separate "benefit cost analyses" (plural) for AMI and Smart Grid. Regardless, DP&L filed separate business cases for Smart Grid and AMI with its Application, which is approved by the Stipulation. Stip. Parties Ex. 1, ¶ 1. (The business cases were updated to conform to the Stipulation. DP&L Ex. 5.)

OCC argues (p. 82) that the Stipulation paragraph that allows DP&L to recover costs through the IIR that are incurred before a Commission order (Stip. Parties Ex. 1, ¶ 3.f) violates the requirement in the ESP I Stipulation that the Commission approve costs before they are recovered through the IIR. That makes no sense. OCC's argument is that DP&L cannot recover SGP costs before a Commission Order; OCC ignores the fact that an Order precedes recovery of costs whether the sequence of events is "cost incurred -- Order issued – costs recovered through rates" or "Order issued – cost incurred – costs recovered through rates." The Commission will approve costs before they are recovered through the IIR, which is consistent with the ESP I Stipulation.

OCC also argues (p. 83) that the Stipulation does not require DP&L to establish that its SGP expenditures were prudent. Not so. The Stipulation requires the costs to be "prudently incurred." Stip. Parties Ex. 1, ¶ 3.a.

OCC also claims (p. 83) that DP&L should not be entitled to recover costs associated with its Grid Mod R&D asset. However, those costs are related to the design of DP&L's Smart Grid Plan, and thus should be recoverable and are part of the overall Stipulation agreed to by the parties and included as part of the overall cap in Stip. Parties Ex. 1.

F. EV AND SMART THERMOSTAT PROVISIONS ARE REASONABLE

OCC asserts (p. 84) that testimony of OCC witness Williams shows that the EV rebate program in the Stipulation (Stip. Parties Ex. 1, ¶ 8), "has nothing to do with the purpose of cost-effective independent AMI and Smart Grid proposals." However, at the hearing, Mr. Williams testified:

> "Q. Well, the EV – the EV rebate program is related to Smart Grid, is it not?
>
> A. Yes . . . ."

Tr. Vol. V at 753.

OCC also claims (p. 84) that "the PUCO has determined that it does not have jurisdiction over Electric Vehicle Charging Services." However, as OCC witness Williams conceded at the hearing (Tr. Vol. V at p. 831), that order does not apply to utilities. In the Matter of EV Charging, Case No. 20-434-EL-COI, Finding and Order, ¶ 34 (July 1, 2020) ("the commission will not address EDU involvement arguments [regarding EVs] in this order").

OCC also asserts (pp. 84-85) that provisions in the Stipulation relating to smart thermostats are unrelated to AMI and Smart Grid. However, OCC witness Williams admitted at the hearing that smart thermostats are a benefit associated with Smart Grid. Tr. Vol. V at 756. Mr. Williams also admitted that smart meters would help customers to reduce their demand, which would allow the utility to invest less money in the grid. Id. at 810, 816. Notably, the smart thermostat program is substantially funded by shareholders.

G. THE SETTLEMENT PROMOTES OHIO POLICIES

DP&L's initial brief (pp. 65-66) demonstrated that the Stipulation would promote Ohio policies. The Commission should reject OCC's policy arguments (pp. 86-93) for the following reasons.

1. Ohio Policy Favors Demand Side Management Programs

OCC argues (p. 86) that the Stipulation violates Ohio policy in R.C. 4928.02 by including an EV rebate program and a Smart Thermostat program that "do nothing more than continue energy-efficiency related programs." However, R.C. 4928.02(D) specifically states that

it is Ohio policy to promote "demand-side management." Further, R.C. 4905.70 provides that the Commission "shall initiate programs that will promote and encourage conservation of energy and a reduction of the growth rate of energy consumption." Those provisions are thus consistent with Ohio policy.

2. **The RSC Does Not Violate Ohio Policy**

OCC argues (pp. 87-89) that the RSC violates Ohio policy because it is not lawful and DP&L no longer provides POLR service. As demonstrated above, OCC's argument that the RSC is not lawful should be rejected for multiple reasons.

3. **The Stipulation Does Not Subsidize AES**

OCC asserts (p. 89) that the Commission should reject the Stipulation because the RSC subsidizes AES. The Commission should reject that argument for two reasons. First, as demonstrated above, the lawfulness of the RSC is not at issue in these cases. The Commission addressed that issue in Case No. 08-1094-EL-SSO. Second, OCC does not explain how the RSC subsidizes AES. The RSC is revenue to DP&L, and AES is DP&L's ultimate parent, but that does not mean that the RSC subsidizes AES. OCC does not explain (much less prove) how the RSC subsidizes AES.

4. **Refunds Are Not Required**

OCC argues (pp. 89-90) that the settlement fails to promote Ohio policy because it does not provide for refunds under R.C. 4928.143(F). However, as demonstrated above, no refunds are required under that section.

5. The Stipulation Will Protect At-Risk Customers

OCC asserts (pp. 91-92) that the Stipulation will not protect at-risk customers. However, under the Stipulation, DP&L will continue to charge the lowest rates in the state to typical residential customers. DP&L Ex. 4, p. 30 (Nov. 30, 2020 Schroder Test.). Further, the Stipulation has a shareholder-funded water-heater program aimed at protecting low-income customers (Stip. Parties Ex. 1, ¶ 12.c), and provides shareholder funding for weatherization for low-income customers. Id. ¶ 12.a.

6. The Stipulation Will Further the State's Effectiveness in the Global Economy

OCC asserts (pp. 92-93) that the Stipulation will not facilitate the state's effectiveness in the global economy. The Commission should reject that argument for the following reasons:

1. The SGP will generate $90.6 million in additional reliability benefits. Stip. Parties Ex. 1, Ex. 4. There is no dispute that those benefits go primarily to commercial customers. OCC Ex. 7C, p. 6 (Dec. 17, 2020 Alvarez Test.).

2. The SGP will have an economic impact in the region of $336.8 million. Stip. Parties Ex. 1, Ex. 4.

3. The Stipulation includes economic development incentives and grants. Id. ¶ 15.

V. DP&L DID NOT WAIVE ANY TRADE SECRETS

OCC asserts (pp. 93-95) that DP&L waived the trade secret status of the amount of FIC that DP&L should get under an MRO when a DP&L witness inadvertently "revealed to the public" that information. The defect in that argument is that OCC has not made any showing that the information was "revealed to the public." OCC has not shown that a member of the public (1) attended the hearing; and (2) heard and understood the testimony. Without such

evidence, the information retains its status as a trade secret. The Commission should thus reject OCC's request that the testimony be unsealed.

VI. CONCLUSION

The Commission should find that the Stipulation is amply supported by the evidence, and should approve it without modification.

Respectfully submitted,

s/ Michael J. Schuler
Michael J. Schuler (082390)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Fax: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Counsel for The Dayton Power and Light Company

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Post-Hearing Reply Brief of The Dayton Power and Light Company (PUBLIC VERSION) has been served via electronic mail upon the following counsel of record, this 5th day of March, 2021:

Steven L. Beeler
Robert A. Eubanks
Thomas G. Lindgren
OFFICE OF THE
OHIO ATTORNEY GENERAL
PUBLIC UTILITIES SECTION
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
steven.beeler@ohioattorneygeneral.gov
robert.eubanks@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov

Counsel for Staff of the
Public Utilities Commission of Ohio

Christopher Healey
William J. Michael
Amy Botschner O'Brien
Angela O'Brien
OFFICE OF THE
OHIO CONSUMERS' COUNSEL
65 East State Street, 7th Floor
Columbus, Ohio 43215
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
angela.obrien@occ.ohio.gov

Steven D. Lesser
N. Trevor Alexander
Mark T. Keaney
Kari D. Hehmeyer
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215-6164
slesser@benschlaw.com
talexander@benschlaw.com
mkeaney@benschlaw.com
khehmeyer@benschlaw.com

Counsel for the City of Dayton and
Honda of America Mfg., Inc.

Michael D. Dortch
Justin M. Dortch
KRAVITZ, BROWN & DORTCH, LLC
64 E. State Street, Suite 200
Columbus, Ohio 43215
mdortch@kravitzllc.com
jdortch@kravitzllc.com

Counsel for Office of the
Ohio Consumers' Counsel

Angela Paul Whitfield
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215

Counsel for The Kroger Co.

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Counsel for Ohio Energy Group

Matthew R. Pritchard
Todd J. Long
MCNEES WALLACE & NURICK LLC
21 E. State Street, 17th Floor
Columbus, Ohio 43215
mpritchard@mcneeslaw.com
tlong@mcneeslaw.com

Counsel for Industrial Energy Users - Ohio

Devin D. Parram
Dane Stinson
Jhay T. Spottswood
BRICKER& ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
dparram@bricker.com
dstinson@bricker.com
Jspottswood@bricker.com

Counsel for The Ohio Hospital Association

Christine M.T. Pirik
Madeline Fleisher
DICKINSON WRIGHT PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
cpirik@dickinsonwright.com
mfleisher@ dickinsonwright.com

Counsel for Mission:data Coalition

Kimberly W. Bojko
Jonathan Wygonski
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Wygonski@carpenterlipps.com

Counsel for Ohio Manufacturers' Association Energy Group

Stephanie M. Chmiel
Kevin D. Oles
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for University of Dayton

David C. Rinebolt
OHIO PARTNERS FOR
AFFORDABLE ENERGY
P.O. Box 1793
Findlay, Ohio 45839

Counsel for Ohio Partners for Affordable Energy

Robert Dove
KEGLER BROWN HILL + RITTER Co. L.P.A.
65 East State Street, Suite 1800
Columbus, Ohio 43215
rdove@keglerbrown.com

Counsel for Natural Resources Defense Council

Madeline Fleisher
Christine M.T. Pirik
William Vorys
DICKINSON WRIGHT PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
mfleisher@dicksoninwright.com
cpirik@dicksonwright.com
wvorys@dicksonwright.com

Counsel for Smart Thermostat Coalition

Joseph Halso
SIERRA CLUB
ENVIRONMENTAL LAW PROGRAM
1536 Wynkoop Street
Denver, Colorado 80202
joe.halso@sierraclub.org
Richard C. Sahli
RICHARD SAHLI LAW OFFICE, LLC
981 Pinewood Lane
Columbus, Ohio 43230
rsahli@columbus.rr.com

Counsel for Sierra Club

Caroline Cox
ENVIRONMENTAL LAW & POLICY CENTER
21 W. Broad Street, Suite 800
Columbus, Ohio 43215
ccox@elpc.org

Nikhil Vijaykar
ENVIRONMENTAL LAW & POLICY CENTER
35 E. Wacker Dr., Suite 1600
Chicago, Illinois 60601
nvijaykar@elpc.org

Counsel for Environmental Law & Policy Center

Miranda Leppla
Trent Dougherty
Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
mleppla@theocc.org
tdougherty@theocc.org
ctavenor@theocc.org

Counsel for Ohio Environmental Council

Dylan F. Borchers
Kara H. Hernstein
Jhay T, Spottswood
BRICKER& ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
dborchers@bricker.com
khernstein@bricker.com
jspottswood@bricker.com

Counsel for Chargepoint, Inc.

Mark A. Whitt
Lucas A. Fykes
WHITT STURTEVANT LLP
88 E. Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
fykes@whitt0sturtevant.com

Counsel for Direct Energy, LP

Bethany Allen
Joseph Oliker
Michael Nugent
IGS ENERGY
6100 Emerald Parkway
Dublin, Ohio 43016
bethany.allen@igs.com
joe.oliker@igs.com
michael.nugent@igs.com

Frank P. Darr
6800 Linbrook Boulevard
Columbus, Ohio 43235
fdarr2019@gmail.com

Counsel for Interstate Gas Supply, Inc.

Michael J. Settineri
Gretchen L. Petrucci
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
mjsettineri@vorys.com
glpetrucci@vorys.com

Drew Romig
Armada Power LLC
230 West Street, Suite 150
Columbus, Ohio 43215
dromig@armadapower.com

Counsel for Armada Power, LLC

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

1482656.1

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/5/2021 5:08:41 PM

in

Case No(s). 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM, 19-1121-EL-UNC, 20-1041-EL-UNC

Summary: Brief Post-Hearing Brief of The Dayton Power and Light Company - PUBLIC VERSION electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company