

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.

CASE 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.

CASE No. 08-1096-EL-AAM

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR WAIVER OF CERTAIN
COMMISSION RULES.

CASE No. 08-1097-EL-UNC

SIXTH ENTRY ON REHEARING

Entered in the Journal on August 11, 2021

I. SUMMARY

{¶ 1} In this Sixth Entry on Rehearing, the Commission denies the applications for rehearing filed by the Ohio Consumers' Counsel and The Dayton Power and Light Company.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio or the Company) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a

firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized.

{¶ 5} By Opinion and Order issued in this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish AES Ohio's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission extended ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved AES Ohio's application for a second ESP (ESP II). *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II as directed by the Court and then granted AES Ohio's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). In light of AES Ohio's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted AES Ohio's application in this case to implement the provisions, terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2016), Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing AES Ohio's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied*, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 545.

{¶ 8} Subsequently, Interstate Gas Supply (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case*, Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case*, eliminating AES Ohio's distribution modernization rider, in light of the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, AES Ohio filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). AES Ohio also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy Supply Association (RESA). Joint comments were filed on December 4, 2019 by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers'

Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) filed a motion on December 4, 2019, seeking rejection of AES Ohio's proposed tariff filing.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved AES Ohio's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019). Subsequently, on January 17, 2020, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger.

{¶ 11} AES Ohio timely filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instant to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing.

{¶ 13} Subsequently, the Commission issued the Fifth Entry on Rehearing in this case on June 16, 2021. OCC and AES Ohio each filed an application for rehearing on July 21, 2021. On July 30, 2021, OCC timely filed a memorandum contra the application for rehearing filed by AES Ohio. AES Ohio also timely filed a memorandum contra the application for rehearing filed by OCC on July 30, 2021.

III. DISCUSSION

A. *OCC's First Assignment of Error and AES Ohio's Second Assignment of Error*

{¶ 14} In its first assignment of error, OCC claims that the Commission erred when it approved a provider-of-last-resort (POLR) charge to consumers without finding it just and reasonable and without evidentiary support, and in violation of Supreme Court of Ohio and

Commission precedent and Ohio law, including R.C. 4903.09, 4905.22, and 4928.02(a). In support of this assignment of error, OCC contends that, between 2006 and 2024, consumers in AES Ohio's service territory will have paid \$1.2 billion in POLR charges and stability charges. OCC further contends that the Commission failed to determine whether continuing to charge customers the RSC is reasonable and lawful. OCC alleges that the RSC is inconsistent with *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011) and the Commission's decision on remand, *In re the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011). OCC also claims that there is no evidentiary support to continue charging the RSC, in violation of R.C. 4903.09.

{¶ 15} In its memorandum contra OCC's application for rehearing, the Company contends that the Commission correctly ruled that R.C. 4928.143(C)(2)(b) required that the RSC be reinstated. The Company also claims that OCC waived the argument that additional evidence is needed because it failed to raise this issue in its January 17, 2020 application for rehearing. Further, AES Ohio avers that OCC ignores the plain language of the governing statute which expressly provides that, in the event of a withdrawal of an application for an ESP, 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).

{¶ 16} The Company also argues the Commission correctly ruled in the Fifth Entry on Rehearing that OCC's arguments in support of this assignment of error are barred by R.C. 4903.10, res judicata and collateral estoppel. In addition, the Company claims that the Supreme Court upheld prior versions of the RSC in two cases. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39-40; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 17-26. AES Ohio also claims that it still provides POLR service; in addition to the reasons cited by the Commission in the Fifth Entry on Rehearing, AES Ohio claims that it bears POLR risk if there are an insufficient number of bidders at the SSO auctions or if the winning bidders default on their obligation to provide generation service to SSO customers. Finally,

AES Ohio argues that no further evidence is needed to justify the RSC because the Commission has provided ample justification for re-establishing the RSC, including the fact that the governing statute required the Commission to do so. Second Finding and Order at ¶ 26; Fifth Entry on Rehearing at ¶ 15.

{¶ 17} In its second assignment of error, AES Ohio claims that the Commission erred by failing to identify an additional reason that the RSC is lawful. Specifically, AES Ohio claims that the Commission erred by failing to find that, 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.

{¶ 18} In OCC's memorandum contra the Company's application for rehearing, OCC urges the Commission to reject AES Ohio's additional justification. OCC argues that the Commission was under no obligation to reinstate the RSC, which, OCC reasons, was part of ESP I but was not part of the previous SSO.

{¶ 19} The Commission finds that OCC's first assignment of error is improper as OCC seeks rehearing of a denial of rehearing on the same issue. The Commission has squarely addressed this question, consistently holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) (*Ormet*) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 20} In this case, OCC raised these same arguments in its fourth assignment of error in its application for rehearing filed on January 17, 2020. Fifth Entry on Rehearing at ¶ 23. The Commission denied rehearing on the fourth assignment of error. *Id.* at ¶ 30.

Accordingly, we find that OCC's first assignment of error in its June 16, 2021 application for rehearing is improper and should be denied.

{¶ 21} Moreover, even if OCC's first assignment of error was not improper, the Commission would deny rehearing on the assignment of error. OCC has raised no new arguments in support of this assignment of error, and the Commission thoroughly addressed these arguments in the Fifth Entry on Rehearing. Fifth Entry on Rehearing at ¶¶ 26-30. Accordingly, rehearing on this assignment of error should be denied.

{¶ 22} With respect to the Company's second assignment of error, AES Ohio argues that the Commission erred, in the Fifth Entry of Rehearing, by failing to find that "[s]ince 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." We find that rehearing on this assignment of error should be denied. The Commission notes that, in the Second Finding and Order, in this case, issued on December 18, 2019, the Commission found that:

DP&L has exercised its statutory right to withdraw ESP III. DP&L's most recent SSO would be ESP I, which was reinstated by the Commission in the Finding and Order issued on August 26, 2016 in these proceedings. ESP I remained in effect until the effective date of ESP III, on November 1, 2017. *According to the plain language of the statute, the Commission must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.*

* * *

[Ohio Hospital Association] questions whether the RSC was properly extended by the Commission on December 19, 2012, when ESP I's term expired while the ESP II Case was pending before the Commission. However, as we noted in the Finding and Order issued on August 26, 2016, the

Commission's decision to extend the RSC, by Entry issued on December 19, 2012, cannot be challenged now. Finding and Order at ¶ 23. When the Commission extended ESP I, *the Commission determined that the RSC was one of the provisions, terms and conditions of ESP I, and, as such, the RSC should continue with ESP I* until a subsequent SSO is authorized. Entry (Dec. 19, 2012) at 3-4. On February 19, 2012, the Commission issued the first Entry on Rehearing in these proceedings, affirming our determination that the RSC is a provision, term, or condition of ESP I. Entry on Rehearing (Feb. 19, 2013) at 4- 6. No party, including OHA, appealed this ruling by the Commission. Thus, the Entry issued on December 19, 2012 is *a final, non-appealable order* of the Commission and *any challenge to that Entry is untimely and barred by R.C. 4903.10*.

Second Finding and Order at ¶¶ 27, 31 (emphasis added).

The Commission's ruling in the Second Finding and Order is substantively identical to the language which AES Ohio claims the Commission erred by failing to adopt. Thus, having made the substantively identical ruling in the Second Finding and Order, we find that it was unnecessary for the Commission to repeat that finding in the Fifth Entry on Rehearing.

{¶ 23} We note, moreover, that OCC is barred from challenging this ruling now by R.C. 4903.10. As we stated in the Fifth Entry on Rehearing:

Further, the Commission notes that, in the Second Finding and Order, we specifically ruled that: (1) the Commission had determined that the RSC is one of the provisions, terms, and conditions of ESP I in the December 19, 2012 Entry; (2) the December 19, 2012 Entry was a final, non-appealable order; and (3) any challenge to the December 19, 2012 Entry is untimely and barred by 4903.10. Second Finding and Order at ¶ 31. In its application for rehearing filed on January 17, 2020, OCC did not seek rehearing on this ruling contained in the Second Finding and Order. Therefore, OCC is barred from challenging this ruling, irrespective of the Commission's separate and independent

determination that OCC's claim is also barred by res judicata and collateral estoppel.

Fifth Entry on Rehearing at ¶ 37.

B. OCC's Second Assignment of Error and AES Ohio's First Assignment of Error

{¶ 24} OCC claims in its second assignment of error that the Commission erred in concluding that the Commission does not have discretion to make rates and charges subject to refund unless two independent conditions are met, where one of the conditions is that the tariff provision for the rate or charge is "reconcilable." OCC avers that, when the Commission added a reconcilable requirement for consumer refunds, the Commission unreasonably and unlawfully construed R.C. 4905.32.

{¶ 25} In its memorandum contra OCC's application for rehearing, AES Ohio argues that the Commission correctly ruled that it lacked authority to order the Company to collect the RSC subject to refund. The Company claims that OCC has waived this argument because it failed to cite to R.C. 4905.32 in its January 17, 2020 application for rehearing. The Company further argues that 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 at ¶¶ 52-60. AES Ohio avers that refunds are barred by long-standing precedent by the Supreme Court of Ohio. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, at ¶ 2. See also, *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011- Ohio-1788, 947 N.E.2d 655 at ¶ 16 ("under *Keco*, we have consistently held that the law does not allow refunds in appeals from commission order"); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853 at ¶ 21 ("any refund order would be contrary to our precedent declining to engage in retroactive ratemaking").

{¶ 26} In AES Ohio's first assignment of error, the Company alleges that the Fifth Entry on Rehearing is unreasonable and unlawful because it requires AES Ohio to propose

language in its tariff making the RSC refundable "to the extent permitted by law." Fifth Entry on Rehearing at ¶ 64. The RSC cannot and should not be made refundable for two reasons: first, the RSC was not refundable under AES Ohio's most recent ESP, and R.C. 4928.143(C)(2)(b) requires the Commission to continue the terms of the Company's most recent ESP; and, second, requiring a utility to collect refundable rates is inconsistent with the balance created by the General Assembly.

{¶ 27} OCC responds, in its memorandum contra AES Ohio's application for rehearing, that the refund language should be included in AES Ohio's tariffs. OCC reasons that the language that the Commission directed be included in the tariffs is consistent with the balance struck by the General Assembly.

{¶ 28} The Commission finds that, with one exception, OCC has raised no new arguments in support of this assignment of error, and the Commission thoroughly addressed OCC's arguments in the Fifth Entry on Rehearing. Fifth Entry on Rehearing at ¶¶ 49-52. As noted in the Fifth Entry on Rehearing, the Commission remains bound to follow established precedent from the Supreme Court of Ohio. Fifth Entry on Rehearing at ¶ 52. The Court has consistently ruled that "[n]either the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco * * **" *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774; see *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 16 (citing *Green Cove*, 2004-Ohio-4774); see also *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462 at ¶ 49; *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764 at ¶ 28. The Commission notes that, in its sole new argument, OCC quotes Justice Kennedy's opinion in *In re Application of Dayton Power & Light Co.* *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied*, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 545, at ¶ 26 (Kennedy, J., concurring). We find, however, that there is nothing inconsistent between Justice Kennedy's opinion and the Commission's directive that AES Ohio include, in the tariff, language that the RSC be refundable "to the extent permitted by

law.” Fifth Entry on Rehearing at ¶ 64. Therefore, rehearing on this assignment of error should be denied.

{¶ 29} With respect to AES Ohio’s first assignment of error, the Commission finds that rehearing on this assignment of error should be denied. The Commission explained the extraordinary circumstances surrounding this proceeding in the Fifth Entry on Rehearing:

We agree with DP&L 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 DP&L withdrew that application. However, the turn of events surrounding ESP I is nothing short of extraordinary. The Commission extended ESP I in the December 19, 2012 Entry while ESP II was pending before the Commission. After the Commission approved ESP II, the Supreme Court ruled that ESP II should be reversed, leading to the subsequent modification of ESP II by the Commission, DP&L’s withdrawal of ESP II, and the first reinstatement of ESP I. After the Commission adopted ESP III, the Supreme Court dismissed as moot the appeals of the decision to reinstate ESP I. The Commission subsequently modified ESP III, based upon the Supreme Court’s decision in the FirstEnergy ESP IV Case, leading to DP&L’s withdrawal of ESP III and the second reinstatement of ESP I. We note that the continuing value of ESP I to ratepayers has been demonstrated in *In re The Dayton Power and Light Co.*, Case Nos. 18-1875-EL-GRD et al. (*Quadrennial Review Case*), which was decided contemporaneously with the decision in this proceeding. However, all of these events have contributed to the extraordinary circumstances surrounding ESP I.

Fifth Entry on Rehearing at ¶ 61.

We remain concerned that the absence of the tariff language making the RSC subject to refund “to the extent permitted by law” would preclude OCC from effectively pursuing an appeal in this case as the absence of such language may be sufficient to decide the appeal. We do not seek to evade review of our decisions by the Supreme Court of Ohio. Therefore, we affirm our determination that the extraordinary circumstances of this case require the inclusion of the tariff language as directed by the Commission in the Fifth Entry on Rehearing.

C. OCC’s Third Assignment of Error

{¶ 30} In its third assignment of error, OCC alleges that the Commission erred in concluding that OCC is barred by res judicata and collateral estoppel from challenging AES Ohio’s rate stability charge. When a judgment is issued without jurisdiction, it is void and subject to collateral attack. OCC contends that, because the Commission had no jurisdiction to order the continuation of AES Ohio’s electric security plan, instead of its standard service offer, its order was void and is subject to collateral attack.

{¶ 31} AES Ohio, in its memorandum contra, claims that OCC already sought rehearing on this issue in its January 17, 2020 application for rehearing. AES Ohio also reiterates its argument that res judicata and collateral estoppel bar OCC from challenging the RSC. The Company avers that the Commission correctly concluded in the Fifth Entry on Rehearing that an ESP is a SSO. Fifth Entry on Rehearing at ¶¶ 15-16.

{¶ 32} Further, AES Ohio rejects OCC’s claim that the Second Finding and Order is void. The Company notes that the Supreme Court of Ohio has recognized that 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); *see also Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, at ¶ 12 (“[o]nce 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). AES Ohio avers that 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 ESP pursuant to R.C. 4928.143(C)(2). In fact, according to the Company, R.C. 4928.143(C)(2)(b) expressly requires "the commission," and no other body, to issue such orders.

{¶ 33} The Commission finds that OCC's third assignment of error is improper as OCC seeks rehearing of a denial of rehearing on the same issue. As noted above, in *Ormet*, the Commission held that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 34} With respect to this assignment of error, OCC acknowledges that it raised these same arguments in its application for rehearing filed on January 17, 2020, stating "[a]s fully explained in OCC's prior application for rehearing (which was denied by the PUCO)." *See also* Fifth Entry on Rehearing at ¶¶ 13, 31-32. The Commission denied rehearing on the assignment of error. *Id.* at ¶¶ 15-16, 38-40. Accordingly, we find that OCC's third assignment of error in its June 16, 2021 application for rehearing is improper and should be denied.

{¶ 35} The Commission further finds that we would deny rehearing on the assignment of error even if the third assignment of error were not improper. As OCC appears to acknowledge, it has raised no new arguments in support of its third assignment of error. The Commission thoroughly addressed these arguments in the Fifth Entry on

Rehearing. Fifth Entry on Rehearing at ¶¶ 15-16, 38-40. Accordingly, rehearing on this assignment of error should be denied.

D. OCC's Fourth Assignment of Error

{¶ 36} In its fourth assignment of error, OCC alleges that the Commission erred in its findings excusing AES Ohio from its ESP I rate freeze commitment to customers. In violation of Supreme Court of Ohio precedent on this issue, the Commission's findings are mistaken and misapprehend OCC claims of error. OCC further argues that, consistent with R.C. 4903.09, and Supreme Court precedent, the Commission's findings can, and should, be abrogated.

{¶ 37} AES Ohio replies that OCC has already sought rehearing on this issue in its previous application for rehearing in this proceeding. The Company also argues that the Commission correctly ruled that OCC waived this argument in the Company's most recent distribution rate case. Fifth Entry on Rehearing at ¶ 19. AES Ohio also claims that that rate freeze was not part of the Company's most recent SSO and that any rate freeze was modified in AES Ohio's last distribution rate case.

{¶ 38} The Commission notes that, with respect to this assignment of error, OCC once again acknowledges that it seeks rehearing upon a denial of rehearing, stating that "OCC challenged the PUCO's unlawful and unreasonable ruling where it failed to continue, for the benefit of consumers, the distribution rate freeze that was part of DP&L's ESP I. *** The PUCO, however, denied OCC's application for rehearing." Therefore, the Commission finds that OCC fourth assignment of error improperly seeks rehearing of a denial of rehearing on the same issue. *Ormet* at 3-4.

{¶ 39} The Commission notes that the improper filing of rehearing upon the denial of rehearing is particularly acute with respect to this assignment of error because OCC seeks to recast the assignment of error on which the Commission denied rehearing in the Fifth Entry on Rehearing. Arguing in the alternative, OCC first argues that it had no opportunity

to raise this issue in AES Ohio's prior rate case, *In re The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR (2015 Distribution Rate Case), because the Staff Report had not been filed during the time ESP I was in effect. However, OCC elides the fact that it could have sought a stay of the 2015 Distribution Rate Case if it believed that the rate freeze was still in effect. We also note that, on August 5, 2021, OCC filed a motion to dismiss the application for an increase in rates in *In re the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Case Nos. 20-1651-EL-AIR et al. (2020 Distribution Rate Case). The Commission will determine in the 2020 Distribution Rate Case whether a motion to dismiss is appropriate pursuant to R.C. 4909.18; however, we note that the filing of the motion to dismiss is effectively an admission that OCC had potential remedies in the 2015 Distribution Rate Case, irrespective of whether the Staff Report had been filed during the time ESP I was in effect.

{¶ 40} OCC also claims that the Commission misapprehended the remedy sought by OCC in its application for rehearing filed on January 17, 2020. This claim is not persuasive. In the application for rehearing, OCC stated that:

During the ESP I term, [AES Ohio] froze distribution rates, consistent with the PUCO-approved stipulation. But in 2018, three years after it filed to increase 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 [Second Finding and Order (Dec. 18, 2019)]. Not so for the ESP I distribution rate freeze, which the PUCO ignored. * * *

The ESP I distribution rate freeze ended when the PUCO approved increased distribution rates for [AES Ohio] [citing 2015 Distribution Rate Case, Opinion and Order (Sept. 26, 2018)].

Memorandum in Support of Application for Rehearing (Jan. 17, 2020) at 7, 9.

The argument in support of the application for rehearing clearly registers OCC's disagreement with the Commission's decision to continue the distribution rates lawfully set by the *2015 Distribution Rate Case*. Further, in the Fifth Entry on Rehearing, the Commission noted that OCC had not proposed any authority for the Commission to retroactively modify the distribution rates approved in *2015 Distribution Rate Case* as 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). Fifth Entry on Rehearing at ¶ 19. After the Commission ruled that OCC had not proposed any authority for the Commission to modify the rates set in the *2015 Distribution Rate Case*, OCC recast its January 17, 2020 application for rehearing, claiming that it did not seek to modify the rates approved by the Commission in the *2015 Distribution Rate Case*. Instead, OCC now argues that the remedy sought in the January 17, 2020 application for rehearing was for rates to be frozen at the levels set by the *2015 Distribution Rate Case* and for the dismissal of AES Ohio's pending rate case, *2020 Distribution Rate Case*. However, this argument is not persuasive. As noted above, the plain language of OCC's January 17, 2020 application for rehearing demonstrates that OCC was disputing the rates placed into effect in the *2015 Distribution Rate Case*, and OCC cannot have sought the dismissal of the *2020 Distribution Rate Case* in its January 17, 2020 application for rehearing because the *2020 Distribution Rate Case* was not filed until October 30, 2020, well after the filing of the January 17, 2020 application for rehearing.

E. OCC's Fifth Assignment of Error

{¶ 41} In its fifth assignment of error, OCC claims that the Commission erred by delaying its rehearing ruling until June 16, 2021 and by deferring yet more rehearing rulings beyond its June 16, 2021 Entry on Rehearing, in violation of R.C. 4903.10, R.C. 4903.11, 4903.12 and 4902.13, and is an abuse of discretion. OCC claims that the Commission's errors have wrongfully delayed the issuance of a final appealable order because the Commission is intending for there to be further rehearing rulings, all of which are denying OCC its statutory right of appeal and denying the Supreme Court its opportunity to review.

{¶ 42} In its memorandum contra, AES Ohio responds that the Commission correctly deferred ruling on the remaining applications for rehearing. The Company claims that, because the Fifth Entry on Rehearing addressed all assignments of error contained in OCC's application for rehearing, this assignment of error should be rejected as granting rehearing on this assignment of error would not abrogate or modify the Fifth Entry on Rehearing in any way. AES Ohio further argues that 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. The Company avers that, since OCC itself sought rehearing from the Fifth Entry on Rehearing, any appeal is precluded at this time; thus, the Company concludes that OCC cannot complain about any inability to appeal while it remains standing in its own way.

{¶ 43} The Commission finds that rehearing on this assignment of error should be denied. OCC waived the arguments contained in this assignment of error by failing to file a motion for a stay or an application for rehearing of the Fourth Entry on Rehearing. The Commission further finds that OCC cannot demonstrate any prejudice by the Commission's decision to accept the request of the parties seeking rehearing to defer ruling on the remaining assignments of error.

{¶ 44} When the Commission issued the Fourth Entry on Rehearing in this proceeding, in which the Commission granted rehearing for the further consideration of the matters specified for rehearing, OCC had two opportunities to raise this issue with the Commission. First, OCC could have filed a motion for a stay in order to preserve this issue, but OCC has not sought a stay of any provision of the Second Finding and Order or the Fourth Entry on Rehearing. Moreover, because OCC failed to seek a stay of either the Second Finding and Order or the Fourth Entry on Rehearing, OCC cannot demonstrate prejudice resulting from these decisions. *ESP III Case*, Second Entry on Rehearing (Jan. 31, 2018) at ¶ 17. Next, OCC failed to file an application for rehearing, challenging the granting of rehearing for further consideration. OCC is aware of the need to file for rehearing to preserve its rights and has availed itself of this remedy in the past, *including in this very case*.

Application for Rehearing (Nov. 14, 2016) at 2, 4-7; Third Entry on Rehearing ¶¶ 36, 38. *See also, In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al., Application for Rehearing (Jan. 20, 2017) at 5, Fourth Entry on Rehearing (Feb. 8, 2017) ¶¶ 19-20, 22; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Application for Rehearing (Jan. 6, 2017) at 2, 4-8, Seventh Entry on Rehearing (Feb. 1, 2017) at ¶¶ 10-13; *In re Dayton Power and Light Co.*, Case Nos. 12-426-EL-SSO et al., Application for Rehearing (Nov. 14, 2016) at 2-3, 4-7, Seventh Entry on Rehearing (Dec. 14, 2016) at ¶¶ 35, 37; *ESP III Case*, Application for Rehearing (Jan. 5, 2018) at 2, 4-7; Second Entry on Rehearing, (Jan. 31, 2018) at ¶¶ 11, 15-16. The Commission has generally denied rehearing on this argument by OCC but raising the issue on rehearing is still necessary to preserve the issue. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757 at ¶ 18. OCC did not seek rehearing of the Fourth Entry on Rehearing and, thus, waived the arguments raised in this assignment of error.

{¶ 45} The Commission further finds that OCC cannot demonstrate any prejudice by the Commission's decision to accept the request of the other parties seeking rehearing to defer ruling on the remaining assignments of error. As noted in the Fifth Entry on Rehearing, among other terms of a global stipulation filed on October 23, 2020, in *the Quadrennial Review Case*, the signatory parties, including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger requested that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represented that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn if the Commission issues a final appeal order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case*. Fifth Entry on Rehearing at ¶ 66. The Commission, in fact, adopted the global stipulation without modification on June 16, 2021. *Quadrennial Review Case*, Opinion and Order (Jun. 16, 2021); Fifth Entry on Rehearing ¶ 67. Accordingly, in the interests of administrative efficiency and in order to avoid the possible filing of unnecessary appeals by

parties who have no intention of prosecuting those appeals, the Commission deferred ruling on the applications for rehearing filed by IEU-Ohio and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger. Fifth Entry on Rehearing at ¶ 67.

{¶ 46} We find that OCC cannot demonstrate any prejudice by the Commission's decision to defer ruling on the applications for rehearing as requested by the parties. Initially, we are not persuaded that this ruling will necessarily result in a delay in the issuance of a final appealable order in this proceeding; it is not at all clear that a Commission order simply accepting the withdrawal of the applications for rehearing would constitute a final appealable order in lieu of a previously issued entry on rehearing.

{¶ 47} Moreover, in the Fifth Entry on Rehearing, the Commission directed AES Ohio to revise its tariff for the RSC to include language making the RSC refundable "to the extent permitted by law." AES Ohio filed compliance tariffs with the appropriate language on July 16, 2021. We are approving these tariffs below. If OCC files an appeal in this proceeding and is successful, refunds of the RSC should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing. Therefore, the date on which the Commission accepts the withdrawal of applications for rehearing as provided by the *Quadrennial Review Case* will be irrelevant, and OCC can demonstrate no prejudice resulting from the decision to defer ruling on the applications for rehearing in the Fifth Entry on Rehearing.

F. AES Ohio's Proposed Tariffs

{¶ 48} In the Fifth Entry on Rehearing, the Commission directed the Company to file new proposed tariffs providing that the RSC shall be refundable "to the extent permitted by law." On July 16, 2021, AES Ohio filed proposed tariffs to comply with the Commission's directive. Upon review, the Commission finds that the proposed tariffs are consistent with the Fifth Entry on rehearing and do not appear to be unjust or unreasonable. In addition, the Commission finds that it is unnecessary to hold a hearing regarding the proposed tariffs. Accordingly, we find that the proposed tariffs should be approved.

IV. ORDER

{¶ 49} It is, therefore,

{¶ 50} ORDERED, That the applications for rehearing filed by OCC and AES Ohio be denied. It is, further,

{¶ 51} ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved. It is, further,

{¶ 52} ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES Ohio shall file one copy in its TRF docket and one copy in this case docket. It is, further,

{¶ 53} ORDERED, That the effective date of the new tariffs shall be the date upon which the final tariffs are filed with the Commission. It is, further,

{¶ 54} ORDERED, That a copy of this Sixth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:

Lawrence K. Friedeman

GAP/hac

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Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Entry on Rehearing, the Commission denies the applications for rehearing filed by the Ohio Consumers' Counsel and The Dayton Power and Light Company. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio