BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Application of Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid.	)	Case No. 18-1875-EL-GRD
In the Matter of the Application of the Dayton Power and Light Company for Approval of A Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2).	)	Case No. 18-1876-EL-WVR
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods.	)	Case No. 18-1877-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test under R.C. 4928.143(F) and Ohio Adm. Code 4901:1- 35-10 for 2018.	)	Case No. 19-1121-EL-UNC
In the Matter of the Application of the Dayton Power and Light Company for A Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E).	)	Case No. 20-680-EL-UNC
In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test under R.C. 4928.143(F) and Ohio Adm. Code 4901:1- 35-10 for 2019.	)	Case No. 20-1041-EL-UNC

REPLY BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

The opening sentence of the brief of the only party actively challenging the October 23, 2020 Stipulation and Recommendation (the Settlement)[1] is telling. The Office of the Ohio Consumers' Counsel (OCC) seeks to overhaul the Public Utilities Commission of Ohio's (Commission) settlement process through this proceeding. Given that the Settlement satisfies the Commission's three-part test, OCC resorts to challenging the settlement process and long-standing Commission stipulation three-part test itself. OCC's challenge to the Commission's process and test should be rejected.

The record demonstrates that a diverse and knowledgeable group of Signatory Parties, including the Dayton Power and Light Company (DP&L), the Ohio Manufacturers' Association Energy Group (OMAEG), Commission Staff, and seventeen other parties,[2] engaged in serious bargaining regarding a variety of issues in these cases that resulted in a Settlement that benefits consumers and the public interest, and complies with Ohio law and Commission precedent.

The parties participated in a robust evidentiary hearing on the Settlement, which began on January 11, 2021 and concluded on January 15, 2021. Following the hearing, OMAEG filed its Post-Hearing Brief, explaining that the Settlement passes the Commission's three-part test for evaluating stipulations, is just and reasonable, lawful, and is in the public interest. When considering the evidentiary record, Ohio law, and the Commission's test for evaluating stipulations, OMAEG urged the Commission to adopt the Settlement.[3]

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[1] Case Nos. 18-1875-EL-GRD (Smart Grid Case), 19-1121-EL-UNC (2018 SEET Case), 20-1041-EL-UNC (2019 SEET Case), and 20-680-EL-UNC (Quadrennial SEET Case), Stipulating Parties Exhibit 1, Stipulation and Recommendation (Oct. 23, 2020) (Settlement).

[2] *See* DP&L Exhibit 4, Testimony of Sharon R. Schroder at 12-13 (Nov. 30, 2020) (Schroder Testimony).

[3] *See generally* Post Hearing Brief of the Ohio Manufacturers' Association Energy Group (Feb. 12, 2021) (OMAEG Initial Brief)

Only one party, OCC, challenged the almost unanimous Settlement and the resolution of the above-captioned cases. OCC filed its initial post-hearing brief (OCC Initial Brief),[4] but its analysis relied upon inaccurate assumptions and flawed interpretations of Ohio law and Commission precedent. OMAEG hereby submits its Reply Brief, again urging the Commission to adopt the just and reasonable Settlement.

II. ARGUMENT

As outlined in OMAEG's Post-Hearing Brief, the Commission uses a three-part test when determining whether to adopt a stipulation, and since the Settlement satisfies all three prongs of the test, it should be adopted.[5]

For the first prong, the Commission considers whether or not the stipulation is the product of serious bargaining among capable, knowledgeable parties.[6] The twenty Signatory Parties, representing a diverse range of interests[7] with a history of participation in Commission proceedings, participated in numerous settlement conferences.[8] This resulted in substantial modifications to DP&L's initial applications and proposals, while obtaining concessions from all parties involved.[9] OCC incorrectly asserts that "DP&L got basically most of what it wanted."[10] However, through a plain reading of the applications and Settlement, it is clear that DP&L did not obtain what it originally sought , including a significant reduction to the length and cost recovery

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[4] *See generally* Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel (Feb. 12, 2021) (OCC Initial Brief).

[5] OMAEG Initial Brief at 6-21.

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

[7] *See* OMAEG Initial Brief at 9.

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

[9] *Id.*

[10] OCC Initial Brief at 48, *citing* OCC Exhibit 3, Testimony of Edward Hill at 21.

from consumers of DP&L's grid modernization proposal,[11] termination of DP&L's Rate Stabilization Charge (RSC) and prohibition of any substantially similar replacement charge,[12] and the provision of a variety of other programs funded by DP&L's shareholders, which will directly benefit consumers[13]—including a time-of-use program,[14] a new customer information system (CIS) system,[15] a customer portal and third-party access to the CIS,[16] a shareholder funded smart thermostat program,[17] and the low-income weatherization program and PIPP water heater pilot program.[18]

For the second prong, the Commission considers whether or not the stipulation, as a package, benefits ratepayers and the public interest.[19] Contrary to OCC's assertions, the Settlement, as a package,[20] provided numerous benefits to DP&L's customers, including those customers that were not involved in this proceeding, and, therefore, is in fact in the public interest. For example, the Settlement lowered the overall cost and reduced the duration of DP&L's grid modernization plan (SGP Phase I) while still providing benefits to consumers.[21] The Settlement requires DP&L to invest in a new CIS, but excludes cost recovery from customers under the

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[11] OMAEG Initial Brief at 3-4; Stipulating Parties Exhibit 1, Settlement at ¶¶ 2-3.

[12] OMAEG Initial Brief at 12-15; Stipulating Parties Exhibit 1, Settlement at ¶ 20(a)

[13] OMAEG Initial Brief at 15.

[14] Tr. Vol. V at 784 (Cross Examination of Williams).

[15] *Id.* at 758.

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

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

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

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

[20] *See In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020) ("The question before the Commission is not whether there are other mechanisms that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest.").

[21] *See* OMAEG Initial Brief at 10-11.

Infrastructure Investment Rider (IIR).[22] Importantly, the Settlement does not create or continue the RSC authorized by the Commission as part of DP&L's current electric security plan (ESP), but rather, the Settlement ensures that DP&L will not seek to reinstate the RSC or any similar charge in its next ESP application.[23] Further, DP&L is required to file an application for a new ESP by October 1, 2023. The Settlement also secured a variety of other benefits for DP&L customers.[24]

For the third prong, the Commission considers whether or not the stipulation violates any important regulatory principles or practices.[25] Contrary to OCC's assertions, as explained above, the Settlement does not create the RSC or any unlawful charges,[26] and the Signatory Parties did not receive "cash for signatures" and do not represent a so-called redistributive coalition that would somehow void the Settlement.[27]

Despite clear evidence to the contrary, OCC, in its Initial Brief, claims that the Settlement does not satisfy the Commission's three-part test.[28] These claims rest on a variety of flawed, incomplete, or irrelevant arguments. Given the magnitude of record evidence supporting the Settlement, rational public policy, and OCC's failure to present a compelling contrary case, the Commission should adopt the Settlement over the objections of OCC.

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[22] *Id.* at 11-12.

[23] OMAEG Initial Brief at 12-14; Stipulating Parties Exhibit 1, Settlement at ¶ 20(a).

[24] *See* OMAEG Initial Brief at 4-6.

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

[26] *See* OMAEG Initial Brief at 19.

[27] *Id.* at 19-21; *see also infra* Part II.A.

[28] *See* OCC Initial Brief at 3.

A. The Signatory Parties did not receive "cash for signatures" or form a so-called redistributive coalition.

OCC incorrectly argues that the Settlement fails the first,[29] second,[30] and third[31] prongs of the Commission's three-part test because, according to one of OCC's witnesses, the Signatory Parties allegedly formed a redistributive coalition that somehow defeats the lawfulness and reasonableness of the Settlement.

First, OMAEG agrees with OCC in two respects: 1) the Commission should adopt good public policy;[32] and, 2) the Settlement does in fact address and fix concerns raised by the Signatory Parties (that is the point of a Settlement after all).[33] In fact, contrary to OCC's claims, the Settlement resolves numerous issues raised by all of the parties (including OCC) in a manner that is good public policy, benefits customers, and is in the public interest.

Interestingly, OCC states that a Settlement should not just fix the problems raised by the Signatory Parties. But in this case, the Settlement was signed by all of the active parties in the case, except OCC. Thus, it fixes many of the problems raised in the case, not just those raised by Signatory Parties. Additionally, under OCC's theory, no Settlement could ever be proper unless it is signed by OCC. The Commission has specifically rejected this unreasonable argument by OCC that would wield an extraordinary power to OCC in every case.[34] Further, this Settlement

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[29] OCC Initial Brief at 47-49.

[30] *Id.* at 73-75.

[31] *Id.* at 75-78.

[32] OCC Initial Brief at 38.

[33] Id.

[34] *In the Matter of the Application of Ohio Power Company for Approval of an Advanced Meter Opt-Out Service Tariff*, Case No. 14-1158-EL-ATA, Opinion and Order at 7 (Apr. 27, 2016), *citing In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order at 32 (Feb. 19, 2014) ("[The] Commission has repeatedly held that no party wields a veto power over the stipulation process and that unanimous stipulations are not required."); *In The Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price*, Case Nos. 05-724-EL-UNC, et al., Opinion and Order at 27 (Nov. 20, 2007) ("Lack of agreement by two parties should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. To do so would be to give those parties, in effect, veto power over the result."); *Dominion Retail, Inc. v. The Dayton Power and Light*

balances all of the interests of all the parties, not just those that OCC believes are the most important. Nevertheless, despite the overwhelming support for the almost unanimous Settlement, in an attempt to discredit the Settlement and criticize those parties that expended time and resources to participate in the case to protect their interests and resolve the issues that harm them and others, OCC selects a few provisions out of the entire Settlement that help resolve some issues for some Signatory Parties and relies on a redistributive coalition theory to argue that those provisions are unreasonable and those parties did something improper. OCC's analysis is flawed.

Even if the Commission recognizes that a redistributive coalition could void a settlement, no redistributive coalition exists in this case. Although diversity of parties is not a requirement for Commission approval of a Settlement,[35] OCC alleges that a supposed lack of diversity is both a flaw in the Settlement itself,[36] and evidence that the Signatory Parties allegedly represent a redistributive coalition.[37] Contrary to OCC's assertions, however, the Signatory Parties *do* represent a diverse group of interests.

The Signatory Parties are diverse in their interests and the objectives they have sought in this proceeding. OCC asserts that the Signatory Parties "are not seeking a single, overarching public policy that is mutually shared."[38] This may be correct, but that is the point. The Signatory

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Company, Case Nos. 03-2405-EL-CSS, et al., Opinion and Order at 18 (Feb. 2, 2005) ("OCC's approach to this prong of the test would give it, effectively, 'global veto power, thereby precluding Commission approval of any settlement not endorsed by the OCC.'").

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

[36] *See* OCC Intial Brief at 48 ("Dr. Hill also explained that the redistributive coalitions might give the settlement 'the veneer of widespread public support,' but the reality is that even when many parties sign a settlement, the settlement lacks diversity because it fails to include the interests of the many thousands of parties that did not sign the settlement and for whom the settlement offers no protection.") (internal citations omitted).

[37] *See* OCC Initial Brief at 40-41 ("The lesson is this: Far from representing broad, diverse interests, the redistributive coalition does precisely the opposite. It favors a small group of interests, by design, so that the small group gains a competitive advantage over the truly diverse parties that are not part of the coalition.").

[38] OCC Initial Brief at 40.

Parties, as representatives of a diverse group of interests, have divergent interests and views, which were balanced in arriving at an almost unanimous Settlement. Ohio law supports this balancing of interests in resolving cases. For example, Revised Code Chapter 4928, which governs SEET proceedings, also enumerates various state policies surrounding the regulation of competitive retail electric service.[39] Many of these policy goals require balancing, as prioritizing one goal would require neglecting another.

For instance, it is the state policy to "[Ensure] the availability" of both "reliable" and "safe" retail electric service, as well as "reasonably priced electric service."[40] Pursuit of reliability and safety goals without any regard to cost would result in unreasonably priced retail electric service. On the other hand, frequently cutting corners in order to obtain the lowest possible price for consumers would create reliability and safety risks. It is also state policy to "[provide] coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates" as well as "avoiding anticompetitive subsidies."[41] Thus, any incentive program must balance the policy goal of incentivizing adoption of new technologies with avoiding anticompetitive subsidies.

Thus, contrary to OCC's assertions,[42] good state policy is balancing the interests of all. The Signatory Parties' representation of a broad group of diverse interests supports the approval of the Settlement supported by so many. Interestingly, while criticizing the Signatory Parties for not pursuing a single overarching policy goal, OCC also conversely claims that the parties *do not*

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[39] *See generally* R.C. 4928.02.

[40] R.C. 4928.020(A).

[41] R.C. 4928.02(H), (J).

[42] *See* OCC Initial Brief at 40.

represent a group with diverse interests.[43] Thus, OCC claims that the Parties formed a redistributive coalition both because they do not unite around one single policy objective, and because they do not seek enough policy goals. It is clear that OCC's standard here is both internally inconsistent and practically impossible to satisfy.

At any rate, the Signatory Parties are not pursuing the same goals as they represent diverse interests. OCC also states that the Signatory Parties represent a redistributive coalition because the Parties "unite around the dominant objective…of the coalition's organizer, providing the utility what it wants."[44] This is incorrect. The objectives of the various Signatory Parties are at times directly oppositional to the dominant objective of the utility. For example, OMAEG[45] has repeatedly[46] argued against DP&L having the authority to continue to charge the RSC. But, on the other hand, DP&L has sought to continue the RSC into perpetuity. In fact, in its Quadrennial SEET Case application, DP&L asked the Commission to retain the RSC regardless of the outcome of the prospective SEET test.[47] Far from "[uniting] around the dominant objective"[48] of DP&L, OMAEG has repeatedly advanced a position directly opposed to one of DP&L's dominant objectives in its application.[49] The Settlement, in turn, represents a compromise between these two

[43] *See* OCC Initial Brief at 40-41 ("The lesson is this: Far from representing broad, diverse interests, the redistributive coalition does precisely the opposite.")

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

[45] Reply Comments of the Ohio Manufacturers' Association Energy Group at 11 (July 16, 2020) ("Given that DP&L is unable to justify the lawfulness of the RSC (as a transition charge, POLR charge, or a financial integrity charge), the Commission should, at a minimum, eliminate the RSC charge from the Modified ESP I.").

[46] Case Nos. 08-1094, et al., Motion to Reject DP&L's Proposed Tariffs to Increase Customer Rates (Dec. 12, 2019).

[47] *See* Quadrennial SEET Case, Application at ¶ 5 (Apr. 1, 2020) ("In that situation, the Commission should exercise its discretion to retain the RSC because the RSC is foundational to DP&L's ability to maintain its financial integrity, and a Commission order invalidating the RSC would make it impossible for DP&L to continue to provide safe and reliable service.").

[48] *See* OCC Initial Brief at 40 (internal quotations omitted).

[49] Note that in its application, *id.*, DP&L dedicates an entire section as to why the Commission should continue to authorize the RSC regardless of the plan it approves going forwards.

positions—termination of the RSC after a short period of time, rather than immediately terminating it (as OMAEG and others have advocated) or continuing it into perpetuity (as DP&L has argued).

Besides seeking different objectives, the Signatory Parties represent a variety of different groups, as DP&L's witness elaborated.[50] Signatory Parties include a major utility,[51] PUCO Staff, groups representing commercial and industrial users of various sizes,[52] a provider of competitive retail natural gas service and competitive retail electric service,[53] a municipality,[54] a university,[55] a nationwide grocery chain headquartered in Ohio,[56] a group representing low income residential customers,[57] an auto manufacturer,[58] and environmental groups.[59]

Additionally, the Settlement process is open to any interested party. OCC argues that the Commission should "consider the millions of parties in Ohio that are *not* part of the Settlement."[60] According to OCC, participation in Commission cases "is exclusive and difficult to obtain for many stakeholders (such as individual residential consumers, small businesses, and others)"[61] where some parties "have money and knowledge to participate" and some do not.[62] This argument

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[50] DP&L Exhibit 4, Schroder Testimony at 12-13.

[51] DP&L

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

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

[54] The City of Dayton.

[55] The University of Dayton.

[56] The Kroger Co.

[57] OPAE.

[58] Honda of America Mfg., Inc.

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

[60] OCC Initial Brief at 41.

[61] OCC Initial Brief at 77.

[62] OCC Initial Brief at 38.

is both incorrect and irrelevant. Commission proceedings are open to any interested party, both as a legal and a practical matter.

R.C. 4903.221 and Ohio Adm. Code 4901-1-11, which govern intervention in Commission proceedings, are to be liberally construed in favor of intervention.[63] Accordingly, the Commission allowed liberal intervention in the above-captioned proceedings. OCC's witness is unable to identify any parties that were denied the right to intervene, or were limited in their participation,in any of the cases in this proceeding.[64] Additionally, all intervening parties participated in Settlement negotiations.[65]

OCC also argues that some otherwise interested parties might be unable to intervene due to a lack of expertise or resources.[66] However, parties that may lack the resources or expertise to participate individually can obtain representation through organizations that collectively advance the interests of a group of individuals or entities. These includes groups where members collectively pool their resources, nonprofit or charitable organizations, or local governments. For example, OPAE represents not just itself, but "the interests of low and moderate-income Ohioans and OPAE members" including "Community Action Agencies."[67] OMAEG represents the interests of its member businesses of all sizes—which do not typically intervene individually in cases. Sierra Club represents members[68] who are interested in the environment, but donate money to Sierra Club to advocate on their behalf instead of intervening personally. The City of Dayton

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[63] *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 15-20.

[64] Tr. Vol. IV at 595 (Cross Examination of Hill).

[65] DP&L Exhibit 4, Schroder Testimony at 13.

[66] *See* OCC Initial Brief at 38, 41, 77.

[67] *See* Smart Grid Case, Motion to Intervene by Ohio Partners for Affordable Energy (July 11, 2019).

[68] According to Sierra Club, it "has millions of members and supporters nationwide and thousands of members in Ohio." Smart Grid Case, Motion to Intervene by Sierra Club at 5 (Feb. 27, 2019).

represents its more than 140,000 residents, all of whom live in DP&L's service territory.[69] Smaller municipalities with fewer residents[70] may even collectively organize with other municipalities to effectively participate.[71] In short, the Commission generally permits intervention, including intervention by entities that may lack the means to participate individually, so that parties have a variety of methods to be heard before the Commission.

Moreover, the economic development grants and incentives provided to certain Signatory Parties do not represent redistributive payments. According to OCC and its witness, a redistributive coalition occurs when "benefits gained by the coalition members are paid for by others—those who are not in the coalition."[72] In that scenario, "money paid to the utility…by other customers" is redistributed to the coalition members in the form of cash or benefits.[73]

But, in this case, other customers are not paying for the economic grants and incentives. The Settlement plainly specifies that DP&L shareholders, not DP&L customers, are to fund the economic development grants and incentives.[74] OCC's witness simply ignores this provision, and incorrectly argues that since money paid through the RSC ultimately flows to DP&L's shareholders, and since money is fungible, any ratepayer dollars paid through economic development incentives or grants are ultimately redistributive payments.[75] This line of thinking does not follow. Regardless of whether or not DP&L shareholders pay the grants and incentives,

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[69] Smart Grid Case, Motion to Intervene of the City of Dayton at 5 (Jan. 13, 2019).

[70] OCC contrasts the City of Dayton's intervention in this proceeding with the nonparticipation of the smaller cities of Trotwood and Greenville. *See* OCC Initial Brief at 43.

[71] Although not a party to this case, the Northwestern Ohio Aggregation Coalition has participated on behalf of its member municipalities—including the Villages of Holland and Ottawa Hills, both with populations of under 5,000—in cases before the Commission.

[72] OCC Initial Brief at 39.

[73] OCC Initial Brief at 40.

[74] Stipulating Parties Exhibit 1, Settlement at ¶ 15.

[75] *See* Tr. Vol. IV at 635 (Cross Examination of Hill).

DP&L customers still pay the RSC.[76] Thus, the economic grants and incentives result in less money ultimately ending up with DP&L shareholders. Further, if shareholder dollars can ultimately be traced back to RSC payments made by nonparticipating customers, then these dollars can also be traced back to RSC payments by the Signatory Parties, who have paid the RSC and continue to pay the RSC, alongside every other customer. Thus, unless OCC can demonstrate that an individual party received more under these grants and incentives than it paid under the RSC, then these payments cannot be considered redistributive. Under OCC's theory, the customer would be receiving just a portion of the money that it has already paid. Additionally, this OCC theory is also impractical as it would question every settlement benefit paid by utilities.

Furthermore, the Settlement plainly secures benefits for parties that did not participate in any of the above-captioned cases. OCC alleges that a redistributive coalition secures only limited benefits for itself.[77] According to OCC, this "increases some, but not all, customers' utility bills."[78] However, the benefits from the Settlement will benefit both the Signatory Parties and nonparticipating customers. For example, the savings from reducing the cost of DP&L's grid modernization proposals and from eliminating the RSC charges will benefit all DP&L customers.[79] DP&L's investment in CIS, as well as no-cost data access, will also benefit all customers.[80] OCC's witness Williams also acknowledges that many other Settlement terms provide benefits to customers in general, including grid modernization,[81] a time-of-use program,[82] a shareholder

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[76] *See id.* at 634.

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

[78] OCC Initial Brief at 77.

[79] Tr. Vol. IV at 652-53 (Cross Examination of Hill).

[80] *See* Tr. Vol. III at 529 (Cross Examination of Alvarez).

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

[82] *Id.* at 784.

funded smart thermostat program,[83] and the low-income weatherization program and PIPP water heater pilot program.[84] Similarly, the Settlement does not raise costs only for nonparticipating parties. All customers, including the Signatory Parties, already pay the RSC and will continue to do so. All customers, including the Signatory Parties will also pay the IIR.

Thus, OCC's argument regarding the alleged formation of a so-called redistributive coalition fails to rebut the overwhelming evidence[85] that the Settlement satisfies the Commission's three-part test for evaluating stipulations. The Signatory Parties represented diverse groups seeking divergent interests and goals. The Commission proceedings and Settlement negotiations were open to all interested parties. The Signatory Parties did not receive redistributive "cash for signatures." The Settlement secures benefits for the general public, including those parties that did not participate in the proceeding. Thus, even under OCC's overly-broad definition, the Signatory Parties do not represent a redistributive coalition.

B. The Settlement does not create the RSC or subject customers to increased charges under the RSC.

In addition to mischaracterizing DP&L's shareholder contributions, OCC mischaracterizes the status of the RSC under the Settlement. OCC repeatedly and mistakenly asserts that the Settlement creates the RSC. According to OCC, customers "will have to ante up $300 million under the [Settlement] for the misleadingly-named 'Rate Stabilization Charge,'"[86] and that "the

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

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

[85] *See* OMAEG Initial Brief at 6-21.

[86] OCC Initial Brief at 1.

Settlement directly results in the continuation of the RSC and more than $300 million in charges to customers."[87]

However, as OMAEG and others have explained, the Settlement does not create the RSC.[88] No provision in the Settlement even requires DP&L to collect the charge, the charge has been authorized by Commission orders in prior proceedings, the charge will continue with or without the Settlement, and the charge could end with or without the Settlement. Simply put, customers will continue to pay the RSC until the Commission orders otherwise, regardless of the Settlement.[89]

Although OCC continues to advance this baseless argument, OCC's witnesses have repeatedly acknowledged that the RSC does not create or authorize the RSC, or any unlawful charge. OCC's witness Duann acknowledges that the Commission has not invalidated the RSC.[90] Absent the provision in the Settlement eliminating the RSC, the RSC will otherwise continue, unless the Commission or the Supreme Court of Ohio takes further action to remove it.[91] OCC's witness Kahal also recognizes that "the charge will continue until the Commission issues a ruling eliminating the charge."[92] And OCC's witness Hill recognizes that the Commission has not issued such a ruling.[93]

In fact, although the Settlement has not yet gone into effect, customers have continued to pay the RSC in 2021. Thus, OCC cannot plausibly argue that the Settlement is responsible for creating something that both predates the Settlement and will continue with or without the

[87] OCC Initial Brief at 69.

[88] *See* OMAEG Initial Brief at 19.

[89] Tr. Vol. III at 456 (Cross Examination of Kahal).

[90] Tr. Vol. V at 910-11 (Cross Examination of Duann).

[91] Tr. Vol. V at 912 (Cross Examination of Duann).

[92] Tr. Vol. III at 456 (Cross Examination of Kahal).

[93] Tr. Vol. IV at 616 (Cross Examination of Hill).

Settlement—in all likelihood even *longer* without the Settlement. The Settlement prohibits DP&L from attempting to implement any nonbybassable charge (including the continuation of RSC) to customers related to provider of last resort (POLR) risks, financial stability or integrity, or any other charge calculated based on credit ratings or performance of any parent or affiliate of DP&L in its application for its next ESP (ESP IV) to be filed in 2023.[94] However, OCC argues that without the Settlement, customers would pay no RSC charges, a view clearly not reflected in reality.

C. The Settlement does not result in a rate case timing issue.

OCC additionally makes an incorrect legal argument surrounding rate case timing. OCC argues that the Settlement allows DP&L to manipulate the timing of its next rate case filing in order to prevent the benefits of SGP Phase I from flowing through to customers. This is incorrect. The Settlement requires that DP&L files a new distribution rate case by January 1, 2025, or else the IIR will be set to zero and collections under the IIR will cease.[95]

OCC in turn argues that "provision of the Settlement is largely meaningless and provides little if any protection to consumers because DP&L very recently satisfied the provision by filing a base rate case."[96] OCC bases this argument entirely on two facts. First, OCC notes that DP&L filed a new rate case[97] before the Settlement actually went into effect. Second, OCC claims that DP&L's witness "confirmed that this rate case filing satisfies the provision."[98] However, Ms.

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

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

[96] OCC Initial Brief at 56.

[97] *Id.*

[98] *Id.*

Schroder did not do so and cannot possibly do so. As she noted, "ultimately that's the Commission's determination [if it is] satisfied or not."[99] She merely believes that it does.[100]

Given that the Settlement has not yet gone into effect, it would be difficult for the recent filing to satisfy the provision. A stipulation itself does not bind the Commission,[101] and has no legal authority until the Commission enters an order adopting the stipulation.[102] At any rate, DP&L cannot recover its capital investments in the new CIS system except through a future base distribution rate case.[103] If DP&L declines to file a new base distribution rate case, then it will forgo recovery of these capital investments. Thus, as both a legal and a practical matter, this alleged distribution rate case timing issue is unlikely to materialize.

D. Through serious bargaining, the Signatory Parties resolved the cases as a package.

OCC also attempts to argue that the resolution of individual cases—namely the 2018 and 2019 SEET Cases—is improper by considering these cases out of context of the Settlement as a whole. Doing so breaks from Commission precedent.

Ohio law allows parties to resolve a case, or cases, through a stipulation. In the past, the Commission has approved global settlement agreements resolving multiple cases, including settlement agreements that OCC participated in.[104] Supreme Court of Ohio precedent supports the

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[99] Tr. Vol. I at 203 (Cross Examination of Schroder).

[100] *Id.*

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

[102] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-26 (1992) ("A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.") (internal quotations omitted).

[103] Settlement at ¶ 10(g) ("DP&L will recover a return on and of its prudently incurred capital investment in the new CIS and its incremental operation and maintenance expenses associated with the new CIS through base distribution rates and not through the IIR.").

[104] *See, e.g., In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Second Entry on Rehearing at ¶ 11 (May 17, 2017) ("On December

Commission practices of using stipulations to resolve multiple cases efficiently.[105] Furthermore, the Commission evaluates stipulations in their entirety, rather than focusing on individual provisions. "The question before the Commission is not whether there are other mechanisms that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest."[106]

However, OCC focuses, without context, on the outcome of two of the five cases resolved by the Settlement to argue that the Settlement as a whole must fail the Commission's test. In reference to the 2018 and 2019 SEET cases, OCC asserts that "DP&L's litigation position was that customers should get no refund, and the Settlement provides that DP&L's litigation position should be adopted, precisely as filed."[107] Furthermore, OCC concludes that since "only DP&L and four nonresidential customer parties"[108] participated in the 2018 and 2019 SEET Cases, they "should not be considered part of the Settlement 'package' for purposes of the three-prong test."[109]

This analysis completely ignores the above precedent. The Signatory Parties negotiated major concessions from all perspectives. The fact that two of the five cases resulted in fewer concessions does not mean that they should be excluded from the package of benefits. OCC's suggestion is also unworkable. For example, a stipulation that settled two separate, equal issues,

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21, 2016, AEP Ohio, Staff, OCC, OMAEG, and Kroger, along with several other parties, filed a Joint Stipulation and Recommendation (Global Settlement Stipulation) in several cases pending before the Commission, including the present proceeding, to resolve all of the issues raised in the cases. OHA signed the Global Settlement Stipulation as a non-opposing party.").

[105] *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992) ("We endorse the [Commission's] effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities.").

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

[107] OCC Initial Brief at 46.

[108] OCC Initial Brief at 45.

[109] OCC Initial Brief at 46.

by resolving one in favor of one party and the other in favor of the other, would not pass the Commission's test—neither issue could be considered part of the package, and thus, neither issue, standing alone, would result in compromise.

E. OCC's arguments target the Commission's entire process for approving stipulations, rather than the Settlement in particular.

Ultimately, OCC's incorrect arguments regarding participation in the Settlement process and the manner in which the Settlement resolves specific cases reveal an inherent flaw in its Brief. OCC is arguing not against the Settlement, but against longstanding and established Commission precedent on stipulations in general. OCC repeatedly states that redistributive coalitions are a natural consequence of the Commission's settlement process,[110] and that the process itself is flawed. OCC argues that "the [Commission's] settlement process is in desperate need of reform by the PUCO or the Ohio legislature."[111] OCC claims that "the [Commission], in concluding that settlements have broad support from many signatory parties, is getting it backwards. It should instead consider the millions of parties in Ohio that are not part of the Settlement."[112]

This argument fails for two reasons. First, the Commission generally favors stipulations that comply with Commission precedent. "The Commission is obligated to follow its precedent."[113] OCC has not presented convincing evidence to even suggest its position is correct, let alone that the Commission should depart from its longstanding precedent.

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110 OCC Initial Brief at 40 ("In the [Commission] context, redistributive coalitions form through the PUCO's settlement process.").

111 OCC Initial Brief at 1.

112 OCC Initial Brief at 41.

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

As discussed above, OCC's definition of a redistributive coalition is over-inclusive and imprecise. The barriers to participation are not nearly as high as OCC claims, as the Commission affords liberal intervention rights and parties have various options for representation.[114] The Settlement secures benefits for all DP&L customers, including those parties that chose not to participate in this proceeding.[115] The Signatory Parties represent a variety of diverse and divergent interests, some of which are diametrically opposes to DP&L's objectives.[116]

Second, OCC does not present any workable alternative solution. Although OCC may take issue with how interested parties join Commission proceedings, how these parties settle cases, and how the Commission reviews these settlements, OCC does not offer any better solutions. For example, OCC takes issue with the fact that not every potentially interested party ultimately participates.[117] OCC's witness seems to believe that the PUCO should do more to secure participation from potentially interested parties.[118] However, inviting every potentially interested individual would require a vast investment in time and resources by the Commission, with no guarantee such parties would even participate. And if they all *did* participate, it would clog dockets with more complicated proceedings, without any guarantee of better outcomes for inexperienced intervening parties. Of course, those inexperienced with Commission proceedings could pool their resources to hire experts and attorneys to advocate for their interests—but when parties do so,

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[114] *See supra* pages 7-9.

[115] *See supra* pages 10-11.

[116] *See supra* pages 4-7.

[117] *See, e.g.* OCC Initial Brief at 41 ("The PUCO, in concluding that settlements have broad support from many signatory parties, is getting it backwards. It should instead consider the millions of parties in Ohio that are not part of the settlement.").

[118] Tr. Vol. IV at 677 ("It's up to the PUCO to ensure equity of access.").

OCC just accuses them of being part of the redistributive coalition. OCC has not presented any evidence of a system that would work better than the one they criticize.

III. CONCLUSION

OMAEG's Post-Hearing Brief filed February 12, 2021 and this Reply Brief demonstrate that the Settlement passes the Commission's three-part test for evaluating stipulations. By resolving a variety of complex issues involving DP&L, the Signatory Parties have secured a just, reasonable, and expeditious outcome that obtains major benefits for customers and is in the public interest. In order to fully provide these benefits to customers, the Commission should adopt the Settlement in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on March 5, 2021 upon the parties listed below.

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