BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan.	**)**	**Case No. 22-0900-EL-SSO**
In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Revised Tariffs.	**)**	**Case No. 22-0901-EL-ATA**
In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Accounting Authority Pursuant to R.C. 4905.13.	**)**	**Case No. 22-0902-EL-AAM**

REPLY BRIEF OF WALMART INC.

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REPLY BRIEF OF WALMART INC.

Walmart Inc. ("Walmart"), by its attorneys, respectfully submits its Reply Brief to the Public Utilities Commission of Ohio ("Commission") to address certain arguments made in the Corrected Initial Brief ("I.B.") of the Office of Consumers' Counsel ("OCC"), particularly related to the first prong of the Commission's three-part test.

A. OCC Misconstrues the Meaning of "Capable, Knowledgeable Parties" Under the First Prong of the Commission's Three-Part Test.

Under the first prong of the Commission's three-part test for evaluating Stipulations, the Commission evaluates whether the settlement reached is "a product of serious bargaining among capable, knowledgeable parties."[1] OCC has argued that the Stipulating Parties were not "knowledgeable" within the meaning of prong one because they "*may not* have known the cost of

[1] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 11-3549-EL-SSO, Opinion and Order (Nov. 22, 2011) ("Duke Energy 2011 ESP Order"), p. 41; *In the Matter of Ohio Edison Company, The Cleveland Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Offer Service Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) ("FirstEnergy 2012 ESP Order"), p. 24 (citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994) and *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992)).

the Settlement or the benefits of the Settlement on a quantifiable basis." OCC I.B., p. 15 (emphasis added). The error in this argument is three-fold. First, OCC misstates the test for what it means for a party to be capable and knowledgeable under the Commission's three-part test. Second, as OCC's own brief concedes, they lack any evidence as to what Stipulating Parties knew or did not know; at best, OCC argues they *may not* have known. Third, OCC offers no legitimate argument that all Stipulating Parties were required to know the cumulative cost of the Stipulation on all consumers in order to knowledgably join the Stipulation.

1. The First Prong does not require parties to be knowledgeable of every aspect of the Stipulation.

As it relates to the first prong of the three-part test, OCC has focused throughout these proceedings solely on whether the Stipulating Parties "were knowledgeable that the cost of the [Electric Security Plan ("ESP")] was $160 million" to consumers. Hearing Transcript ("Tr."), Vol. I, p. 129, lines 11-20. This is not the proper standard. Indeed, the first prong of the Commission's three-prong test does not require that a settling party "know" every single aspect of a settlement. Rather, as written, the first prong of three-part test asks whether the settlement is a product of serious bargaining "among capable, knowledgeable parties." This concept of capable and knowledgeable parties means that those parties have "proven their ability to grasp and resolve complex utilities issues."[2] In examining this standard in prior cases, the Commission has also pointed out that parties are knowledgeable based on their "involvement with the issues presented over a number of years."[3] The purpose of the first prong is to ascertain whether the parties are sufficiently knowledgeable of the issues at stake so as to engage in legitimate, arms' length

[2] *See* Consumers' Counsel v. Pub. Util. Comm'n, 64 Ohio St. 3d 123, 126, 592 N.E. 2d 1370, 1373 (Ohio 1992) (endorsing the Commission's three-part test, including the description of the meaning of prong one above).

[3] *See Industrial Energy Consumers of Ohio Power Co. v. Public Utilities Comm'n*, 68 Ohio St. 3d 559, 562, 629 N.E.2d 423, 426 (Ohio 1994).

negotiations, not whether they have knowledge of every single aspect of the Stipulation. In this case, there is no claim that the parties lack such "knowledge" or "capability." Because OCC's arguments on whether or not the Stipulating satisfies the first prong of the Commission's three-part test are based on a misstatement of the applicable standard, the Commission should reject OCC's arguments and find that the first prong has been met.

2. OCC lacks evidence that Signatory Parties were unaware of the cumulative costs of the Stipulation to Consumers.

Even using the improper meaning of "knowledgeable" as put forth by OCC, it is clear that OCC lacks evidence as to whether or not the Signatory Parties were knowledgeable. OCC's Initial Brief acknowledges that they are relying on an assumption that Signatory Parties *may not* have known; they have no evidence that Signatory Parties, in fact, did not know the total costs of the Stipulation to consumers. *See* OCC I.B., p. 15. Nor can OCC present such evidence.

In order to ascertain whether Signatory Parties were "knowledgeable" of the $160 million cost of the ESP, OCC attempted to cross-examine testifying witnesses presented by AES Ohio and Commission Staff ("Staff"). As Walmart noted in its Initial Brief, however, and notwithstanding the objections sustained by the Hearing Examiner, OCC could never obtain from Staff witness Messenger or AES Ohio witness Schroder information concerning "whether the parties [other than Staff or AES Ohio] were knowledgeable about the impact of the settlement on their clients." *See* OCC I.B., p. 75. Staff witness Messenger could – and did – testify that Staff looked "at the costs of the settlement to consumers" and also that Staff was "aware of the costs of the settlement to all the different customer classes."[4] And, Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or "Company") witness Schroeder, for her part, confirmed that the Company afforded parties the opportunity to ask any questions they wanted regarding the Stipulation, and that AES

[4] Hearing Tr., Vol. III, p. 562, lines 13-18.

Ohio had "an opportunity to advise the parties as to the cost – the cumulative cost to the different customers and the different customer classes." *Id.*, p. 131, line 22 to p. 132, line 13.[5] Beyond that, these parties are not able to represent what Signatory Parties knew or did not know.

Walmart does not believe that all Signatory Parties needed to know the cumulative impact of the Stipulation in order to join the Stipulation; but, if OCC was interested in this issue, including whether a Signatory Party analyzed the rate impact associated with the Stipulation, they could and should have issued discovery to the individual Signatory Parties.[6] OCC did not, however, seek discovery from any of the Signatory Parties as to their knowledge of the cumulative costs of the ESP. Thus, the Commission should reject what amounts to OCC's speculation that Signatory Parties were not aware of the cumulative cost of the Stipulation.

3. The Commission should reject the premise of OCC's argument that Signatory Parties needed to be knowledgeable of the impact of the Stipulation on all consumers.

The underlying misassumption in OCC's argument is that all parties that joined the Stipulation were somehow obligated to be knowledgeable of each and every term in the Stipulation, including the overall financial impact of it. This argument fails to recognize that the Signatory Parties represent different interests, which do not broadly encompass all consumers. It is illogical to think that these parties representing specific groups or parties must know and/or make their decisions based on the impact a given settlement had on all customers, particularly where, as here, not every provision is applicable to each and every Signatory Party. Instead, it is logical to think that these customers likely needed to know the impact of the Stipulation on them.

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[5] Hearing Tr., Vol. 1, p. 131, lines 14-18; p. 131, line 22 to p. 132, line 13.

[6] OCC has done this very thing in prior cases. *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Hearing Tr., Vol. XVIII, p. 4454, lines 7-17 (noting that Sierra Club responded to OCC-issued discovery concerning whether Sierra Club "performed any rate analysis on the rate impact of the stipulation").

By contrast, other parties, like Staff, serve in precisely that oversight role; they specifically examine the totality of the impact of the Stipulation on all customers and customer classes. In this case, Staff confirmed that it was knowledgeable of the impact of the Stipulation in this case on all consumers. OCC offers no legitimate argument for *why* other parties, each of whom represent specific customer groups or parties, needed to be similarly knowledgeable. The Commission should reject OCC's insinuation that the Commission's three-prong test requires all parties to have knowledge of all aspects of a Stipulation, whether or not it is applicable to them. Because OCC's arguments are premised on an improper understanding of the meaning of the first prong of the Commission's three prong test; supported by no evidence; and OCC cannot establish why all Stipulating Parties need to have knowledge of all aspects of a settlement, even when those provisions that do not impact them, the Commission should reject OCC's myriad arguments and find that the Stipulation was the product of serious bargaining by capable, knowledgeable parties.

B. The Commission Must Reject OCC's Argument Concerning the Weight to be Given the Stipulation.

Relying on a non-binding concurring/dissenting option from 15 years ago, OCC now claims that the Commission should "give little weight, if any, to the fact that numerous parties (all but OCC) signed the Settlement" because of alleged "unequal bargaining power" as between the utility and Signatory Parties. OCC I.B., p. 17. This argument lacks merit and must be rejected for two reasons. First, OCC has no evidence there is any unequal bargaining power beyond citing the ESP statute and the remedies that it provides to AES Ohio. While unequal bargaining power may have existed in the at-issue case cited in 2008, OCC offers no evidence that it existed in this present matter. Moreover, OCC's argument willfully ignores all the compromises made by AES Ohio to reach an agreement in this case, which suggests that parties were more than able to negotiate with

equal bargaining power. *See* Ohio Manufacturers' Association Energy Group ("OMAEG") and The Kroger Company ("Kroger") I.B., pp. 5-6.

Second, and more importantly, OCC's argument is an improper backdoor attempt to rehash the argument that it made – and that the Commission rejected – in Case Nos. 21-0887-EL-AIR, *et al.*.[7] Specifically, OCC is attempting to argue, albeit using different verbiage, that OCC has some type of veto power over a stipulation that it chooses not to join. The Commission rejected that argument in Case Nos. 21-0887-EL-AIR, *et al.*, and it should do so here. There is no basis for the Commission to give lesser weight to the Stipulation merely because OCC did not join it.

C. **The Commission Did Not Err and OCC was Not Harmed When Hearing Examiner Price Sustained Objections to OCC's Questions that Invaded the Settlement Privilege.**

In its I.B., OCC argues that objections sustained by Hearing Examiner Price "hindered" OCC's ability to challenge the first prong of the three-part test concerning whether Signatory Parties were "knowledgeable" that the ESP would cost $160 million to consumers. OCC I.B., p. 71. The Commission did not commit a procedural error when it sustained the parties' objections to this line of questioning that invaded the settlement privilege, and it should reject OCC's arguments on this issue.

Among other things, as described above, OCC's questions are based on a misunderstanding of the appropriate standard under the first prong of the Commission's three-part test, and, notwithstanding the sustained objections, OCC was still able to cross-examine witnesses for AES Ohio and Staff concerning whether Stipulating Parties were "knowledgeable" within both the actual meaning of the first prong of the test as well as OCC's incorrect interpretation of the first prong. Thus, there was no harm to OCC. Because these issues were discussed above, Walmart will

[7] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 21-0887-EL-AIR, *et al.*, Opinion and Order, pp. 42-43 (Dec. 14, 2022)

not restate those arguments here. Instead, Walmart is focused on the reasons the Commission should find that Hearing Examiner Price correctly sustained the objections based on the settlement privilege.

1. OCC's questions improperly sought the disclosure of settlement communications in order to invalidate the Stipulation.

Ohio Administrative Code 4901-1-26(E) states as follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another valid purpose.

Id. The obvious purpose of this provision is to prohibit parties on either side of a dispute from using offers of settlement, or conduct or statements made in the course of settlement negotiations, in order to prove a dispute is/is not valid. OCC argues that its questions did not run afoul of this rule because "OCC was not attempting to prove liability." OCC I.B., p. 73. By its own admission, however, OCC **was** asking these questions in order to be able to argue that the Stipulation was *invalid* because it did not satisfy (OCC's albeit inaccurate interpretation of) the first prong of the Commission's three-part test for reviewing settlements. *See id*. Thus, quite clearly, OCC is seeking to ask questions for a purpose expressly prohibited by the Ohio Administrative Code. For this reason, the Commission should find that Hearing Examiner Price appropriately sustained the parties' objections to OCC's line of questions.

2. Seeking to invalidate the Stipulation is not a "valid purpose" within the meaning of Ohio Administration Code 4901-1-26(E) or Ohio Rule of Evidence 408.

OCC goes on to argue that OCC's questioning of AES Ohio witness Schroeder and Staff witness Messenger "about signatory parties' knowledge of the settlement's $160 million cost were highly relevant to this proceeding…" and "was for a valid purpose, as permitted under" Ohio Administrative Code 4901-1-26(E) and Ohio Rule of Evidence 408. *Id*., pp. 73-74. While OCC asserts its questions constitute a "valid purpose" under these rules, OCC fails to articulate *how* its purpose is valid within the meaning of either of these rules. OCC's conclusion on this point is unsupported by any argument, legal or otherwise.

Admittedly, both Ohio Administrative Code 4901-1-26(E) and Ohio Rule of Evidence 408 contain exceptions to the general rule prohibiting the admission of settlement communications "when the evidence is offered for another valid purpose" or "when the evidence is offered for another purpose." *Id*. While the Ohio Administration Code does not define what constitutes a "valid purpose," Rule 408 of the Ohio Rules of Evidence defines what constitutes "another purpose," stating:

> This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Ohio R. Evid. 408. OCC has not and did not claim to be questioning AES Ohio witness Schroeder or Staff witness Messenger for the one of enumerated purposes authorized by Ohio Rule of Evidence Rule 408. Instead, it appears that OCC believed its questions to be for the "valid purpose" of proving the Stipulation does not satisfy the first prong of the Stipulation. Besides the fact that OCC had numerous other avenues to obtain that information without invading settlement communications, it is quite clear that this is the precise use of settlement communications that

Ohio Administrative Code 4901-1-26(E) and Ohio Rule of Evidence 408 prohibit. OCC has not established that its questions were for a valid purpose – a burden that OCC must meet – and the Commission should affirm Hearing Examiner Price's rulings sustaining objections to OCC's line of questions that sought to invade the settlement privilege.

3. OCC's citation to the Hearing Examiner's Rulings in Case No. 14-1693-EL-RDR do not support their argument.

OCC claims that prior Commission precedent stemming from an evidentiary ruling in Case No. 14-1693-EL-RDR prove that Hearing Examiner Price improperly sustained the at-issue objections. *See* OCC I.B., pp. 74-75. A review of the cited portions of the transcript from that proceeding reveal they do not support OCC's arguments and, in fact, are easily distinguishable from the present case. Furthermore, other portions of that same transcript actually support the Commission upholding Hearing Examiner Price's ruling in this case.

OCC's I.B., cites to pages 4812-4819 of Transcript Volume XIX in Case No. 14-1693-EL-RDR. That portion of the proceeding involved a discussion of a Global Settlement Agreement that was negotiated in a case separate from Case No. 14-1693-EL-RDR.[8] OMAEG posed questions regarding whether were knowledgeable of the Global Settlement Agreement when they signed the Stipulation presented in Case No. 14-1693-EL-RDR.[9] Counsel for AEP Ohio objected to such questions on the grounds of relevance, arguing the Global Settlement Agreement was not relevant to whether the settlement presented in Case No. 14-1693-EL-RDR satisfied the three-part standard. *Id*. There was no objection on the basis the document was a confidential settlement

[8] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Hearing Tr., Vol. XIX, p. 4809, line 18 to p. 4811, line 8.

[9] *Id*., p. 4812, lines 17-22.

communication. Thus, the portions of the transcript cited by OCC from Case No. 14-1693-EL-RDR are wholly irrelevant.

What is relevant, however, from the transcript for Case No. 14-1693-EL-RDR, is an earlier evidentiary ruling by Hearing Examiner Parrot where she interpreted the confidentiality of settlement communications precisely the same was Hearing Examiner Price did in this current matter. Specifically, in Case No. 14-1693-EL-RDR, the following Q&A occurred as between counsel for OCC and AEP Ohio's witness supporting the stipulation:

> Q: Okay. You referenced in your response, Mr. Allen, the intent of that provision. And I am wondering on what basis are you testifying to the intent of that provision.
>
> A: If I stated the word "intent," I didn't intend to use the word "intent." What I was describing was the meaning of that paragraph.
>
> Q: Okay. And do you attribute the meaning of that paragraph to your participation in the drafting of the document?
>
> MR. SATTERWHITE [Counsel for AEP Ohio]: Your Honor, I'll object to the extent the question is asking the witness to divulge discussions with other parties that took place during negotiations. That's protected by the Commission as confidential.
>
> EXAMINER PARROT: I agree, Mr. Satterwhite. Mr. Allen, to the extent you can answer the question without needing to divulge the substance of any settlement discussion, please do so.[10]

Quite clearly, Hearing Examiner Parrot, much like Hearing Examiner Price, have consistently prohibited parties from invading the confidentiality of settlement communications in order to attack a settlement presented to the Commission for consideration. Commission precedent, thus, confirms that Hearing Examiner Price properly ruled to sustain the parties objections when OCC posed questions that sought disclosure of confidential settlement communications.

[10] *Id*., at p. 4687, line 25 to p. 4688, line 19.

CONCLUSION

For all the reasons set forth above and as previously set forth in its Initial Brief, Walmart Inc. respectfully requests that this Commission adopt and approve the Stipulation in its entirety and without modification.

Respectfully submitted,

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Dated: June 5, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Walmart Inc., was served by electronic mail, upon the following Parties of Record on this 5th day of June, 2023.

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