BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval to Defer Distribution Decoupling Costs.	))))	Case No. 20-0140-EL-AAM

POST HEARING BRIEF OF THE KROGER COMPANY

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) should reject the Application[1] filed by the Dayton Power and Light Company, d/b/a AES Ohio (DP&L or the Company) in the above-captioned case. DP&L's request for deferral authority is unreasonable, unlawful, and unsupported by evidence. In its Application, DP&L asked the Commission to grant it "the accounting authority to defer as a regulatory asset/liability the Company's distribution decoupling costs."[2] DP&L also requested authority to recover carrying costs on the deferred balance, based on DP&L's most recently approved cost of long-term debt in its distribution rate case.[3] According to DP&L, it has a "right to defer its distribution decoupling costs pursuant to the rate case Stipulation."[4]

DP&L, however, is wrong. The Commission already determined that, given DP&L voluntarily withdrew its third Electric Security Plan (ESP III) in which the Distribution Decoupling

[1] *See* The Dayton Power and Light Company's Application for Approval to Defer Distribution Decoupling Costs (Application) at ¶¶ 1, 6 (January 23, 2020).

[2] *See id.* at ¶ 1.

[3] *Id.* at ¶ 12.

[4] *Id.* at ¶ 8.

Rider was created, then DP&L cannot continue that Rider and cannot collect decoupling revenues from customers.[5]

For these reasons, on April 29, 2020, Staff filed its Review and Recommendation (Staff Report), stating that the Commission should deny DP&L's Application.[6] The Kroger Company (Kroger) intervened in this case on June 10, 2020,[7] and participated in an evidentiary hearing on May 4, 2021.

Pursuant to the directive by the Administrative Law Judges to file post-hearing briefs by June 18, 2021, Kroger respectfully submits the following arguments for the Commission's consideration.

II. LAW AND ARGUMENT

A. DP&L has No Existing Decoupling Authority Absent the ESP III Stipulation.

Without the Amended Stipulation and Recommendation filed March 14, 2017 (ESP III Stipulation)[8] in Case No. 16-0395-EL-SSO (the ESP III Case), DP&L has no right to collect—let alone defer—any decoupling revenues. The signatory parties to the ESP III Stipulation agreed to implement a Distribution Decoupling Rider, which would allow DP&L to collect decoupling revenues.[9] The parties also agreed to set a rate methodology for the Distribution Decoupling Rider in a subsequent proceeding.[10] DP&L has since withdrawn from the ESP III Stipulation and

[5] *See In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Second Finding and Order at ¶ 36 (Dec. 18, 2019).

[6] Staff Review and Recommendation at 4 (April 29, 2020) (Staff Report) (Please note that the Staff Review and Recommendation does not include page numbers. For purposes of this filing, Kroger has manually numbered the page numbers.).

[7] *See* Motion To Intervene and memorandum in support By The Kroger Co. (June 10, 2020).

[8] *See* AES Ohio Exhibit 19 (*In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al. (ESP III Case), Amended Stipulation and Recommendation (Mar. 14, 2017) (ESP III Stipulation))

[9] *See id.* at ¶ VI.1.b.

[10] *See id.* at ¶ VI.1.b.

terminated the agreement. As such, it has no legal authority to collect these revenues, and should not be allowed to benefit from a bargain with which it no longer complies.

1. DP&L Could Only Collect Decoupling Revenues pursuant to the ESP III Stipulation.

DP&L claims the Stipulation and Recommendation (Rate Case Stipulation)[11] filed June 18, 2018 in Case No. 15-1830-EL-AIR, et al. (2015 Rate Case) provides justification for its deferral request.[12] However, the Rate Case Stipulation did not independently provide DP&L with the authority to collect decoupling revenues. Instead, it relied on the existence of the earlier ESP III Stipulation.

DP&L originally filed a notice of its intent to file an application for an increase in rates on October 30, 2015, in the 2015 Rate Case.[13] Shortly thereafter, DP&L also filed an application for approval of its ESP III, on February 22, 2016, in the ESP III Case.[14] Kroger intervened in both the 2015 Rate Case[15] and the ESP III Case.[16] The interested parties to both cases subsequently reached settlements in both cases, to resolve a variety of issues. Kroger was a signatory party to both settlements.[17]

A large group of interested parties, including DP&L and Kroger, first signed and filed the ESP III Stipulation.[18] As part of the ESP III Stipulation, the signatory parties agreed to resolve a

[11] *See* Kroger Exhibit 3 (2015 Rate Case, Stipulation and Recommendation (June 18, 2018) (Rate Case Stipulation)).

[12] *See* Application at ¶ 8.

[13] *See* 2015 Rate Case, Notice of the Dayton Power and Light Company's Intent to File an Application for Increase in Rates (Oct. 30, 2015).

[14] *See* ESP III Case, Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan (Feb. 22, 2016).

[15] *See* 2015 Rate Case, Kroger's Motion to Intervene and Memorandum in Support of the Kroger Co. (Dec. 9, 2015).

[16] *See* ESP III Case, Motion to Intervene and Memorandum in Support of the Kroger Co. (Mar. 15, 2016).

[17] *See* Tr. at 83, 85 (Cross Examination of Teuscher).

[18] *See* AES Ohio Exhibit 19 (ESP III Case, Amended Stipulation and Recommendation (ESP III Stipulation)).

wide variety of issues in the ESP III Case.[19] One of the many agreements reached as part of the bargain[20] in this Stipulation allowed DP&L to recover decoupling revenues, and to collect those revenues through the Distribution Decoupling Rider.[21] Regarding the Rider, the ESP III Stipulation stated that:

> DP&L will implement the Decoupling Rider to include the lost revenues currently recovered through the Energy Efficiency Rider as agreed to in the Stipulation filed in Case No. 16-649-EL-POR on December 13, 2016. All other matters relating to the Decoupling Rider, including but not limited to cost allocation, term and rate design, shall be addressed in the pending distribution case, Case No. 15-1830-EL-RDR or in DP&L's next Energy Efficiency Portfolio case. This Rider will be charged on a non-bypassable basis.[22]

The Commission approved and adopted the ESP III Stipulation in October 2017.[23]

Subsequently, many of the same parties that had been involved in reaching the ESP III Stipulation[24] filed the signed Rate Case Stipulation on June 18, 2018.[25] Once again, the Rate Case Stipulation addressed a wide variety of issues, including a new rate design and methodology for collection of decoupling revenues, pursuant to the previous agreement in the ESP III Stipulation.[26] The Rate Case Stipulation specified that the provisions regarding decoupling relied on the ESP III Stipulation and that the new methodology was to be collected through the existing Distribution Decoupling Rider. The Rate Case Stipulation stated, in part that:

> The Signatory Parties agree, that pursuant to the October 20, 2017 Opinion and Order in Case No. 16-395-EL-SSO, DP&L shall be permitted to implement Revenue Decoupling through its *existing* Decoupling Rider.[27]

---

[19] *See* Tr. at 82 (Cross Examination of Tyler Teuscher).

[20] Tr. at 32 (Cross Examination of Nyhuis).

[21] Tr. at 82 (Cross Examination of Tyler Teuscher).

[22] AES Ohio Exhibit 19, ESP III Stipulation at ¶ VI.1.b.

[23] *See* ESP III, Opinion and Order at ¶ 1 (Oct. 20, 2017).

[24] *See* Tr. at 85 (Cross Examination of Teuscher).

[25] *See* Kroger Exhibit 3 (Rate Case Stipulation).

[26] *See id.* at ¶ III.3.

[27] *See* Kroger Exhibit 3 at ¶ III.3 (Rate Case Stipulation).

The signatory parties to the Rate Case Stipulation agreed to apply a "revenue per customer" rate design to the Distribution Decoupling Rider,[28] based on the share of the stipulated revenue requirement for several select tariff classes.[29] The Commission approved and adopted the Rate Case Stipulation in an Opinion and Order issued on September 26, 2018.[30] As part of this Opinion and Order, the Commission approved, without modification, the new decoupling methodology as proposed in the Rate Case Stipulation.[31] The Commission noted that the agreement in the Rate Case Stipulation related to the previous agreement in the ESP III Stipulation, as it permitted "DP&L to implement revenue decoupling *through the Distribution Decoupling Rider.*"[32] The Commission Opinion and Order did not give DP&L any further authority to defer decoupling revenues. [33]

DP&L and its witnesses seem to assert that the Rate Case Stipulation gave DP&L the blanket authority to collect, or defer, any decoupling revenues.[34] This is not the case. The signatory parties to the Rate Case Stipulation did not agree to give DP&L blanket authority to defer or

[28] Rate Case Stipulation at ¶ 3.a ("Revenue Decoupling shall employ a revenue per customer ("RPC") methodology and is applicable to tariff classes D17, D18, and D19 only. The calculation of the allowed RPC allocates the Stipulated Revenue Requirement to each tariff class based on the revenue allocations in the Staff Report and divides the result by the test year number of customers as filed in DP&L's Application. The resulting RPC is shown and calculated on Exhibit 4.").

[29] *Id.*

[30] *See* 2015 Rate Case, Opinion and Order at ¶ 1 (Sept. 26, 2018).

[31] *See id.* at ¶ 54.III.3.

[32] *See* 2015 Rate Case, Opinion and Order at ¶ 1 (Sept. 26, 2018) (emphasis added).

[33] *See id*.

[34] *See, e.g.*, Tr. at 56 (Cross Examination of Nyhuis) ("It is my testimony that DP&L no longer has the recovery mechanism to…recover these through a decoupling rider. That's different than the authority. I think that would be from the—is not tied to the recovery mechanism, tied to the…the distribution rate case and that stipulation."); Tr. at 112 (Cross Examination of Teuscher) ("I believe that the deferral authority is—is in [the 2015 Rate Case]."); Application at ¶ 6 ("DP&L is still entitled to defer the distribution Revenue Decoupling costs, pursuant to the Revenue-Per-Customer methodology defined and approved in DP&L's Distribution Rate Case").

recover any amounts. The signatory parties established, pursuant to a previous agreement, a methodology to apply to an "existing" Rider, which was part of DP&L's ESP III.[35]

Furthermore, any authorization arising from the Rate Case Stipulation applied to the collection, not the deferral, of decoupling revenues. The Rate Case Stipulation addressed the amounts to be collected through an existing recovery mechanism.[36] Besides stating that "[the] Decoupling Rider deferral balance (whether over or under) will include carrying costs at DP&L's Stipulated Cost of Debt,"[37] the Rate Case Stipulation did not address deferral of the decoupling revenues. Nor did the Commission Opinion and Order, which adopted the Rate Case Stipulation without modification, give DP&L any such blanket authority to collect or defer decoupling revenues. Instead, the Commission tied this recovery to the ESP III Stipulation, when it held that the Rate Case Stipulation authorized "DP&L to implement revenue decoupling through the Distribution Decoupling Rider."[38] DP&L and its witnesses even acknowledge that the ESP III Stipulation and Rate Case Stipulation dealt with the recovery, not the deferral, of decoupling revenues.[39]

Thus, to the extent that the Rate Case Stipulation authorized DP&L to collect decoupling revenues, it only did so within the parameters of the ESP III Stipulation. Unfortunately for DP&L, the ESP Stipulation is no longer in effect.

---

[35] Kroger Exhibit 3 at ¶ III.3 (Rate Case Stipulation).

[36] *See* Kroger Exhibit 3 at ¶ III.3.g (Rate Case Stipulation) ("The Decoupling Rider will be charged based on the percentage of base distribution revenue for each applicable tariff class individually"); *see also* Tr. at 25 (Cross Examination of Nyhuis).

[37] Rate Case Stipulation at ¶ 3.e ("The Decoupling Rider deferral balance (whether over or under) will include carrying costs at DP&L's Stipulated Cost of Debt;"); *see also* Tr. at 94-95 (Cross Examination of Teuscher) (When asked if any other parts of the Rate Case Stipulation authorized deferral, the witness replied "I'm not quite sure.").

[38] 2015 Rate Case, Opinion and Order at ¶ 66 (Sept. 26, 2018).

[39] *See* Application at ¶ 6 ("DP&L should be permitted to *defer* those amounts because the parties to DP&L's Distribution Rate Case agreed in the Stipulation that DP&L could *recover* those base distribution amounts in a specific way.") (emphasis added); *see also* AES Ohio Exhibit 1 at 3 (Direct Testimony of Karin M. Nyhuis (Mar. 5, 2021)) ("Additionally, DP&L was authorized to collect (or refund) the Decoupling Amounts through the Decoupling Rider.").

2. DP&L Voluntarily Withdrew from the ESP III Stipulation, Terminating the Company's Right to Collect Decoupling Revenues.

As discussed above, the Rate Case Stipulation only gave DP&L the authority to collect decoupling revenues through its existing Distribution Decoupling Rider. However, as a result of DP&L's business decisions, this Rider no longer exists.[40]

Following a Supreme Court decision holding that the Distribution Modernization Rider (DMR) contained in another utility's Electric Security Plan was unlawful, the Commission moved to remove a similar DMR from DP&L's ESP III. Accordingly, the Commission issued a Supplemental Opinion and Order in the ESP III Case, terminating DP&L's DMR.[41] Finding that the DMR was unlawful and violated important regulatory principles and practices, the Commission modified the ESP III Stipulation to remove the DMR from ESP III.[42]

According to DP&L's witness, "the Company had to take a look and evaluate different options" regarding ESP III following the termination of the DMR.[43] "Based on the analysis for what was best for the company and the customers at the time," DP&L decided that the prudent course of action was to withdraw from ESP III in its entirety.[44] Although the Commission did not direct DP&L to withdraw ESP III,[45] DP&L chose to do so.[46] Within a week, DP&L voluntarily

[40] *See* Tr. at 20 (Cross Examination of Nyhuis) ("There's no longer a decoupling rider, that's correct."); Tr. at 90, 92 (Cross Examination of Teuscher) ("I believe the decoupling rider was eliminated with the withdrawal of the ESP III.").

[41] *See* OCC Exhibit 13 at 4 (Direct Testimony of Wm. Ross Willis (Mar. 12, 2021)).

[42] ESP III Case, Supplemental Opinion and Order at ¶ 110 (Nov. 21, 2019).

[43] Tr. at 90 (Cross Examination of Teuscher).

[44] *Id.*

[45] *Id.*

[46] OCC Exhibit 9 (ESP III Case, The Dayton Power and Light Company's Notice of Withdrawal of Its Application in Case No. 16-395-EL-SSO Pursuant to R.C. 4928.143(C)(2)(a) (Nov. 26, 2019)).

withdrew ESP III and stated its intent to revert to the terms of its previously approved first Electric Security Plan (ESP I).[47] Withdrawing ESP III also removed the Distribution Decoupling Rider.[48]

DP&L proposed to continue the Distribution Decoupling Rider when it reverted to ESP I.[49] DP&L had not originally included a decoupling rider in its application ESP I, and ESP I as originally approved by the Commission did not include the Distribution Decoupling Rider.[50] DP&L also attempted the "blanket authority" argument in this instance. The Company argued that since "the decoupling revenues collected by the decoupling rider are a form of 'lost revenue,'" that the prior stipulation in Case No. 08-1094-EL-SSO had authorized the Company to collect lost revenue, and that therefore, the Commission should allow DP&L to continue collecting decoupling revenues.[51] The Commission did not agree with this argument. When it authorized DP&L to revert to a version of ESP I, it noted that the Distribution Decoupling Rider was created by the ESP III Stipulation, and ordered DP&L to file tariffs that did not collect the decoupling revenues identified in the Rate Case Stipulation.[52]

3. DP&L Should Not Benefit from an Agreement It No Longer Honors.

The fact that DP&L's withdrawal of ESP III terminated the regulatory authorization to collect these revenues in the first place defeats any argument DP&L has regarding its "right" to

[47] *Id.* at 3.

[48] Tr. at 140 (Cross Examination of Teuscher).

[49] *See In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Second Finding and Order at ¶ 36 (Dec. 18, 2019).

[50] *See* Tr. at 56 (Cross Examination of Nyhuis) ("The decoupling rider was not included in ESP I, correct."); Tr. at 91-92 (Cross Examination of Teuscher) ("I don't believe that DP&L filed for a distribution decoupling rider or got one approved originally with ESP I.").

[51] *See In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Second Finding and Order at ¶ 24 (Dec. 18, 2019).

[52] *See id.* at ¶¶ 36, 38.

collect decoupling revenues. As if that were not enough, however, DP&L claims it should continue receiving the benefits of an agreement that it made but subsequently withdrew from.

DP&L and its witnesses argue that it should retain its one-sided benefits of the bargain.[53] DP&L's witness, Tyler Teuscher, argues that granting this novel request to defer is akin to "honoring the benefit of the bargain approved by this Commission."[54] However, as discussed above, DP&L's authority to collect decoupling revenues is premised on the ESP III Stipulation, which, no longer exists.[55]

When DP&L withdrew ESP III,[56] customers and signatory parties ceased receiving the benefits they obtained under that agreement. Nonetheless, DP&L thinks that it should continue receiving its own benefits under that now-terminated agreement—the right to collect decoupling revenues. DP&L made the decision to withdraw ESP III with the knowledge that it would result in the loss of decoupling revenues with no guarantee of future deferral authority.[57] However, DP&L still made that decision, based on its cost-benefit analysis about what was best for the Company.[58] DP&L essentially seeks to avoid any of the costs associated with its decision to withdraw ESP III. The Company previously attempted to retain the most beneficial parts of ESP III when it reverted to ESP I. The Commission has already rejected this effort in the past.[59]

---

[53] *See* Application at ¶ 6 ("DP&L should be permitted to defer those amounts because the parties to DP&L's Distribution Rate Case agreed in the Stipulation that DP&L could recover those base distribution amounts in a specific way, the Commission approved that Stipulation, and no party sought rehearing on that issue."); *See also* AES Ohio Exhibit 2 at 6 (Direct Testimony of Tyler A. Teuscher (Mar. 5, 2021)) ("Deferral of the Decoupling Amounts would enable DP&L to retain 5 the benefit of its bargain in settling that proceeding, that I understand to still be in effect.").

[54] *See supra* Part II.A.1.

[55] *See supra* Part II.A.2.

[56] *See* ESP III Case, Notice at 1 (November 26, 2019).

[57] Staff Exhibit 1 at 2 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[58] *See* Tr. at 90 (Cross Examination of Teuscher).

[59] *See In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Second Finding and Order at ¶¶ 24, 36, 38 (Dec. 18, 2019).

Denying DP&L's application to defer these decoupling revenues would be consistent with the Commission's prior decision in Case No. 08-1094-EL-SSO.[60]

B. DP&L Cannot Defer Decoupling Revenues.

As discussed above,[61] DP&L does not have any existing mechanism or authority to recover decoupling revenues. As such, DP&L's Application requesting deferral authority should be treated as an entirely novel request to defer revenues. When examined as a novel request to defer revenues against Commission precedent and the Staff's typical analysis regarding deferral requests, it is apparent that the Company's request for deferral authority should be denied.

1. DP&L Seeks to Defer Revenues, not Costs.

First, despite how DP&L[62] and its witnesses[63] have attempted to mischaracterize this request for deferral authority, it is apparent that DP&L is seeking to defer, and eventually recover, decoupling revenues, not costs, in this case. DP&L has inconsistently identified its deferral requests as one for 'costs' or 'amounts' at different points in this proceeding. DP&L originally identified the decoupling revenues as "decoupling costs" in its Application.[64] However, as DP&L witness Nyhuis admits, she "did not list any [costs] out in [her supporting] testimony," and DP&L did not list any costs out in its application.[65] DP&L also can no longer identify costs associated with energy efficiency, as Commission-approved energy efficiency programs terminated at the end

[60] *See* OCC Exhibit 13 at 7 (Direct Testimony of Wm. Ross Willis (Mar. 12, 2021)).

[61] *See supra* Part II.A.

[62] *See* Application at ¶ 1 (Jan. 23, 2020) ("DP&L respectfully requests the accounting authority to defer as a regulatory asset/liability the Company's distribution *decoupling costs*") (emphasis added).

[63] *See* AES Ohio Exhibit 1 at 3 (Direct Testimony of Karin M. Nyhuis (Mar. 5, 2021)) ("Additionally, DP&L was authorized to collect (or refund) the *Decoupling Amounts* through the Decoupling Rider.") (emphasis added); AES Ohio Exhibit 2 at 2 (Direct Testimony of Tyler A. Teuscher (Mar. 5, 2021)) ("The purpose of my testimony is to provide an overview of DP&L's *decoupling amounts*") (emphasis added).

[64] *See* Application at ¶ 1 (Jan. 23, 2020) ("DP&L respectfully requests the accounting authority to defer as a regulatory asset/liability the Company's distribution decoupling costs").

[65] *See* Tr. at 46 (Cross Examination of Nyhuis).

of 2020.[66] Notably, when approving the Rate Case Stipulation, the Commission considered these (now-discontinued) programs, as it noted that allowing DP&L to implement revenue decoupling through the existing Distribution Decoupling Rider would "promote energy efficiency efforts."[67]

DP&L's witness attempted to conflate the concepts of costs and revenues claiming that "the distinction between revenues and costs is not significant,"[68] and that since costs of service "are part of leading up to the revenue requirement," then the distinction between costs and revenues "is more of a presentation or timing difference."[69] Although costs of service are one component of a revenue requirement, this does not mean that the difference in revenues collected versus revenues authorized is a "decoupling cost." To the extent that these revenues are "costs," a difference in collection represents a revenue shortfall that should be recovered in a new rate case.[70]

Commission Staff disagreed with DP&L's characterization of its deferral request. The Staff Report stated that what DP&L requested to defer in this case "are revenues and not costs."[71] In a recent DP&L 10-K filing, the Company stated that it sought "authority to record a regulatory asset to accrue revenue that would have otherwise been collected under the [ESP III] through the [Distribution] Decoupling Rider."[72] Staff's witness David Lipthratt specified that "decoupling is

[66] *See* Tr. at 46-47 (Cross Examination of Nyhuis); Tr. at 99 (Cross Examination of Teuscher) ("The mandated programs ended December 31, 2020.").

[67] *See* 2015 Rate Case, Opinion and Order at ¶ 66 (Sept. 26, 2018).

[68] Tr. at 22 (Cross Examination of Nyhuis).

[69] Tr. at 41 (Cross Examination of Nyhuis).

[70] *Id.* ("Granting the deferral that DP&L is requesting could create a pathway for other utilities to file similar applications that request to defer what amounts to shortfalls in the revenue requirement.").

[71] Staff Report at 3.

[72] *Id.* at 3, fn.4.

intended to recover the difference between actual and approved revenues."[73] Therefore, the so-called "amounts"[74] that DP&L seeks to defer are actually revenues, not costs.[75]

Following the Staff Report, DP&L began referring to its request as one to recover "decoupling amounts."[76] Witness Nyhuis testified that the Commission has allowed companies "to defer amounts on their regulatory books and, therefore, create regulatory assets or liabilities."[77] Presumably, this is because DP&L recognizes that a request to defer revenues will not succeed.

2. <u>The Commission typically Does Not Allow Deferral of Revenues.</u>

According to Staff's witness, "all decoupling mechanisms generally have been approved in the form of a rider and not…deferral authority."[78] Staff also does not typically support deferral of revenues, and the Commission typically denies such requests.[79] As such, this request to defer decoupling revenues should likewise be rejected.

DP&L cannot refute this point. Witness Nyhuis stated that she is "not aware of what the Commission has historically allowed in all circumstances" when asked if the Commission typically allows utilities to defer revenues. Witness Nyhuis could only identify "energy efficiency lost revenues" when asked for any specific circumstance where the Commission has allowed a utility to defer revenues.[80] However, according to the Commission, the Rate Case Stipulation specifically prevented DP&L from collecting "lost revenues,"[81] so this example is inapplicable.

---

[73] Staff Exhibit 1 at 2 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[74] *See, e.g.*, AES Ohio Exhibit 2 at 2 (Direct Testimony of Tyler A. Teuscher (Mar. 5, 2021)).

[75] Staff Exhibit 1 at 2 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021))

[76] AES Ohio Exhibit 2 at 2 (Direct Testimony of Tyler A. Teuscher (Mar. 5, 2021)).

[77] AES Ohio Exhibit 1 at 2-3 (Direct Testimony of Karin M. Nyhuis (Mar. 5, 2021)).

[78] Tr. at 234 (Redirect Examination of Lipthratt).

[79] Staff Exhibit 1 at 6 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[80] Tr. at 38-39 (Cross Examination of Nyhuis).

[81] 2015 Rate Case, Opinion and Order at ¶ 66 (Sept. 26, 2018) ("revenue decoupling through the Distribution Decoupling Rider…will promote energy efficiency efforts, result in the elimination of collection of lost revenues…").

Rather than deferring decoupling revenues, these revenue shortfalls are best addressed in a rate case proceeding.[82] DP&L is attempting to circumvent the ratemaking process by instead seeking to defer these revenues. Even DP&L's witness Tyler Teuscher agrees that the issue of decoupling should be addressed in a ratemaking proceeding.[83]

3. DP&L has Failed to Satisfy the Commission Staff's Test for Evaluating Deferral Requests.

Even if the Commission maintained a practice of approving requests to defer revenue in general, which it does not, the Commission should still reject this request. DP&L's deferral request in its Application failed to meet the Commission Staff's standards for supporting deferral requests. DP&L also failed to provide further evidence to refute this finding.

When reviewing deferral requests generally, the Commission Staff uses a six-part test:

1. Whether the utility's current rates or revenues are sufficient to cover the costs associated with the requested deferral;
2. Whether the costs requested to be deferred are material in nature;
3. Whether the problem was outside of the Company's control;
4. Whether the expenditures are atypical and infrequent;
5. Whether the financial integrity of the utility will be significantly and adversely affected; and
6. Whether the Commission could encourage the utility to do something it would not otherwise do through the granting of the deferral authority.[84]

Since this is a request to defer revenues, not costs, Staff modified this test to apply it to DP&L's request.[85] Staff found that the first criteria was irrelevant.[86] Staff also notes that the materiality of the costs, and the impact on DP&L's financial integrity are both minimized by the fact that this

[82] Staff Exhibit 1 at 5 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)) ("Additionally, approving this deferral request could encourage a utility to circumvent a rate case by requesting deferral authority for revenue deficiencies that should otherwise be addressed in a rate case proceeding.").

[83] *See* Tr. at 109 (Cross Examination of Teuscher) ("I think that my testimony in this case states that the Commission set that the time to address decoupling is in a base rate case."); AES Ohio Exhibit 2 at 7 (Direct Testimony of Tyler A. Teuscher (Mar. 5, 2021)) ("The Commission has held that the appropriate time to implement a decoupling rate design is during an electric utility's base rate case.").

[84] Staff Exhibit 1 at 3 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[85] *Id.*

[86] *Id.*

request would not result in immediate cash flows, and would instead be contingent on future approval of recovery.[87] To the extent any problem exists, it results solely from the Company's own decisions. As discussed above, DP&L made the voluntary choice to withdraw ESP III, despite knowing that this would terminate its authority to collect decoupling revenues.[88]

Furthermore, the Commission typically approves deferral where the costs or revenues associated are atypical and infrequent.[89] The current request represents a monthly amount.[90] Lastly, Staff notes that the Commission should not encourage utilities to circumvent the typical ratemaking process.[91]

DP&L's request also fails to satisfy the applicable Financial Accounting Standards Board (FASB) regulatory standard for deferring revenues, or Ohio law for recognizing a regulatory asset. In order to defer revenues, Accounting Standards Codification (ASC) 980-605 requires that:

- The program is established by an order from the utility's regulatory commission that allows for automatic adjustment of future rates. Verification of the adjustment to future rates by the regulator would not preclude the adjustment from being considered automatic.
- The amount of additional revenues for the period is objectively determinable and is probable of recovery.
- The additional revenues will be collected within 24 months following the end of the annual period in which they are recognized.[92]

The Ohio Revised Code defines a regulatory asset as "regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, *pursuant to an order or practice of the*

[87] *Id.* at 4-5.

[88] *See supra* Part II.A.2.

[89] For example, such as "extremely unique and unprecedented [revenue shortfalls] caused by a once in a century pandemic." Staff Report at 6.

[90] Staff Report at 4.

[91] *See id.* at 5; *see also* Staff Exhibit 1 at 5 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)) ("Additionally, approving this deferral request could encourage a utility to circumvent a rate case by requesting deferral authority for revenue deficiencies that should otherwise be addressed in a rate case proceeding.").

[92] *See* Staff Report at 3-4.

public utilities commission or pursuant to generally accepted accounting principles *as a result of a prior commission rate-making decision*, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action.[93]

To recognize the decoupling revenues as a regulatory asset under Ohio law, or to defer revenues per ASC 980-605, DP&L must demonstrate that deferral is pursuant to an order or practice of the Commission. As discussed above, DP&L currently has no existing Commission authorization to collect decoupling revenues.[94] Furthermore, DP&L *never* had Commission authorization to defer the same amounts. Lastly, deferral of revenues cuts against the practice of this Commission. As a result, DP&L's request lacks existing Commission authorization and also fails to find support in the Commission and Commission Staff's practice of approving deferral requests.

III. CONCLUSION

DP&L unlawfully and unreasonably seeks to defer decoupling revenues. However, the Company currently has no existing authorization to collect, let alone defer, these revenues. Any authorization the Company previously had to collect these revenues originated with the ESP III Stipulation, and ended when DP&L willingly withdrew from that Stipulation. Furthermore, this request to defer revenues conflicts with Commission precedent, and fails to satisfy Commission Staff's standards for approving deferral requests in general. As such, The Kroger Company respectfully requests that the Commission deny the Application in its entirety.

[93] R.C. 4928.01(A)(26) (emphasis added).

[94] *See supra* Part II.A.

Respectfully submitted,

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
(Counsel of Record)
Jonathan Wygonski (0100060)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
paul@carpenterlipps.com
Wygonski@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Company

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 June 18, 2021 upon the parties listed below.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

ambrosia.logsdon@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
robert.eubanks@ohioattorneygeneral.gov
michael.schuler@aes.com
jsharkey@ficlaw.com
chollon@ficlaw.com
bojko@carpenterlipps.com
donadio@carpenterlipps.com

Attorney Examiners:
Michael.Williams@puco.ohio.gov
Patricia.Schabo@puco.ohio.gov

Summary: Brief Post Hearing Brief Of The Kroger Company electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.