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

REPLY BRIEF OF
THE KROGER COMPANY

I. INTRODUCTION

After The Dayton Power and Light Company, d/b/a AES Ohio (DP&L or the Company) voluntarily terminated[1] its third Electric Security Plan (ESP III),[2] the Public Utilities Commission of Ohio (Commission) made it clear that DP&L has no authority to collect decoupling revenues from customers.[3] Instead of filing an application for rehearing, DP&L filed this Application as an improper end-run on the Commission's previous decision on the matter.[4] Since it can no longer recover decoupling revenues, DP&L seeks to defer these uncollected revenues for future recovery. However, DP&L is not entitled to these revenues in any form. The Commission should reject, in its entirety, DP&L's baseless and unsupported request for "the accounting authority to defer as a regulatory asset/liability the Company's distribution decoupling costs."[5]

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[1] *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), 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); *see also* Tr. at 90 (Cross Examination of Teuscher).

[2] *See* ESP III Case, Opinion and Order (Oct. 20, 2017) (ESP III Order).

[3] *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).

[4] *See* OCC Brief at 5.

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

Accordingly, in the Commission Staff's Review and Recommendation (Staff Report), filed April 29, 2020, Staff recommended that the Commission deny DP&L's Application.[6] Following a May 4, 2021 evidentiary hearing, the parties to this case submitted post-hearing briefs. All of the parties, except for DP&L, recommended that the Commission deny DP&L's Application.

As The Kroger Company (Kroger),[7] Staff,[8] and other interested parties,[9] pointed out in initial post-hearing briefs, DP&L's request for deferral authority is unreasonable, unlawful, and unsupported by evidence. DP&L's own post-hearing brief[10] failed to demonstrate any additional factual or legal support for its Application, but instead advanced several misrepresentations and incorrect legal conclusions. Pursuant to the directive by the Administrative Law Judges to file reply briefs by July 9, 2021, Kroger respectfully submits the brief in reply to DP&L's post-hearing brief.

II. LAW AND ARGUMENT

A. DP&L is Making an Improper Request to Defer Revenues.

Despite DP&L's repeated attempts to mischaracterize this request for deferral authority, it is apparent that DP&L is seeking to defer, and eventually recover, decoupling revenues, not costs. Previously, DP&L has variously identified the amounts at issue in this case as costs,[11] revenues,[12]

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[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* Post Hearing Brief of The Kroger Company (June 21, 2021) (Kroger Brief).

[8] *See* Initial Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (June 21, 2021) (Staff Brief).

[9] *See* Post Hearing Brief of The Ohio Manufacturers' Association Energy Group (June 21, 2021) (OMAEG Brief); *See* Initial Brief for Consumer Protection by Office of The Ohio Consumers' Counsel (June 21, 2021) (OCC Brief)

[10] *See* Initial Post-Hearing Brief of the Dayton Power and Light Company (d/b/a "AES Ohio") (June 18, 2021) (DP&L Brief).

[11] Application at ¶ 1.

[12] *See* Case Nos. 08-1094-EL-SSO, et al., the Dayton Power and Light Company's Memorandum in Opposition to Motion to Reject DP&L's Tariffs at 19 (Dec. 10, 2019).

and amounts.[13] However, as various parties to this case have shown, the amounts at issue are clearly revenues.[14]

Although cost of service is part of the calculation used to establish a revenue requirement, decoupling specifically addresses revenues. Through decoupling, the Commission seeks to break the link between sales or energy delivery and a company's revenues, in order to encourage various policy goals, such as energy efficiency.[15] Additionally, DP&L did not list any costs out in its application, and DP&L Witness Nyhuis "did not list any [costs] out in [her supporting] testimony."[16] Furthermore, when the Commission approved the stipulation in DP&L's most recent rate case (Rate Case Stipulation),[17] the Commission considered that the then-existing Distribution Decoupling Rider would "promote energy efficiency efforts."[18] However, Commission-approved energy efficiency programs, and associated costs, terminated at the end of 2020.[19]

Perhaps recognizing that it cannot continue to mischaracterize decoupling revenue as costs, DP&L instead attempts to argue that the distinction is not significant.[20] DP&L Witness Nyhuis attempted to make a similar argument during the hearing, stating that "the distinction between revenues and costs is not significant,"[21] and that the difference between the two concepts "is more

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

[14] *See* Staff Report at 3; Staff Brief at 3; OMAEG Brief at 11-13.

[15] Staff Brief at 3.

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

[17] *See In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution*, Case Nos. 15-1830-EL-AIR, et al. (2015 Rate Case), Stipulation and Recommendation (June 18, 2018) (Rate Case Stipulation) approved by Opinion and Order (Sept. 26, 2018) (2015 Rate Case Order).

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

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

[20] *See* DP&L Brief at 15-16.

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

of a presentation or timing difference."[22] In reality, the distinction between costs and revenues is clear, and pertinent to this case.

Commission Staff typically supports requests to defer revenues only in extraordinary circumstances.[23] Similarly, the Commission typically does not grant requests to defer revenue except in extraordinary circumstances.[24] In its initial post-hearing brief, DP&L cites to a few isolated, extraordinary exceptions, including deferral of lost revenues resulting from the COVID-19 pandemic[25] or from Commission-ordered moratoriums associated with extreme weather events.[26] Similarly, at the evidentiary hearing, DP&L 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.[27] She further 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.

These examples of revenue deferral all resulted from extreme circumstances outside of the control of the utility. However, DP&L's lack of decoupling revenue was a foreseeable consequence of its own decision. DP&L voluntarily terminated ESP III.[28] While the Commission had previously removed another rider from ESP III, the Commission did not direct DP&L to withdraw ESP III.[29] When DP&L made the decision to withdraw ESP III, DP&L was fully aware that doing so would result in a loss of authority to collect decoupling revenues with no future

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

[23] *Id*. at 6; Staff Brief at 6; Staff Report at 3.

[24] *Id.*

[25] *See* Staff Brief at 6; DP&L Brief at 16, 18.

[26] DP&L Brief at 17.

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

[28] 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).

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

guarantee of recovery or deferral authorization.[30] DP&L still made the decision to withdraw ESP III, even knowing the consequences, "based on the analysis for what was best for the company."[31]

If DP&L is incurring costs of service that are not recovered under its current rate design, then it should address these shortcomings in a rate case.[32] Instead, DP&L seeks an end-run of proper ratemaking procedures by requesting a deferral of revenue that it is unable and unauthorized to collect. However, "[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."[33] Even DP&L Witness Tyler Teuscher agrees that addressing decoupling in a rate case is most compliant with Commission practice.[34] The Commission should not encourage utilities to use deferral to increase their recoverable revenue outside of a ratemaking case.

B. DP&L's Request Does Not Satisfy the Six-Part Test.

Even if DP&L were not improperly seeking to defer revenues – which it is – this deferral request would still fail to meet the standards for deferral approval. Staff uses a six-part test to evaluate deferral requests.[35] DP&L's Application fails to satisfy this test.[36] In applying the test, Staff found that: (i) the first criteria was irrelevant; (ii) the materiality of the costs, and the impact on DP&L's financial integrity are both minimized by the fact that this request would not result in

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[30] Staff Exhibit 1 at 2 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)); *see also* Staff Brief at 4-5.

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

[32] 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.").

[33] Staff Exhibit 1 at 5 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[34] *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.").

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

[36] *See* Kroger Brief at 13-14.

immediate cash flows and would require further approval for recovery; (iii) any financial issues result from the Company's own decisions; (iv) the request involves a monthly amount; and (v) approval would encourage utilities to circumvent ratemaking.[37] Based on its application of the test, Staff recommended that the Commission deny DP&L's request.[38]

DP&L makes several misrepresentations in arguing against Staff's conclusion regarding this test. DP&L tries to argue that "the events giving rise to this matter are highly unusual,"[39] and the problem was beyond DP&L's control.[40] According to DP&L, because the Commission terminated a rider in ESP III, DP&L chose to withdraw ESP III, the invalidated ESP III had a rider that terminated with ESP III, and the rate methodology for the Decoupling Rider were determined in another case, this situation is unlikely to reoccur.[41] That is inaccurate. As discussed above,[42] DP&L voluntarily withdrew ESP III based on its analysis of what was best for the Company.[43] While the exact circumstances that influenced this analysis may be somewhat novel, the fact remains that DP&L made the ultimate and self-serving decision to withdraw ESP III based on its own conclusions. And at any rate, regardless of the exact circumstances, the event giving rise to this case is not novel. DP&L has withdrawn Electric Security Plans on multiple occasions.[44]

[37] Staff Exhibit 1 at 3-5 (Prefiled Testimony of David M. Lipthratt (Mar. 19, 2021)).

[38] *See* Staff Brief at 4-6.

[39] DP&L Brief at 13.

[40] *Id.*

[41] *Id.* at 13-14.

[42] *See supra* 4-5.

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

[44] *See, e.g. In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, 12-426-EL-SSO, Motion of The Dayton Power and Light Company to Withdraw its Application (July 27, 2016) (ESP II); 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) (ESP III).

DP&L is now trying to avoid the consequences of that decision. It cannot. As Staff noted, by allowing DP&L to defer this decoupling revenue, the Commission may incentivize DP&L and other utilities to attempt to avoid unfavorable aspects of Electric Security Plans in the future.[45]

Additionally, DP&L seems to recognize that its request for deferral authority does not satisfy Staff's six-part test, and instead seeks to argue against the test itself. For example, despite acknowledging that "the costs at issue are typical and frequent,"[46] DP&L makes a non sequitur argument about the events associated with the request.[47] According to DP&L, when Staff considers "[whether] the expenditures are atypical and infrequent,"[48] they should really consider "[whether] the events at issue are unusual."[49] Since it is requesting deferral authority for frequent, monthly revenues, DP&L attempts to reframe this factor of the test to interject unrelated information in support of its request. The Commission should not consider this unrelated argument.

Similarly, while Staff determined that the Application fails to pass the six-part test,[50] DP&L argues that "the Commission has repeatedly granted deferrals without making a finding on the six factor test."[51] However, despite arguing that the Commission "repeatedly" does so, DP&L only identifies two examples from the past three decades. As with revenue deferrals, DP&L has identified examples that demonstrate how unusual its request truly is.

[45] Staff Brief at 5.

[46] DP&L Brief at 13.

[47] *Id.*

[48] *See* Staff Brief at 4.

[49] DP&L Brief at 13 (emphasis original).

[50] Staff Brief at 4-6.

[51] DP&L Brief at 11.

C. DP&L's Decoupling Authority Depended upon the Existence of ESP III.

DP&L argues that the Rate Case Stipulation, entered into in Case No. 15-1830-EL-AIR, et al. (2015 Rate Case)[52] gives it authority to defer decoupling revenues.[53] DP&L claims that "the parties to the [Rate Case] Stipulation — including all of the parties to this case — agreed that AES Ohio is entitled to 'Revenue Decoupling,' which is the ability to recognize and recover the Decoupling Amounts."[54] DP&L states that "because the parties to the [Rate Case] Stipulation agreed that AES Ohio was entitled to recover those amounts" it should also "have the opportunity to recover the Decoupling Amounts in the future."[55]

DP&L claims the parties to the Rate Case Stipulation allowed recovery of decoupling revenues as a substitute for DP&L's proposed, higher customer charge.[56] According to DP&L, "instead of a higher customer charge, the [Rate Case] Stipulation provided that the Decoupling Rider would be reset to zero and that [DP&L] would then implement a 'Revenue Decoupling' rate design that created an Allowable Revenue Requirement based upon a 'revenue per customer' methodology."[57] In its initial post-hearing brief, DP&L states that other parties have confused "why [DP&L] should have the opportunity to recover the Decoupling Amounts with how [DP&L] should be permitted to recover the Decoupling Amounts."[58] In reality, DP&L, not the other parties, mistakenly conflates these two concepts.

[52] *See* Rate Case Stipulation.

[53] DP&L Brief at 9-11.

[54] *Id.* at 10.

[55] *Id.* at 2.

[56] *Id.* at 7.

[57] *Id.*

[58] *Id.* at 2.

DP&L's recovery of decoupling revenues was premised on the Amended Stipulation and Recommendation filed March 14, 2017 (ESP III Stipulation)[59] in Case No. 16-0395-EL-SSO (the ESP III Case), not the Rate Case Stipulation. The parties to the ESP III Case stipulated to the creation of a new Distribution Decoupling Rider (Decoupling Rider).[60] The signatory parties to the ESP III Stipulation also specified that the Decoupling Rider would recover decoupling revenues through a lost revenue methodology.[61] The Commission approved the ESP III Stipulation and authorized DP&L to implement revenue decoupling through the Decoupling Rider.[62] The ESP III Stipulation also specified that the parties to the 2015 Rate Case would implement a new rate design mechanism in that case:

> 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.[63]

When the parties to the 2015 Rate Case agreed to the Rate Case Stipulation and implemented the revenue per customer methodology, DP&L was already collecting decoupling revenues under the lost revenue methodology. The Rate Case Stipulation stated that DP&L would implement the new rate design methodology through the existing Decoupling Rider.[64]

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[59] *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)).

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

[61] AES Ohio Exhibit 19 at ¶ VI.1.b (ESP III Stipulation) ("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.").

[62] ESP III Order at ¶¶ 14, 130.

[63] AES Ohio Exhibit 19 at ¶ VI.1.b (ESP III Stipulation).

[64] *See* Rate Case Stipulation at 10 ("DP&L shall be permitted to implement Revenue Decoupling through its *existing* Decoupling Rider.") (emphasis added).

The Rate Case Stipulation recognized that DP&L was already collecting decoupling revenues, and required that "[the] Decoupling Rider will be set to zero with the implementation of this distribution rate case,"[65] until DP&L calculated the rates for the Decoupling Rider under the new methodology. When it approved and adopted the Rate Case Stipulation, the Commission noted that the new Decoupling Rider rate design methodology would "result in the elimination of collection of lost revenues."[66] The revenue per customer methodology would be a replacement for the existing Decoupling Rider rate design methodology,[67] rather than an independent authorization for DP&L to collect decoupling revenues.

DP&L, therefore, is not "entitled" to anything under the Rate Case Stipulation. The Commission has already rejected DP&L's arguments that its authority to recover decoupling revenues survives its termination of ESP III. When it voluntarily withdrew from ESP III and reverted to its first Electric Security Plan (ESP I), DP&L tried to continue collecting decoupling revenues. [68] In that case, DP&L also argued that it had entitlement to decoupling revenues, claiming that because "the decoupling revenues collected by the [Decoupling Rider] are a form of 'lost revenue,'" the prior stipulation in Case No. 08-1094-EL-SSO permitted DP&L to continue collecting decoupling revenues.[69] The Commission rejected DP&L's request and ordered DP&L to cease collection of decoupling revenues.[70]

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[65] Rate Case Stipulation at 10.

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

[67] *See id.*

[68] *See*, *e.g.*, OMAEG Brief at 12; Kroger Brief at 8; OCC Brief at 4.

[69] *See* OMAEG Exhibit 1 at ¶ 24 (*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, et al., Second Finding and Order (Dec. 18, 2019)).

[70] *See id.* at ¶¶ 36, 38; *see also* Tr. at 48-49 (Cross Examination of Nyhuis).

III. CONCLUSION

DP&L unlawfully and unreasonably seeks to defer decoupling revenues. The Company currently has no existing authorization to collect, let alone defer, these revenues, following DP&L's voluntary termination of ESP III. Furthermore, this request to defer revenues conflicts with Commission precedent, and fails to satisfy Staff's standards for approving deferral requests in general. DP&L, in its initial post-hearing brief, failed to address any of the factual or legal flaws with its request for deferral authority, and instead advanced a number of incorrect misrepresentations and arguments.

Accordingly, for the reasons set forth herein and the reasons set forth in its initial post-hearing brief, The Kroger Company respectfully requests that the Commission deny the Application in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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