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

MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO IN OPPOSITION TO APPLICATION FOR REHEARING BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY

The Commission should reject the latest (and in many cases, late) arguments of The Office of the Ohio Consumers' Counsel ("OCC") against the restoration of "the provisions, terms, and conditions of the . . . most recent standard service offer" of The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") pursuant to R.C. 4928.143(C)(2)(b). Second Finding and Order (Dec. 18, 2019) at ¶¶ 27, 42. As demonstrated below, OCC either should have raised (or, in fact, did raise) many of the arguments in its July 16, 2021 Application for Rehearing by Office of the Ohio Consumers' Counsel ("Application for Rehearing"), from the June 16, 2021 Fifth Entry on Rehearing in its January 17, 2020 Application for Rehearing from the December 18, 2019 Second Finding and Order. Such arguments are either waived or an impermissible second bite at the apple, in violation of R.C. 4903.10.

Yet, even if the Commission were to consider OCC's newfound arguments, the Commission should deny OCC's July 16, 2021 Application for Rehearing for the following reasons:

First, the Commission correctly allowed AES Ohio to continue the Retail Stability Charge ("RSC") as part of its "most recent standard service offer" under R.C. 4928.143(C)(2)(b) (i.e., ESP I, as approved in the August 26, 2016 Finding and Order). Second Finding and Order (Dec. 18, 2019) at ¶¶ 26-35; Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 23-41. Division (C)(2)(b) required the Commission to restore ESP I – with the RSC – and no additional evidence was necessary.

Second, the Commission correctly found that it lacks authority to order AES Ohio to collect the RSC subject to refund. Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 49-60. Indeed, such an order would violate well-established precedent that prohibits retroactive ratemaking. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957); Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 686 N.E.2d 501 (1997).

Third, OCC nonsensically argues (p. 17) that the Second Finding and Order is "void" because the Commission restored the RSC as part of AES Ohio's "most recent standard service offer" under R.C. 4928.143(C)(2)(b). As the Commission correctly ruled, res judicata and collateral estoppel bar OCC from challenging the RSC. Second Finding and Order (Dec. 18, 2019) at ¶¶ 31-32; Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 35-41.

Fourth, the Commission correctly denied OCC's attempt to reimpose a base rate freeze from the June 24, 2009 Opinion and Order approving the February 24, 2009 Stipulation and Recommendation. Aside from waiving this argument, the rate freeze was not incorporated into the Company's "most recent standard service offer" that was restored under R.C. 4928.143(C)(2)(b). Accord: Entry (Dec. 19, 2012); Entry on Rehearing (Feb. 19, 2013); Finding and Order (Aug. 26, 2016); Third Entry on Rehearing (Dec. 14, 2016).

Fifth, the Commission did not abuse its discretion in deferring judgment on rehearing applications filed by parties who have agreed to withdraw them upon a final appealable order in In re The Dayton Power and Light Co., Case No. 18-1875-EL-GRD, et al. ("Quadrennial Review Case"), particularly since the Commission issued its Opinion and Order in that case at the same time as it issued the Fifth Entry on Rehearing in this case.

II. OCC'S APPLICATION FOR REHEARING VIOLATES R.C. 4903.10

As a threshold matter, many of the arguments raised by OCC in its July 16, 2021 Application for Rehearing either (1) could have been raised in its January 17, 2020 Application for Rehearing from the Second Finding and Order and were not, or (2) were in fact raised in that Application for Rehearing. Those untimely arguments are either waived or impermissibly seek rehearing upon rehearing, in violation of R.C. 4903.10.

Section 4903.10 provides, in pertinent part:

> "After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission."

Accord: Ohio Adm.Code 4901-1-35(A). Although the statute allows applications for rehearing, the Commission has repeatedly concluded that it "does not allow persons who enter appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue." In re The Dayton Power and Light Co., Case No. 16-395-EL-SSO, et al. ("ESP III Case"), Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17 (citing Ormet Primary Aluminum Corp., et al. v. S. Central Power Co. and Ohio Power Co., Case No. 05-1057-EL-CSS, et al., Second Entry on Rehearing (Sept. 13, 2006) at pp. 3-4; In re The East Ohio Gas Co. d.b.a. Dominion East Ohio and Columbia Gas of Ohio, Inc., Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at p. 4).

Thus, as further shown below, to the extent that the arguments in OCC's July 16, 2021 Application for Rehearing should have been raised in its January 17, 2020 Application for

Rehearing – or were, in fact, raised at that time – the Commission should reject them. In re The East Ohio Gas Co., Second Entry on Rehearing (May 3, 2020) at p. 4.

III. THE COMMISSION CORRECTLY RULED THAT R.C. 4928.143(C)(2)(b) REQUIRED RESTORATION OF THE RSC

In its December 18, 2019 Second Finding and Order, the Commission recognized (¶ 26) that it "is bound by the plain language of R.C. 4928.143(C)(2)(b)," which provides, in its entirety:

> "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, 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, 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: Fifth Entry on Rehearing (June 16, 2021) at ¶ 15 ("Accordingly, the Commission restored the provisions, terms and conditions of ESP I, as required by the plain language of the statute.").

Ignoring that clear and unambiguous authority, OCC now argues in its first assignment of error (p. 2) that the Commission erred in restoring the RSC, as part of ESP I, "without finding it just and reasonable, and without evidentiary support," citing In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, and R.C. 4903.09, 4905.22, and 4928.02(A). OCC is wrong.

A. OCC Waived the Argument That Additional Evidence Is Needed by Not Raising It in Its January 17, 2020 Application for Rehearing

OCC's January 17, 2020 Application for Rehearing did not assert that the Commission should consider additional evidence regarding the RSC. OCC offers no explanation why it waited until after the Commission ruled on its January 17, 2020 Application for Rehearing to seek additional evidence about whether the RSC is just and reasonable. As shown above (Section II), this argument is not only waived, but also untimely. R.C. 4903.10; ESP III Case, Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17. The Commission should reject OCC's first assignment of error for this reason alone. In re Duke Energy Ohio, Inc., Case No. 03-93-EL-ATA, et al., Third Entry on Rehearing (Nov. 5, 2008) at ¶¶ 13-16 (rejecting an assignment of error that "stem[med] from our original conclusion . . . not on any new decision made in the second entry on rehearing").

B. OCC Ignores the Plain Language of the Governing Statute

As the Commission recognized in its December 18, 2019 Second Finding and Order (¶ 26) and its June 16, 2021 Fifth Entry on Rehearing (¶ 15), R.C. 4928.143(C)(2)(b) expressly 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." (Emphasis added).

The Commission implemented ESP I, including the RSC, after the Company exercised its right under R.C. 4928.143(C)(2)(a) to withdraw and terminate ESP III. Second Finding and Order (Dec. 18, 2019) at ¶¶ 26, 29-35. Accord: In re The Dayton Power and Light Company, Case No. 12-426-EL-SSO, et al. ("ESP II Case"), Finding and Order (Aug. 26, 2016)

at ¶ 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.").

"Shall" is mandatory. E.g., Dorrian v. Scioto Conservancy Dist., 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971). The Commission did what the statute required after AES Ohio terminated ESP III – issue a new Order continuing the provisions, terms, and conditions of ESP I (including the RSC). Second Finding and Order (Dec. 18, 2019) at ¶¶ 9, 26-40.

OCC ignores the mandatory language of R.C. 4928.143(C)(2)(b). It does not contest that the word "shall" is mandatory or explain how or why the Commission could have ignored that word. In fact, OCC filed a motion in ESP I asserting that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" required the Commission "to implement ESP I after withdrawal." Motion to Reject [AES Ohio's] Proposed Tariffs to Increase Consumer Rates (Dec. 4, 2019) at p. 13. Accord: Entry (Dec. 19, 2012) at ¶ 5 ("The Commission finds that the provisions, terms, and conditions of the ESP include the RSC.").

In addition, OCC admitted in a Supreme Court brief that R.C. 4928.143(C)(2)(b) required the Commission to implement ESP I. Specifically, in OCC's Merit Brief that it filed with the Supreme Court in AES Ohio's ESP II case (Supreme Court Case No. 2017-241), OCC told the Court:

> "The language in the statute is not optional. The word 'shall' is to be construed as mandatory, unless clear and unequivocal legislative intent connotes that it receives a construction other than its ordinary usage.
>
> With no evidence that the legislative intent was for a different construction, the court must construe 'shall' as mandatory. The General Assembly used the word 'shall' leaving the PUCO no

> choice but to return to 'the utility's most recent standard service offer.'"

In re The Dayton Power and Light Company, Sup. Ct. Case No. 2017-241, Merit Brief of Appellant The Office of the Ohio Consumers' Counsel (May 16, 2017) at p. 19 (citations omitted) (emphasis added). That argument was exactly right – the Commission had no discretion but to return to AES Ohio's most recent SSO, which included the RSC.

OCC also ignores the fact that after AES Ohio initially withdrew ESP II and reverted to ESP I, the Commission held that it was obligated to implement the terms of ESP I, including the RSC. Finding and Order (Aug. 26, 2016) at ¶ 23; Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 31-35. Thus, when the December 18, 2019 Second Finding and Order was issued, the "most recent standard service offer" unquestionably included the RSC. There is no room, let alone requirement, for the Commission to independently evaluate the RSC when implementing ESP I pursuant to R.C. 4928.143(C)(2)(b).

C. R.C. 4903.10, Res Judicata and Collateral Estoppel Bar OCC's Arguments

The Commission correctly held that OCC is barred by R.C. 4903.10 and the doctrines of res judicata and collateral estoppel from challenging the RSC. Second Finding and Order (Dec. 18, 2019) at ¶¶ 32-35; Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 35-41. Specifically, OCC joined a stipulation in this proceeding to include the RSC in the Company's Electric Security Plan. Stipulation and Recommendation ("ESP I Stipulation") (Feb. 24, 2009) at ¶ 3. The Commission approved that Stipulation. Opinion and Order (June 24, 2009) at p. 13.

Section 4928.143(C)(2)(b) was enacted in 2009 when OCC signed that ESP I Stipulation. OCC was on notice that AES Ohio had the right to terminate a future ESP and

reinstate ESP I if the Commission were to modify and approve future ESPs. Fifth Entry on Rehearing (June 16, 2021) at ¶ 61 ("We agree with [AES Ohio] that, when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified and approved a subsequent application for an ESP and [AES Ohio] withdrew that application."). No party, including OCC, sought rehearing of the Commission's decision approving the ESP I Stipulation, and OCC did not appeal that decision. A party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

Moreover, while OCC sought rehearing when the Commission extended the RSC beyond its original December 31, 2012 expiration date while the Company's ESP II Application was pending, no party, including OCC, appealed from that decision. Entry (Dec. 19, 2012); Entry on Rehearing (Feb. 19, 2013). Thus, the RSC was a settled part of ESP I when ESP II went into effect, and was properly restored in both the August 26, 2016 Finding and Order following the termination of ESP II and the December 18, 2019 Second Finding and Order following the termination of ESP III.

Since OCC failed to challenge the RSC when it was approved in 2009, OCC is also barred from challenging the lawfulness of the RSC by the doctrines of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St.3d 59, 2007-Ohio-1102,

862 N.E.2d 803, ¶ 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. . . . Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id. (citations omitted) (emphasis added). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. . . . Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (citation omitted). "[T]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (citation omitted). Accord: Nat'l Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'") (citation omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982) (emphasis added).

D. OCC Ignores Two Rulings by the Supreme Court of Ohio That the RSC Is Lawful

Continuing its pattern of ignoring controlling law that is adverse to its position, OCC also ignores the two Supreme Court of Ohio cases that held that AES Ohio's RSC is lawful. Constellation NewEnergy, Inc. v. PUC, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39-40; Ohio Consumers' Counsel v. PUC, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 17-26.

Specifically, the RSC (also called the Rate Stabilization Surcharge ("RSS") in earlier cases) was established six years and two rate plan cases before the ESP I case. In 2003, the RSC was included in a Stipulation and Recommendation that was approved by the Commission. In re The Dayton Power and Light Company, Case No. 02-2779-EL-ATA, et al., Stipulation and Recommendation (May 28, 2003) at ¶ IX.E. That Stipulation provided that the RSC would be implemented in a subsequent case. Id. An intervenor in that 2003 case appealed that Commission decision to the Supreme Court, and argued that the RSC was not lawful. The Court rejected that argument:

> "The commission specifically found: 'An RSS is reasonable and legally sustainable * * *. As to the issue of whether the RSS should apply to all customers, whether or not they purchase their generation from [AES Ohio], the Commission would note, initially, that representatives of all customer groups agreed, in the stipulation, with charging the RSS to all customers. In addition, the Commission finds it is reasonable for [AES Ohio] to argue that it will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS. While the Commission is not finding that the costs specified in the stipulation as the basis for the RSS are POLR costs, the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers.'
>
> Constellation disputes both of the justifications the commission gave for approving the RSS mechanism. However, Constellation's arguments lack substance and are unconvincing. The record supports the commission; it does not support Constellation. Thus, we find no error in the commission's findings as to the RSS mechanism."

Constellation, 2004-Ohio-6767 at ¶ 39-40 (emphasis added).

The RSC was later implemented in a 2005 Commission case, which was also resolved via a Stipulation and Recommendation that was approved by the Commission. In re The Dayton Power and Light Company, Case No. 05-276-EL-AIR, et al., Stipulation and

Recommendation (Nov. 3, 2005) at ¶ I.C. OCC appealed that Commission decision to the Supreme Court, but the Court again held that the RSC was lawful:

> "OCC maintains that the commission erred when it approved a distribution-service rate increase to compensate [AES Ohio] for costs that are purely generation-service costs. The commission's approval of the rate and amount is in conformity with applicable law. . . .
>
> In the MDP-extension stipulation in 2003, [AES Ohio] proposed a rate-stabilization surcharge, which was intended to allow [AES Ohio] to increase rates in order to recover increases in generation-related costs for fuel, for actions taken in compliance with environmental and tax laws and for physical security and cyber security. These increased costs were to be collected from all customers, whether they purchased generation service from [AES Ohio] or from another supplier. With respect to those customers who do not take generation service from [AES Ohio], the rate-stabilization surcharge would compensate [AES Ohio] for the risks and costs that [AES Ohio] will incur as a POLR. See R.C. 4928.14(C).
>
> * * *
>
> . . . Accordingly, the PUCO's order is affirmed with regard to the amount of the charge . . ."

Ohio Consumers' Counsel, 2007-Ohio-4276 at ¶ 17-18, 26 (emphasis added).

E. AES Ohio Still Provides POLR Service

OCC asserts (pp. 9-13) that the RSC is not lawful because AES Ohio is no longer providing provider of last resort ("POLR") service. As an initial matter, the Commission should reject that argument for the reasons identified above:

1. OCC has failed to preserve the issue.
2. The Commission was required by R.C. 4928.143(C)(2)(b) to reinstate the RSC when AES Ohio terminated ESP III.
3. OCC is barred by R.C. 4903.10, res judicata and collateral estoppel from challenging the RSC.

4. The Supreme Court has twice held that the RSC is lawful.

In addition, the RSC is also lawful because, as the Commission correctly recognized, AES Ohio is still subject to POLR risk.

> "In addition, the Commission has noted that the RSC is a non-bypassable POLR charge to allow [AES Ohio] to fulfill its POLR obligations. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. While POLR service is currently provided by competitive bidding process auction participants, [AES Ohio] retains its obligation, over the long term, to serve as provider of last resort. Therefore, pursuant to R.C. 4928.141, [AES Ohio] maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. We note there have been substantial disruptions in the competitive bidding auction schedules due to litigation regarding capacity auctions at the Federal Energy Regulatory Commission (FERC). *In re Ohio Edison, et al.,* Case Nos. 16-776-EL-UNC et al, Second Entry on Rehearing (Feb. 24, 2021) at ¶¶ 4-5. These disruptions are the reason that competitive auctions have not been held to supply the SSO after May 31, 2022. The litigation at FERC appears to have been resolved, although that resolution could be affected by appeals to the Federal Court of Appeals. *Id.* at ¶ 22. Therefore, we cannot find that [AES Ohio] bears zero POLR risk.
>
> Although the POLR risk is difficult to quantify, the signatory parties, including OCC, did stipulate in the ESP I Stipulation to continue the RSC at the rate previously approved in the *[AES Ohio] RSP Extension Case*. The stipulated RSC was designed to collect 11 percent of [AES Ohio]'s generation rates as of January 1, 2004, which at that time was $76,250,127. *[AES Ohio] RSP Extension Case,* Opinion and Order (Dec. 28, 2005) at 3, 11; *see also Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 8, fn. 3. As we noted in the Third Entry on Rehearing in this proceeding:
>
> > 'The Stipulation, which includes the RSC, was adopted by the Commission after holding a hearing and providing parties the opportunity to fully litigate this case. * * * The parties agreed that 1) the settlement was the product of serious bargaining

> among capable, knowledgeable parties; 2) the settlement, as a package, benefits ratepayers and the public interest; and 3) the settlement package does not violate any important regulatory principle or practice. Stipulation (Feb. 24, 2009) at 1-2. The Stipulation states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Stipulation (Feb. 24, 2009) at 17-18. Third Entry on Rehearing at ¶ 31.'
>
> We are reluctant to disturb the stipulated rates based upon the contention of one of the signatory parties, out of many, that circumstances have changed. The stipulated rates have never been subject to reconciliation or true up to recover a fixed revenue requirement. Further, the stipulated rates for the RSC have never been adjusted, irrespective of any changes in customer usage or to reflect changes in the market in [AES Ohio]'s service territory; the rates for the RSC today are exactly the same as they were when the ESP I Stipulation was adopted in 2008. We are not persuaded that the stipulated rates should be changed now."

Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 28-29. Accord: Finding and Order (Aug. 26, 2016) at ¶ 23.

In addition to the reasons cited by the Commission, AES Ohio is still subject to POLR risk for the following reasons.

1. The SSO auctions are conducted periodically, and there is no guarantee that they will continue or that any suppliers will bid. AES Ohio thus bears a POLR risk that it will have to provide generation service to some or all of its customers if there are not enough bidders at auction.

2. A significant weather event could cause winning bidders to default on their obligation to provide generation service to SSO customers. Generation service within the SSO is provided to customers at a fixed price, and there is a risk that winning bidders will default

when demand and market prices spike. AES Ohio would then be required by R.C. 4928.141(A) to supply generation to those customers, which imposes a POLR risk on AES Ohio.

The February 2021 winter storm in Texas demonstrate that weather events can cause wide swings in the price of generation and cause providers to default. Indeed, the weather events in Texas caused a utility to default in Ohio. In re Entrust Energy East Inc., Case No. 12-2854-EL-CRS, Entry (Mar. 3, 2021) at ¶¶ 2-6.

Further, OCC witness Kahal recently admitted in the Quadrennial Review Case that there is still POLR risk for AES Ohio as to the customers that receive SSO service:

> "Q. What would happen if one of the winning bidders at the auction were to default and not provide generation service?
>
> A. * * *
>
> They can involve a lot of things. First of all, I think – as your question suggests, Standard Service Offer still has to be provided. That is, the Standard Service Offer customers have to be served. Sometimes this is done by shifting the load onto other suppliers, that is, other winning bidders in the auction.
>
> Sometimes the utility – if that's not done, sometimes the utility goes in the market directly and procures the power that's no longer being supplied by the – by the supplier that defaulted so there are procedures for dealing with that, but at the end of the day, the customers will be served, and they have to be served one way or the other."

Quadrennial Review Case, Tr. Vol. III, at 431-32 (emphasis added).

3. For customers that have switched -- i.e., do not take SSO service -- they have the right to return to SSO service. R.C. 4928.141(A). They are likely to exercise that right if market prices are high and they are unable to sign a favorable contract with a competitive supplier or are on a variable rate with a competitive supplier; in that instance, it may be cheaper

for them to return to the fixed-price generation service under the SSO. Those customers should then be served by the winning bidders from prior auctions, but as demonstrated above, there are risks that (a) there will be no such winning bidders; or (b) the winning bidders will not be able or willing to supply the additional generation required for the returning customers, or will default on their obligations. In those instances, AES Ohio would be obligated to procure generation to serve those customers, which imposes POLR risks upon AES Ohio.

Indeed, the Supreme Court of Ohio has acknowledged that POLR obligations impose risks on a utility. Constellation NewEnergy, Inc., 2004-Ohio-6767 at ¶ 39, n. 5 ("POLR costs are those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [the utility] for generation service") (emphasis added); In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 23. ("Under Ohio law, customers may purchase generation service from a competitive supplier. If such a supplier fails to provide service, 'the supplier's customers * * * default[] to the utility's standard service offer * * * until the customer chooses an alternative supplier.' R.C. 4928.14. This obligation to stand ready to accept returning customers makes the utility the 'provider of last resort,' or 'POLR.'") (citations omitted).

OCC's reliance (pp. 9-12) on the Court's decision in In re Application of Columbus S. Power Co. is misplaced. In that case, the Court found that "no evidence supports the commission's characterization of [AEP's POLR] charge as based on costs." 2011-Ohio-1788 at ¶ 29. However, the Court made clear that it expressed "no opinion" on whether AEP could support its POLR charge with actual evidence and whether a "non-cost-based POLR charge is reasonable and lawful":

> "On remand, the commission may revisit this issue. To be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non-cost-based POLR charge is reasonable and lawful. Alternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs. However the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."

Id. at ¶ 30 (emphasis added). That decision is not applicable here for three reasons.

First, as shown above, OCC failed to make this argument in its January 17, 2020 Application for Rehearing; thus the argument is waived and untimely. ESP III Case, Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17.

Second, unlike the AEP POLR charge, the Court twice found that AES Ohio's RSC was supported by the evidence and was lawful. Constellation New Energy, Inc., 2004-Ohio-6797 at ¶ 39-40; Ohio Consumers' Counsel, 2007-Ohio-4276 at ¶ 17-26. The In re Columbus Southern Power case is thus inapplicable.

Third, as demonstrated above, the RSC is intended to compensate AES Ohio for the risks of its POLR obligations. The Court in In re Columbus Southern Power expressed "no opinion" on whether such a "non-cost-based POLR charge is reasonable and lawful."

As demonstrated above, a POLR risk exists because AES Ohio has a statutory obligation to provide generation if there are no other providers. R.C. 4928.141. AES Ohio has POLR risk whether it owns generation assets or not. Indeed, AES Ohio's POLR risk is higher now that it no longer owns generation assets, since AES Ohio cannot access that generation to satisfy its statutory obligations if a winning bidder or CRES defaults, or use that generation as a hedge to offset the risk.

Thus, there are substantial grounds for the Company to maintain a POLR charge, irrespective of the fact that R.C. 4928.143(C)(2)(b) required restoration of the RSC.

F. No Further Evidence Is Necessary to Justify the RSC

Finally, the Commission should reject OCC's argument (pp. 9, 13) that the restoration of the RSC violated R.C. 4903.09, 4905.22, and 4928.02(A).

First, R.C. 4903.09 provides:

> "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

Second, R.C. 4905.22 provides:

> "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."

Finally, R.C. 4928.02(A) articulates that it is the policy of the State of Ohio to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."

As demonstrated above, the Commission has provided ample justification for restoring the RSC, including the fact that R.C. 4928.143(C)(2)(b) required the Commission to do so. Second Finding and Order (Dec. 18, 2019) at ¶ 26; Fifth Entry on Rehearing (June 16, 2021)

at ¶ 15. Indeed, contrary to OCC's contention that the Commission did not find the RSC to be just and reasonable, the Commission expressly found that reimplementing ESP I, with the RSC, did "not appear to be unjust or unreasonable" and is "consistent with R.C. 4928.143(C)(2)." Second Finding and Order (Dec. 18, 2019) at ¶ 42. The Commission was not required to take additional evidence to justify the RSC in order to comply with R.C. 4903.09 and 4905.22. Although R.C. 4928.02 merely sets forth state policy, even if it imposed substantive requirements, OCC provides no basis for why the Second Finding and Order or Fifth Entry on Rehearing violate its terms.[1]

IV. THE COMMISSION CORRECTLY RULED THAT IT LACKS AUTHORITY TO ORDER AES OHIO TO COLLECT THE RSC SUBJECT TO REFUND

In its second assignment of error (pp. 13-17), OCC maintains that the Commission erred in deciding that it has no discretion to order AES Ohio to collect the RSC subject to refund because the rider is not reconcilable. Since OCC has already raised this issue (but not this argument) on rehearing, and since it offers no authority allowing the Commission to do so, the Commission should deny this assignment of error, as well.

A. OCC Failed to Seek Rehearing on This Argument in Its January 17, 2020 Application for Rehearing

In its January 17, 2020 Application for Rehearing from the December 18, 2019 Second Finding and Order, OCC argued (p. 28) that the Commission "should have ordered the

[1] To the extent there is any conflict between R.C. 4903.09, 4905.22, and 4928.02(A) on one side and R.C. 4928.143(C)(2)(b) on the other (which there are not), the latter should control as both the later-enacted and more specific statute. R.C. 4903.09 was enacted in 1953, R.C. 4905.22 was enacted in 1953, and R.C. 4928.02(A) was enacted in 1999 as part of S.B. 3, while R.C. 4928.143(C)(2)(b) was enacted as part of S.B. 221. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); Humphrys v. Winous Co., 165 Ohio St. 45, 48, 133 N.E.2d 780 (1956) ("It is a well settled rule of statutory construction that where a statute couched in general terms conflicts with a specific statute on the same subject, the latter must control.") (citation omitted).

rates to be collected, subject to refund, pending the outcome of any final decision by the Ohio Supreme Court." In the June 16, 2021 Fifth Entry on Rehearing, the Commission aptly noted (¶ 50) that "OCC does not identify any statutory authority vesting the Commission with the discretion to make the rates and charges subject to refund." By asking the Commission yet again to order AES Ohio to collect the RSC subject to refund, but this time by citing R.C. 4905.32, OCC is impermissibly raising an argument that it waived, in violation of R.C. 4903.10. ESP III Case, Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17.

B. The Commission Has No Authority to Order AES Ohio to Collect the RSC Subject to Refund

The Commission correctly concluded that it "has no statutory authority to make rates and charges subject to refund at [its] discretion," subject to exceptions that are inapplicable to the RSC. Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 52-60.

As an initial matter, the RSC was not subject to refund under ESP I, as initially approved in the June 24, 2009 Opinion and Order, extended in the December 19, 2012 Entry, and reimplemented in the August 26, 2016 Finding and Order. The Commission is required to (i.e., "shall") implement the "provisions, terms and conditions" of ESP I (R.C. 4928.143(C)(2)(b)), and since the RSC was not subject to refund under ESP I, it cannot be subject to refund now.

In any event, refunds are barred by long-standing precedent by the Supreme Court. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2 ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action

for restitution of the increase in charges collected during the pendency of the appeal."). Accord: id. at 257 ("Under [R.C. 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.") (emphasis added).

Moreover, a refund would violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

The Supreme Court of Ohio rejected a similar argument when reviewing AEP-Ohio's 2008 ESP case. In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In that case, OCC argued that the Commission should have made AEP-Ohio's ESP rates subject to refund. Id. at ¶ 16. The Court rejected that argument, explaining that "under Keco, we have consistently held that the law does not allow refunds in appeals from commission orders." Id. Accord: Ohio Consumers' Counsel v. Pub. Util. Comm., 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21 ("any refund order would be contrary to our precedent declining to engage in retroactive ratemaking"); Green Cove Resort I Owners' Assn. v. Pub. Util. Comm., 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in Keco . . . . "); In re The Dayton Power and Light Company, Case No. 05-792-EL-ATA, Opinion and Order (Mar. 1, 2006) at p. 14 (rejecting motion to collect rider subject to refund as contrary to Commission precedent).

OCC would have the Commission ignore that precedent and find that under R.C. 4905.32, it can make any rate subject to refund so long as it incants refund language in the

utility's tariff. OCC specifically asks the Commission to reconsider its determination that a charge must be reconcilable to be made subject to refund. Fifth Entry on Rehearing (June 16, 2016) at ¶ 53 (citing River Gas Co. v. Pub. Util. Comm., 69 Ohio St.2d 509, 509, 433 N.E.2d 568 (1982)).

Pursuant to R.C. 4905.32:

> "No public utility shall charge, demand, exact, receive, or collect a different rate . . . for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
>
> No public utility shall refund . . . any rate . . . except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

OCC maintains that since refunds are prohibited "except such as are specified" in a utility's tariff under R.C. 4905.32, the Commission must have unfettered discretion to make any rate subject to refund. OCC's deductive reasoning stretches too far. The statute merely provides that refunds are allowed when tariffs so provide, but does not state whether or when the Commission may include such language.

As OCC acknowledges (p. 22), the Commission is a "creature of statute" and can exercise only the authority which has been expressly granted to it by the legislature. OCC provides no authority, other than opinions by a single justice – speaking only for herself and not the Court – for the proposition that the Commission may make any rate subject to refund. Instead, OCC cites (p. 15) In re Application of Ohio Edison Co., 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23, which observed only that the rate at issue was not made subject to refund, without indicating whether it could have been made subject to refund.

There is nothing inconsistent with R.C. 4905.32 and the Commission's conclusion that a rate must be subject to reconciliation before it may be made subject to refund. Fifth Entry on Rehearing (June 16, 2021) at ¶ 53. Indeed, the Commission's determination follows nearly seventy years of precedent since Keco.

Moreover, allowing the Commission to order utilities to collect any and all rates subject to refund would undermine the statutory framework that the legislature has provided for parties who feel aggrieved by a Commission order – i.e., the right to secure a stay pending appeal of the collection of new rates after posting a bond pursuant to R.C. 4903.16. In re Application of Columbus S. Power Co., 2011-Ohio-1788 at ¶ 17 (citing Keco at 257). Such a bond must be "conditioned for the prompt payment . . . of all damages caused by the delay in the enforcement of the order complained of . . . ." R.C. 4903.16. If the Commission could make any rate subject to refund, it would provide an end-run around those strict prerequisites, and upset the legislature's longstanding allocation of risks associated with reversal of Commission orders by the Supreme Court.[2]

As the Court acknowledged in Keco, there are sound policy decisions that rates should not be subject to refund:

> "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

[2] As AES Ohio explains in its July 16, 2016 Application for Rehearing (pp. 1-3), the Commission likewise does not have authority to make rates subject to refund "to the extent required by law."

> 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."

166 Ohio St. at 259.

V. THE COMMISSION CORRECTLY RULED THAT IT WAS REQUIRED TO RESTORE THE RSC AS PART OF THE MOST RECENT ELECTRIC SECURITY PLAN

In its third assignment of error, OCC combines two issues that the Commission has already addressed on rehearing into a non sequitur: (1) whether the doctrines of res judicata and collateral estoppel bar OCC from challenging the RSC, and (2) whether there is a distinction between a "standard service offer" that must be continued under R.C. 4928.143(C)(2)(b) and an "electric security plan." Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 15-16, 35-41. OCC's arguments are without merit.

A. OCC Already Sought Rehearing on This Issue in Its January 17, 2020 Application for Rehearing

OCC addressed the effect of res judicata and collateral estoppel on its challenge to the RSC, as well as the scope of the term "standard service offer" under R.C. 4928.143(C)(2)(b) in the first and fifth assignments of error in its January 17, 2020 Application for Rehearing from the December 18, 2019 Second Finding and Order. OCC even admits (p. 17) that it raised the latter issue on rehearing, and that the Commission rejected it. Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 15-16. Thus, yet again, OCC seeks rehearing on rehearing, in violation of R.C. 4903.10. ESP III Case, Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17.

B. Res Judicata and Collateral Estoppel Bar OCC from Challenging the RSC

As shown above, the doctrines of res judicata and collateral estoppel bar OCC from challenging the Commission's decision to restore the RSC as part of ESP I pursuant to R.C. 4928.143(C)(2)(b). See, Section III(C) above. AES Ohio incorporates those arguments by reference here. OCC offers no arguments in its third assignment of error to suggest otherwise.

C. An Electric Security Plan is a Standard Service Offer

As the Commission correctly concluded:

> "It is beyond dispute that, at the time [the Company] withdrew from and terminated ESP III, ESP I was [the Company's] most recent SSO, which was reinstated by the Commission on August 26, 2016, in these proceedings. Finding and Order (Aug. 26, 2016). Accordingly, the Commission restored the provisions, terms and conditions of ESP I, as required by the plain language of [R.C. 4928.143(C)(2)(b)]."

Fifth Entry on Rehearing (June 16, 2021) at ¶ 15. Thus, R.C. 4928.143(C)(2)(b) provides that a utility shall revert to its most recent SSO, it means that AES Ohio must revert to ESP I. The Dayton Power and Light Company's Memorandum in Opposition to Applications for Rehearing (Feb. 3, 2020) at pp. 2-5 (incorporated by reference here). Again, OCC offers no reason why the Commission should address this issue yet again.

Further, the Commission correctly found that an ESP is an SSO:

> "The Commission notes that R.C. 4928.141 requires each EDU to 'provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or

4928.143 of the Revised Code.' R.C. 4928.142 states that an EDU 'may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.' R.C. 4928.143 provides that '[f]or the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan * * * .' Thus, we find that, under the plain language of the statute, an SSO may be an MRO or an ESP. Moreover, R.C. 4928.143(C)(2)(b) states, in relevant part:

> 'If the utility terminates an application pursuant to division (C)(2)(a) of this section * * * 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*, 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).'

It is beyond dispute that, at the time [AES Ohio] withdrew from and terminated ESP III, ESP I was [AES Ohio]'s most recent SSO, which was reinstated by the Commission on August 26, 2016, in these proceedings. Finding and Order (Aug. 26, 2016). Accordingly, the Commission restored the provisions, terms and conditions of ESP I, as required by the plain language of the statute.

Moreover, we find that OCC's statutory interpretation to be flawed. OCC claims that the enumerated provisions in R.C. 4928.143(B)(2) can be part of the ESP but are not part of the SSO. However, several of the enumerated provisions include charges that relate solely to the SSO for non-shopping customers. R.C. 4928.143(B)(2)(e) specifically authorizes '[a]utomatic increases or decreases in any component *of the standard service offer price* * * * [emphasis added].' Under OCC's flawed interpretation of the statutes, this provision, which explicitly relates to the 'standard service offer price,' would be part of the ESP but not part of the SSO. Further R.C. 4928.143(B)(2)(a) authorizes:

> 'Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied *under the offer*; the cost of purchased power supplied *under the offer*, including

> the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes * * *. (emphasis added).'
>
> The General Assembly clearly intended that the SSO may include provisions allowing for the recovery of the cost of fuel, purchased power, emission allowances and carbon or energy taxes. These provisions would be part of the ESP, but these provisions also would be one of the 'terms, conditions or provisions' of the SSO applicable to non-shopping customers. OCC's statutory interpretation is not persuasive. Rehearing on this assignment of error should be denied."

Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 15-16.

In addition to the reasons identified by the Commission, it should conclude that an ESP is an SSO because R.C. 4928.143(A) and (B)(1) & (B)(2) state:

> "(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. . . .
>
> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> (1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. . . .
>
> (2) The plan may provide for or include, without limitation, any of the following: . . . ." (Emphasis added).
>
> Division (B)(1) relates to the supply of generation, while division (B)(2)

authorizes the ESP to contain a variety of other provisions. Under OCC's theory, division (B)(1) would be the division that established the obligation of a utility to provide an SSO, since that section addresses the obligation to provide generation service. Further under OCC's theory,

divisions (B)(2)(a) - (i) are components of an ESP, but not an SSO. However, that theory is misplaced for three reasons:

First, R.C. 4928.143(A) states that "[f]or the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section." As discussed above, Section 4928.141 requires utilities to provide a "standard service offer in accordance with Section 4928.142 or 4928.143." If OCC's theory was correct -- i.e., that an SSO is approved only under (B)(1) -- then subsection (A) would state "for the purpose of complying with Section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B)(1) of this section."

However, that is not what division (A) states. The fact that a utility can comply with its Section 4928.141 obligation to provide an SSO by filing for an ESP that includes terms from either division (B)(1) or (B)(2) necessarily means that divisions (a) - (i) under division (B)(2) are components of an SSO.

In other words, an SSO must include terms under either division (B)(1) or (B)(2), because otherwise division (A) would make no sense. When division (A) says that to "comply[] with Section 4928.141" -- i.e., to supply an SSO -- the utility may include terms under division (B), that necessarily means that an SSO under R.C. 4928.141 may include terms authorized by either division (B)(1) or (B)(2).

Second, if OCC's theory were correct, then division (B)(1) would have been written to state that "an electric security plan shall include provisions relating to the supply and

pricing of an SSO." However, that is not what that section says. Instead, it refers to the "supply and pricing of electric generation service." The fact that division (B)(1) does not refer to SSO but instead refers to "generation service" confirms that the two are not synonymous.

Third, under R.C. 4928.143(C)(2)(b), the Commission was required to implement all of the "provisions, terms, and conditions" of DP&L's most recent SSO. The requirement that the "provisions, terms, and conditions" be implemented would make no sense if that section required only that the prior generation rates be reinstated. The requirement that all of the "provisions, terms, and conditions" of the most recent SSO be implemented necessarily means that the entire ESP was to be implemented.

Indeed, in a motion that OCC filed in this case, OCC asserted that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" required the Commission "to implement ESP I after withdrawal":

> "By statute, the Commission is limited to authorizing a return to the EDU's most recent ESP together with necessary fuel-cost adjustments. Where a statute is unambiguous, it must be enforced according to its terms. Applying that interpretive principle, the Commission should conclude that its powers under R.C. 4928.143(C)(2)(b) were limited to authorizing [AES Ohio] to implement its ESP I after withdrawal . . . ."

Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates (Dec. 4, 2019) at p. 13 (emphasis added).

In short, as established in R.C. 4928.141, an SSO is either an ESP or an MRO. When section 4928.143(C)(2)(b) provides that a utility shall revert to its most recent SSO, it means that DP&L must revert to ESP I.

D. The Second Finding and Order Is Not Void

The Second Finding and Order is not void. As the Supreme Court has recognized, if a tribunal "possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." Bank of Am., N.A. v. Kuchta, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 19 (citation omitted). Accord: Pratts v. Hurley, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12 ("Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it . . . the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred . . . .") (internal quotation marks and citation omitted).

There is no question that the Commission has subject-matter jurisdiction to issue orders that "continue the provisions, terms, and conditions of the utility's most recent standard service offer" when a utility terminates an electric security plan pursuant to R.C. 4928.143(C)(2). In fact, R.C. 4928.143(C)(2)(b) expressly requires "the commission," and no other body, to issue such orders. Thus, alleged errors in such orders do not render them "void," but rather, at most, subject to correction on rehearing and appeal. Pratts at ¶ 12.

Moreover, even if the December 18, 2019 Second Finding and Order were somehow void, OCC does not and cannot argue that the Commission's previous orders that give rise to the doctrines of res judicata and collateral estoppel are void, i.e. the Opinion and Order (June 24, 2009) (establishing the RSC as part of ESP I) from which OCC did not seek rehearing; the Entry (Dec. 19, 20120 (expressly extending the RSC beyond its December 31, 2012 expiration), from which OCC did not appeal; and the Finding and Order (August 26, 2016)

(including the RSC in the Company's most "recent standard service offer" under R.C. 4928.143(C)(2)(b)).

VI. THE COMMISSION CORRECTLY RULED THAT AES OHIO IS NOT SUBJECT TO A BASE RATE FREEZE

In its fourth assignment of error (pp. 18-21), OCC recasts and restates its second assignment of error from its January 17, 2020 Application for Rehearing, i.e., that the Commission should reimpose a base rate freeze from the June 24, 2009 Opinion and Order approving the February 24, 2009 Stipulation and Recommendation in this proceeding. As shown below, in addition to improperly seeking rehearing on rehearing, in violation of R.C. 4903.10, OCC has waived all arguments relating to the rate freeze by joining the Stipulation and Recommendation in the Company's last distribution rate case (Case No. 15-1830-EL-AIR, et al.). In addition, the rate freeze was not incorporated into the Company's "most recent standard service offer" under R.C. 4928.143(C)(2)(b). Finding and Order (Aug. 26, 2016).

A. OCC Already Sought Rehearing on This Issue in Its January 17, 2020 Application for Rehearing

After the Second Finding and Order, OCC argued in its January 17, 2020 Application for Rehearing that the Commission should have reimposed the distribution rate freeze from the June 24, 2009 Opinion and Order. Fifth Entry on Rehearing (June 16, 2021) at ¶¶ 17-19. Having lost that argument, OCC now makes a new argument that the Commission "misapprehended" (p. 19) its assignment of error, which according to OCC, sought a freeze of the Company's current base rates and not those in effect when the original freeze was in place. But that is not the relief that OCC sought in its prior application for rehearing, and it is too late for OCC to raise that argument now. R.C. 4903.10.

Specifically, in its January 17, 2020 Application for Rehearing, OCC asserted:

> "[I]n 2018, three years after it filed to increase distribution rates to customers, the PUCO unfroze the distribution rates, increasing distribution charges to [AES Ohio]'s customers. Those increased distribution rates are now part of the continued rates approved by the PUCO in the 2019 tariff order. Not so for the ESP I distribution rate freeze, which the PUCO ignored."

Application for Rehearing (January 17, 2020) at p. 7.

OCC thus asked in that application that the Commission restore the distribution rates that were in effect when the ESP I Stipulation was signed, i.e., to reverse the 2018 distribution rate increase. However, in that January 17, 2020 application, OCC did not ask the Commission to continue a rate freeze and bar AES Ohio's pending rate case. The Commission thus did not "misapprehend" OCC's argument. OCC is trying to make a new argument in its present application, and it is too late to do so. R.C. 4903.10.

Moreover, OCC waived this argument even before its previous Application for Rehearing by failing to raise it in response to the Commission's Entry establishing a comment period on the Company's proposed tariffs. Memorandum Contra by OCC (Dec. 4, 2019) at pp. 1-14; Motion to Reject DP&L's Proposed Tariffs (Dec. 4, 2019) at pp. 1-16. Accord: City of Parma v. Pub. Util. Comm., 86 Ohio St.3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred."). OCC's failure to raise this argument before rehearing constitutes a waiver of it.

B. The Commission Correctly Ruled that OCC Waived This Argument in the Company's Most Recent Distribution Rate Case

In addition, in its Fifth Entry on Rehearing (June 16, 2021) at ¶ 19, the Commission correctly declined to reimpose the rate freeze because OCC failed to seek to impose a rate freeze in AES Ohio's 2015 rate case, finding:

> "In the Distribution Rate Case, DP&L's current distribution rates were lawfully established by the Commission pursuant to the specific requirements of Chapter 4909 of the Revised Code. Although we are not persuaded that Parma should apply to OCC's failure to raise this issue during the comment period established by the November 27, 2019 Entry in this case, we do find that Parma applies to the failure of OCC to raise this issue during the Distribution Rate Case. While the Distribution Rate Case was pending before the Commission, the provisions, terms, and conditions of ESP I were reinstated for the period between September 1, 2016, and October 31, 2017; thus, OCC should have raised this issue, or otherwise preserved its rights, in the Distribution Rate Case, where the distribution rates were, in fact, established according to law. It is settled law in Ohio that retroactive ratemaking is not permitted. Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). However, OCC has offered no compelling argument regarding how the Commission, after approving distribution rates in the Distribution Rate Case, could retroactively modify DP&L's rates to the prior levels. Thus, we find that OCC's failure to raise this issue at an earlier juncture, during the Distribution Rate Case, constitutes a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. Ohio Consumers' Counsel v. Pub. Util. Comm., 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757 at ¶ 18 (citing Parma, 86 Ohio St.3d at 148, 712 N.E.2d 724)."

By failing to raise the rate freeze issue in the 14 months during which the AES Ohio's "most recent standard service offer" was in effect while the Company's last rate case was pending, OCC waived this argument. Fifth Entry on Rehearing (June 16, 2021) at ¶ 19.

C. The Rate Freeze Was Not Part of the Company's Most Recent Standard Service Offer

When the Company withdrew and terminated ESP II, it moved to "implement rates . . . that are consistent with the rates that were in effect before the Commission's September 4, 2013 Opinion and Order" in Case No. 12-426-EL-SSO pursuant to R.C. 4928.143(C)(2)(b). Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016) (Case No. 08-1094-EL-SSO). No party asserted that a rate freeze should be reinstated when ESP I was reinstated. The Commission granted AES Ohio's motion. Finding and Order (Aug. 26, 2016) (Case No. 08-1094-EL-SSO). OCC sought rehearing from the Finding and Order that reinstated ESP I, but did not seek to reinstate the rate freeze. Application for Rehearing by The Office of the Ohio Consumers' Counsel (Aug. 26, 2016).

Thus, the version of ESP I that was in effect after ESP II was terminated included ESP I's "rates" (the subject of AES Ohio's motion) but did not include the rate freeze (since no party sought rehearing on the Commission's order granting AES Ohio's motion). Therefore, when AES Ohio terminated ESP III, it reverted to the version of ESP I that was in effect after ESP II was terminated, i.e., ESP I without the rate freeze.

D. Any Rate Freeze Was Modified in the Company's Last Distribution Rate Case

Even if the rate freeze somehow survived the August 26, 2016 Finding and Order (which it did not), the Commission (with OCC's assent) effectively modified that provision when the Commission approved the Stipulation and Recommendation in Case No. 15-1830-EL-AIR, et al. Specifically, that stipulation provides that the Company may file a distribution rate case "on or before October 31, 2022" to maintain its Distribution Investment Rider. In re The Dayton Power and Light Co., Case No. 15-1830-EL-AIR, et al., Stipulation and Recommendation (June

18, 2018) at p. 7. That Stipulation was signed by OCC (p. 17) and approved by the Commission. Since the June 2018 Stipulation was filed after the June 2009 Opinion and Order in this proceeding, it establishes that DP&L has the right to file a distribution rate case separate and independent of any order in the Company's standard service offer cases.

VII. THE COMMISSION CORRECTLY DEFERRED A RULING ON THE REMAINING APPLICATIONS FOR REHEARING FROM THE SECOND FINDING AND ORDER

In its fifth and final assignment of error, OCC complains both that the Commission took too long to rule on its January 17, 2020 Application for Rehearing, and that the Commission erred in deferring ruling on applications for rehearing filed by other parties relating to the December 18, 2019 Second Finding and Order.

On the former issue, it is unclear what OCC would have the Commission do at this point since the Fifth Entry on Rehearing addressed all of the assignments of error in its January 17, 2020 Application for Rehearing. Since this issue, even if accepted, would not abrogate or modify the Fifth Entry on Rehearing, it should be rejected. R.C. 4903.10.

On the latter issue, OCC's interest in the timing of the Commission's ruling on other parties' applications for rehearing extends only to its ability to file an appeal under R.C. 4903.10 through 4903.13. Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 333, 533 N.E.2d 353 (1988). However, OCC itself sought rehearing from the Fifth Entry on Rehearing, thus, precluding any appeal at this time. Id. OCC cannot complain about any inability to appeal while it remains standing in its own way.

Moreover, the Commission has acted within its discretion. Nothing in R.C. 4903.10 or any other statute requires the Commission to issue substantive rulings all issues in all

applications for rehearing within a certain period of time, or in splitting those issues up among multiple entries. State ex rel. Consumers' Counsel v. Pub. Util. Comm., 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 19 (per curiam) ("Nothing in R.C. 4903.10 or precedent specifically prohibit[s] the Commission from so proceeding."). Since the applications from rehearing from which the OCC seeks an immediate ruling were filed by parties that have agreed to withdraw them pending a final appealable order in the Quadrennial Review Case, and since the Commission has already issued an Opinion and Order in that case, it is consistent with administrative economy to defer ruling on those other applications at this time, in order to save the time, energy, and resources of the Commission and the parties.

VIII. CONCLUSION

For the foregoing reasons, the Commission should deny the July 16, 2021 Application for Rehearing filed by The Office of the Ohio Consumers' Counsel ("OCC") concerning the Commission's June 16, 2021 Fifth Entry on Rehearing.

Respectfully submitted,

s/ Michael J. Schuler
Michael J. Schuler (0082390)
AES OHIO
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com

Counsel for AES Ohio

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of The Dayton Power and Light Company in Opposition d/b/a AES Ohio to Application for Rehearing by Office of The Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 30th day of July, 2021:

Jodi Bair
Kyle Kern
Office of Ohio Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215
jodi.bair@ohioattorneygeneral.gov
kyle.kern@ohioattorneygeneral.gov

Counsel for Staff of the Commission

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Mkurtz@BKLlawfirm.com
Kboehm@BKLlawfirm.com
Jkylercohn@BKLlawfirm.com

Counsel for Ohio Energy Group

Kimberly W. Bojko
Jonathan Wygonski
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
wygonski@carpenterlipps.com

Counsel for The Ohio Manufacturers' Association Energy Group

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com

Counsel for The Kroger Company

Christopher Healey
Ambrosia E. Wilson
John Finnigan
The Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215
christopher.healey@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov

Counsel for The Office of the Ohio Consumers' Counsel

Stephanie M. Chmiel
Kevin D. Oles
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for the University of Dayton

Matthew R. Pritchard
Rebekah J. Glover
Bryce A. McKenney
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
bmckenney@mcneeslaw.com

Counsel for Industrial Energy Users-Ohio

Robert Dove
KEGLER BROWN HILL + RITTER CO., L.P.A.
65 East State Street, Suite 1800
Columbus, OH 43215-4295
rdove@keglerbrown.com

Counsel for Ohio Partners for Affordable Energy

Carrie H. Grundmann
SPILMAN THOMAS & BATTLE, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
cgrundmann@spilmanlaw.com

Derrick Price Williamson
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com

Counsel for Walmart Inc.

Mark A. Whitt
Lucas A. Fykes
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Counsel for Direct Energy Business LLC and Direct Energy Services, LLC

Bethany Allen
Joseph Oliker
Michael Nugent
Evan Betterton
IGS ENERGY
6100 Emerald Parkway
Dublin, OH 43016
bethany.allen@igs.com
joe.oliker@igs.com
michael.nugent@igs.com
evan.betterton@igs.com

Counsel for IGS Energy

Frank Darr
6800 Linbrook Boulevard
Columbus, Ohio 43235
fdarr2019@gmail.com

Counsel for Retail Energy Supply Association

Caroline Cox
Rebecca Lazer, Legal Assistant
ENVIRONMENTAL LAW & POLICY CENTER
21 West Broad Street, 8th Floor
Columbus, OH 43215
ccox@elpc.org
rlazer@elpc.org

Counsel for Environmental Law & Policy Center

Devin D. Parram
Rachael N. Mains
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
dparram@bricker.com
rmains@bricker.com

Counsel for The Ohio Hospital Association

Drew Romig
ARMADA POWER, LLC
230 West Street, Suite 150
Columbus, OH 43215
dromig@armadapower.com
dromig@nationwideenergypartners.com

Counsel for Armada Power, LLC
and Nationwide Energy Partners, LLC

Michael J. Settineri
Gretchen L. Petrucci
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Armada Power, LLC
and Nationwide Energy Partners, LLC

Christina Wieg
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
cwieg@fbtlaw.com

Darren A. Craig (pending Pro Hac Vice)
Robert L. Hartley (pending Pro Hac Vice)
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
Indianapolis, IN 46204

Attorneys for Nationwide Energy
Partners LLC

Kara Herrnstein
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
kherrnstein@bricker.com

Counsel for ChargePoint, Inc.

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com

Marion H. Little, Jr.
Christopher J. Hogan
ZEIGER, TIGGES & LITTLE LLP
41 South High Street
3500 Huntington Center
Columbus, OH 43215
little@litohio.com
hogan@litohio.com

Katie Johnson Treadway
James Dunn
ONE ENERGY ENTERPRISES LLC
Findlay, OH 45840
ktreadway@oneenergyllc.com
jdunn@oneenergyllc.com

Counsel for One Energy Enterprises, LLC

s/ Christopher C. Hollon
Christopher C. Hollon

1507813.1

Summary: Memorandum Memorandum of The Dayton Power and Light Company D/B/A AES Ohio in Opposition to Application for Rehearing by Office of the Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company