BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	:	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF THE DAYTON POWER AND LIGHT COMPANY D/B/A/ AES OHIO

Pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35, The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") seeks rehearing from the Commission's June 16, 2021 Fifth Entry on Rehearing on the following grounds:

1. The Fifth Entry on Rehearing is unreasonable and unlawful insofar as it requires AES Ohio to propose language in its tariff making the Rate Stabilization Charge ("RSC") refundable "to the extent permitted by law." June 16, 2021 Fifth Entry on Rehearing, ¶ 64. The RSC cannot and should not be made refundable for two reasons: (a) the RSC was not refundable under AES Ohio's most recent Electric Security Plan ("ESP"), and R.C. 4928.143(C)(2)(b) requires the Commission to continue the terms of the Company's most recent ESP; and (b) requiring a utility to collect refundable rates is inconsistent with the balance created by the General Assembly.

2. The Commission correctly concluded that the RSC was lawful. June 16, 2021 Fifth Entry on Rehearing, ¶¶ 26-30. However, there is an additional reason supporting the Commission's conclusion – R.C. 4928.143(C)(2)(b)

required the Commission to reinstate the RSC after AES Ohio terminated ESP III and reverted to ESP I, which included the RSC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO

I. INTRODUCTION AND SUMMARY

The Dayton Power and Light company d/b/a AES Ohio ("AES Ohio" or the "Company") seeks rehearing from the June 16, 2021 Fifth Entry on Rehearing on two grounds.

First, the Commission erred when it made the Rate Stabilization Charge ("RSC") refundable "to the extent permitted by law" (Fifth Entry on Rehearing, ¶ 64) for two reasons:

a. After AES Ohio terminated in third Electric Security Plan ("ESP III"), R.C. 4928.143(C)(2)(b) required to the Commission to implement the terms of AES Ohio's "most recent standard service offer." ESP I was AES Ohio's "most recent standard service offer," and the RSC was not refundable under ESP I.

b. Making rates "refundable" is inconsistent with the balance struck by the General Assembly.

Second, the Commission correctly concluded that the RSC was lawful. Fifth Entry on Rehearing, ¶¶ 26-30. However, there is an additional reason supporting the Commission's decision, i.e., that the Commission was required to institute the RSC pursuant to R.C. 4928.143(C)(2)(b).

II. THE RSC SHOULD NOT BE REFUNDABLE

The Commission should not have ordered AES Ohio to propose language in its tariff that the RSC is refundable "to the extent permitted by law" (Fifth Entry on Rehearing, ¶ 64) for the following reasons:

A. THE RSC DID NOT PREVIOUSLY INCLUDE SUBJECT-TO-REFUND LANGUAGE, AND CANNOT NOW INCLUDE SUCH LANGUAGE

After a utility terminates an ESP pursuant to R.C. 4928.143(C)(2)(a), R.C. 4928.143 (C)(2)(b) provides that the Commission "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer." R.C. 4928.143(C)(2)(b).

AES Ohio's "most recent standard service offer" before ESP III was terminated was ESP I, as it existed between August 26, 2016 and October 20, 2017.[1] The tariff for the RSC under ESP I during that period did not include any "refundable to the extent permitted by law" language.[2]

Since the Commission was required ("shall") by R.C. 4928.143(C)(2)(b) to reinstate AES Ohio's "most recent standard service offer," it was required to reinstate ESP I as it existed between August 26, 2016 and October 20, 2017. And since the tariff for the RSC did not include "refundable to the extent permitted by law" language under that iteration of ESP I, the Commission erred by ordering AES Ohio to include such language in its tariff for the RSC.

[1] In re The Dayton Power and Light Company, Case No. 08-1094-EL-SSO et al. ("ESP I"), Finding and Order, (Aug. 26 2016), ¶ 30 (granting AES Ohio's motion to implement ESP I rates following the termination of ESP II); In re The Dayton Power and Light Company, Case No. 16-395-EL-SSO, et al. ("ESP III"), Opinion and Order (Oct. 20, 2017), ¶ 141 (approving ESP III).

[2] ESP I, Case No. 08-1094-EL-SSO et al., Final Tariff Sheets (Sept. 1, 2016), Tariff No. G25, pp. 1-2.

B. MAKING RATES REFUNDABLE IS INCONSISTENT WITH THE BALANCE CREATED BY THE GENERAL ASSEMBLY

The Supreme Court of Ohio has explained why including refundable language in a tariff is inconsistent with the balance created by the General Assembly:

> "In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 259, 141 N.E.2d 465 (1957).

III. THE RSC IS LAWFUL FOR AN ADDITIONAL REASON NOT IDENTIFIED BY THE COMMISSION

The Commission correctly concluded that the RSC was lawful. Fifth Entry on Rehearing, ¶¶ 26-30. AES Ohio would not ordinarily seek rehearing on issues with which it agrees, such as the fact that the RSC is lawful.

However, a recent decision by the Supreme Court of Ohio has created uncertainty regarding what AES Ohio needs to do to preserve alternative arguments supporting a Commission decision for appeal. Specifically, in a recent case, the utility made a variety of arguments regarding why it passed the significantly excessive earnings test ("SEET"). In re Determination of Existence of Significantly Excessive Earnings for 2017 under Elec. Sec. Plan of Ohio Edison Co., 162 Ohio St.3d 651, 2020-Ohio-5450, 166 N.E.3d 1191, ¶¶ 39-48.

The Commission expressly agreed with some of the arguments made by the utility, but did not address others. Id. The Court rejected the rational used by the Commission (id. at ¶¶ 22-28) and expressly refused to consider the utility's alternative arguments in support of the Commission's decision:

> "Ohio Edison made this argument in the ESP case, but the commission did not rely on it when it excluded the DMR revenue. Even though the commission ruled in Ohio Edison's favor, the company continued to argue that it was proper to exclude the revenue on these additional grounds.
>
> * * *
>
> We have previously explained that our practice is not to uphold a commission's decision based on a justification asserted by a party on appeal that is different from the justification the commission provided in its order."

Id. at ¶¶ 41, 47 (citations omitted). Accord: R.C. 4903.09 ("In all contested cases . . . the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.").

AES Ohio is thus seeking rehearing on the issue of whether the RSC is lawful to preserve an alternative argument supporting the RSC so that AES Ohio may rely on that argument as a reason that the Supreme Court should affirm the Commission's decision.

Turning to the merits, as discussed above, R.C. 4928.143(C)(2)(b) establishes what the Commission is required do after a utility exercises its right to withdraw and terminate its ESP Application under R.C. 4928.143(C)(2)(b):

> "If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, <u>the commission shall issue such order as is necessary to continue the provisions,</u>

> terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." (Emphasis added.)

Accord: In re The Dayton Power and Light Company, Case No. 12-426-EL-SSO, et al. ("ESP II"), Finding and Order, (Aug. 26, 2016), ¶ 14 ("The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to . . . accept the withdrawal of ESP II.").

The Commission was thus required to issue an order that continued the terms of AES Ohio's standard service offer that was in effect when the Commission approved ESP III, i.e., the rates in effect in ESP I pursuant to the August 26, 2016 Finding and Order issued in this case.

Since the RSC was in effect as part of ESP I when ESP III was approved, the Commission was required to reinstitute the RSC as it existed when ESP III was terminated. That is an additional reason supporting the Commission's conclusion that the RSC is lawful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing and Memorandum in Support of The Dayton Power and Light Company d/b/a/ AES Ohio has been served via electronic mail upon the following counsel of record, this 16th day of July, 2021:

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