

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton)
Power and Light Company for an Increase In) Case No. 20-1651-EL-AIR
Its Electric Distribution Rates.)

In the Matter of the Application of The Dayton)
Power and Light Company for Accounting) Case No. 20-1652-EL-AAM
Authority.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval) Case No. 20-1653-EL-ATA
Of Revised Tariffs.)

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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The Public Utilities Commission of Ohio should uphold the distribution rate freeze agreed to by AES Ohio in the ESP I Stipulation¹, adopt a revenue requirement at the bottom of the range recommended by the Commission Staff based on the adoption of a rate of return at the low end of Staff's range, adopt the Commission Staff's recommended rates (as adjusted downward based on a revenue requirement and return on equity below the Commission Staff's midpoint), and affirm the Staff Report's rejection of AES Ohio's request to charge customers \$11.9 million per year for energy efficiency programs.

I. ARGUMENT

- A. The Commission should uphold the distribution rate freeze agreed to by AES Ohio in the ESP I settlement until new SSO rates are established by the Commission.**

¹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, *et al.*, ESP I Stipulation Feb. 24, 2009 ("ESP I").

The Commission should find that AES Ohio is prohibited from implementing new distribution rates until a new electric security plan (“ESP”) is approved. To this end, the Commission should find that the distribution rate freeze remains effective through the entire term of AES Ohio’s current ESP I. AES Ohio returned to ESP I on December 18, 2019. ESP I was resolved by a stipulation and recommendation (“ESP I Settlement”) approved by the Commission. ESP I had an initial term that lasted through December 31, 2012. The ESP I Settlement provides that DP&L’s distribution base rates will be frozen through December 31, 2012.”² Through the application of R.C. 4828.143(C)(2)(b), DP&L has returned to ESP I, extending the term beyond December 31, 2012. Accordingly, until a subsequent ESP or market rate offer (“MRO”) is approved for AES Ohio, its distribution rates cannot be increased through an application to increase rates pursuant to R.C. 4909.18.

This result is consistent with the treatment of other terms and conditions of ESP I that were also supposed to expire on December 31, 2012. Another significant term of ESP I was the Rate Stabilization Charge (“RSC”). The ESP I Settlement provides that the RSC was to end on December 31, 2012. DP&L’s ESP II was not authorized by the end date of ESP I.³ Accordingly, R.C. 4928.143(C)(2)(b) provides that the terms and conditions of the existing ESP shall continue until the next standard service offer (“SSO”) is authorized.⁴ On December 19, 2012, the Commission issued an Entry finding that the RSC was a provision, term, or condition of ESP I and would continue beyond December

² *ESP I*, Stipulation and Recommendation (Feb. 24, 2009) at 10 (Paragraph 18).

³ *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, March 30, 2012, (“ESP II”).

⁴ *ESP I*, Entry (Dec. 19, 2012) at ¶ 5.

31, 2012. The Commission found that despite the language of the ESP I Settlement that the RSC should end on December 31, 2012, the RSC should continue because it is “a provision, term, or condition” of ESP I as that term is used in R.C. 4928.143(C)(2)(b).⁵ Likewise, in the present case, the distribution rate freeze is a provision, term, or condition of ESP I. The Commission should uphold the distribution rate freeze on the same grounds as it upheld the RSC in the Commission’s December 19, 2012, Entry in ESP I.⁶

B. AES Ohio has not met its burden under R.C. 4909.19(C) that its proposed rates and charges are just and reasonable, so the Commission must review the evidentiary record and issue an Order to establish rates that are just and reasonable.

Pursuant to R.C. 4909.19(C), “at any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.” AES Ohio has not met its burden to show that its proposed rates and charges are just and reasonable. None of the intervening parties support the rates proposed in AES Ohio’s application, and after a review of AES Ohio’s revenues and expenses, the Commission Staff recommended that rates be increased by much less than what was proposed.⁷ Accordingly, the Commission must review the application, the Staff Report, and the evidentiary record in this case and issue an Order adopting just and reasonable rates.

To this end, R.C. 4909.19(C) directs that the Commission “shall consider the matters set forth in said application and make such order respecting the prayer thereof as it seems just and reasonable.” AES Ohio failed to demonstrate that the rates and

⁵ *Id.*

⁶ *ESP I*, Entry (Dec. 19, 2012) at ¶ 5.

⁷ See Staff Ex. 1 (“Staff Report”).

charges proposed in its application are just and reasonable. For guidance on what would constitute just and reasonable rates in the AES Ohio service territory, the Commission should look to the Staff Report and the evidentiary record.

After a thorough review of AES Ohio's revenues and expenses, the Staff Report makes the following recommendations:

- Revenue Requirement in the range of \$306,600,385 to \$312,150,118
- Rate of Return ("ROR") of 7.15% to 7.70%
- Return on Equity ("ROE") of 8.76% to 9.78%
- Exclude \$9,649,258 in working capital

The Commission should adopt these recommendations, but with a revenue requirement at the bottom of the range recommended based on an ROR at the low end of Staff's range. And, in regard to the ROE, the Commission should adopt an ROE at the low end of the Staff Report's recommended range and certainly no greater than the midpoint ROE of 9.27 percent.

C. The Commission should adopt an ROR based on an ROE at the low end of the Commission Staff's recommended range.

i. The Commission Staff improperly calculated its recommended ROE for AES Ohio.

The Commission should adopt an ROE at the low end of the Staff Report's recommended range of 8.78% to 9.78% because the Commission Staff improperly calculated its recommended ROE to arrive at a recommendation that is higher than what is appropriate. The Commission Staff used the Capital Asset Pricing Model (CAPM) and Discounted Cash Flows (DCF) analyses for calculating its recommended ROE. The CAPM and DCF analyses are financial formulas for calculating a return on common equity

and should not be subjected to policy recommendations or different approaches. However, Staff witness Buckley testified that “Staff continues its process of modernizing the rate of return calculation by studying many different approaches.”⁸ There should be no modernizing of the financial formulas or different approaches to the straightforward calculations.

For the CAPM analysis, the formula is $ROE = rf + \beta (\text{market return} - rf)$ where rf is the risk-free rate and β is market sensitivity. The risk-free rate is the interest rate an investor would expect to receive in a hypothetical risk-free investment, and financial analysts, investors, and companies routinely use yields on U.S. Treasury Bonds as the proxy for the risk-free rate.⁹ The reason yields on U.S. Treasury Bonds are used for the risk-free rate is because U.S. Treasury Bonds are the least risky investment an investor can obtain in the market (because they are backed by the good faith and credit of the United States).¹⁰ Not only do financial analysts, investors, and companies routinely use yields on U.S. Treasury Bonds for calculating the risk-free rate, but so have this Commission and the Federal Energy Regulatory Commission (“FERC”).¹¹ If yields on U.S. Treasury Bonds increase, then the risk-free rate increases as an indicator of increased market risk, which also increases the return, thus resulting in a higher recommended ROE. However, if a risk-free rate is used that is higher than yields on U.S.

⁸ Staff Ex. 2 (Buckley Testimony) at 6.

⁹ Tr. Vol. V at 1025-1026.

¹⁰ *Id.* at 1026.

¹¹ *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, Docket No. PL19-4-000, 166 FERC ¶61,207, at ¶14, “The risk-free rate is represented by a proxy, typically the yield on 30-year Treasury bonds.”, citing Roger A. Morin, *New Regulatory Finance* 308 (Public Utilities Reports, Inc. 2006) at 155-162; *see also, e.g., In Re Dayton Power & Light*, Case No. 15-1830-EL-AIR, Staff Report at 19 (Mar. 12, 2018); *Vectren Energy Delivery of Ohio*, Case No. 18-298-GA-AIR, Staff Report at 21 (Oct. 1, 2018).

Treasury Bonds, then it attributes greater market risk to the company than what actually exists in the market, which results in a recommended ROE that is higher than what is appropriate. This is what the Commission Staff did in this case, it used historic yields on U.S. Treasury Bonds to arrive at a risk-free rate that is higher than yields on current U.S. Treasury Bonds, which improperly increased the Staff's recommended ROE.¹² Staff used yields on U.S. Treasury Bonds going back as far as 2006, which provide no value as an indicator of market risk during the test year.

While the Commission Staff correctly looked at U.S. Treasury Bonds to calculate the risk free rate, the Commission Staff improperly used a long-term historical average that does not accurately represent market risk during the test year.¹³ If the Commission Staff had properly used current yields on 30-year Treasury Bonds, 15-year Treasury Bonds, 10-year Treasury Bonds, or 13-week Treasury Bonds, all else being held equal, the Commission Staff would have arrived at an ROE in the range of 7 percent to 8 percent. If the Commission Staff believed that such result is too low, then the Commission Staff can propose a higher ROE and explain its reasoning, but Commission Staff should not manipulate the financial formulas to arrive at an intended result. For this reason, the Commission should consider the 9.27 percent ROE mid-range of Staff's recommendation as the upper-bound of what is just and reasonable in this case.

Pursuant to R.C. 4909.18, the Commission has long conducted utility ratemaking with the goal of establishing just and reasonable rates, which are rates that provide the utility with an opportunity to earn a reasonable return on and of its investment. To

¹² Tr. Vol. V. at 1027.

¹³ *Id.* at 1026-1027.

establish these just and reasonable rates, the Commission uses a date certain and test year. AES Ohio should be provided an opportunity to earn a reasonable return on and of its investment as of the date certain and test year, and the Commission Staff should have used yields on U.S. Treasury Bonds during the test year (or on the date certain) when conducting its financial analysis. By utilizing a historic average of yields on U.S. Treasury Bonds, the Commission Staff arrives at a recommended ROE that offers a higher rate of return to AES Ohio than what its market and financial risk support. Additionally, by utilizing a historic average going back 15 years, the Commission Staff prevents customers from realizing the benefits of low interest rates. These are the same customers that have been required to pay higher costs over the last decade than market rates. For these reasons, the Commission should adopt an ROE at the low end of the Staff Report's recommended range of 8.78 percent to 9.78 percent, but no higher than the Commission Staff's midpoint of 9.27 percent.

- ii. **The Commission Staff did not take into consideration that AES Ohio has less risk than comparable regulated companies because of the many riders that provide AES Ohio with guaranteed or nearly guaranteed recovery of distribution capital costs.**

AES Ohio has numerous distribution riders that provide the company with guaranteed or nearly guaranteed recovery of costs. For example, the Commission has authorized AES Ohio to seek recovery of a return on and of its prudently incurred Smart Grid Phase 1 capital investments and associated operations and maintenance expenses up to \$267,600,000 through the Infrastructure Investment Rider.¹⁴ Additionally, AES Ohio

¹⁴ *In re Dayton Power and Light Co. D/B/A AES Ohio to Implement its Infrastructure Investment Rider*, Case No. 21-1110-EL-RDR, Finding and Order (Feb. 23, 2022) at ¶ 6, 15.

has a storm cost recovery rider which compensates the company for storm damage expenses that it incurs, and deferral authority for additional expenses related to COVID-19.¹⁵ Each of these riders, in some manner, reduces AES Ohio's financial risk. A company's expected rate of return is driven by its risk, and AES Ohio as a regulated monopoly has less market and financial risk than other companies. Not only does AES Ohio have less risk than other companies in competitive industries, but the distribution riders of AES Ohio provide the company with less risk than even otherwise comparable electric distribution utilities. Distribution riders reduce the level of business and financial risk faced by AES Ohio, which warrants a rate of return (driven by an ROE) at the lower end of Commission Staff's recommendation. For this reason, the Commission should adopt an ROE at the low end of Commission Staff's range, and any ROE higher than the Commission Staff's midpoint of 9.27 percent would be unjust and unreasonable.

D. It would be unjust and unreasonable for the Commission to allow AES Ohio to charge customers \$11.9 million per year for the DSM Customer Program.

The Commission should uphold Staff's recommendation to remove AES Ohio's proposed mandatory energy efficiency/peak demand reduction ("EE/PDR") program, which AES Ohio calls the Demand Side Management Customer Program ("DSM Customer Program"). The costs of this program should not be charged to customers in nonbypassable distribution rates. Commission Staff's recommendation to remove these costs from AES Ohio's proposed rates is consistent with Ohio law, which broadly favors customers choice and specifically supports a mercantile customer's right to opt-out of

¹⁵ *Id.* at ¶ 39; see also, *In re the Dayton Power and Light Co. for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency*, Case Nos. 20-651-EL-UNC, et al., Finding and Order (May 20, 2020).

paying costs for any such program. Beyond the legal impediments, the record lacks the details necessary for the Commission to conclude that the proposed DSM Customer Plan is just and reasonable.

i. Ohio law favors individual customer choice and specifically prohibits utilities from passing mandatory energy efficiency costs on to all customers.

Ohio law has long encouraged customer choice, and recent legislation makes it clear that businesses have a choice regarding their participation in any utility run energy efficiency program. AES Ohio's proposed plan would force all customers to pay for its proposed DSM Customer Program through nonbypassable distribution rates.¹⁶ The program, as proposed, is inconsistent with Ohio law and should not be approved.

It is the policy of the state of Ohio in R.C. 4928.02(C) to ensure "diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers." This applies to energy efficiency programs as much as it does any other provision of retail electric service – consumers should have an effective choice over whether to independently engage in energy efficiency measures or to hire a competitive company to assist that customer with being more energy efficient. There is nothing about energy efficiency programs that inherently requires such service to be provided by monopoly electric utilities. Further, R.C. 4928.02(G) indicates it is the policy of the state of Ohio to recognize "the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment." For the Commission to require all customers to pay for mandatory charges

¹⁶ Tr. Vol. III at 574, Lines 12-17 ("Q. So as I understand your testimony is that cost recovery for the energy efficiency programs proposed by the Company would be mandatory; is that correct? A. Yes, they would be a part of base distribution rates, as we have indicated.").

for energy efficiency programs in base distribution rates would be the very opposite of “flexible regulatory treatment” or development of competitive markets. Additionally, in R.C. 4928.02(H), it is the policy of this state for the Commission to prohibit the recovery of any generation-related costs through distribution rates. AES Ohio’s arguments in support of the DSM Customer Program rely heavily upon theoretical generation-related savings (e.g. energy and capacity savings), and the costs of the DSM Program are inherently generation-related. However, it is the policy of the state of Ohio for the Commission to prohibit recovery of generation-related costs through distribution rates. Finally, in R.C. 4928.02(M), it is the policy of this state to encourage the education of small business owners regarding the use of, and encourage the use of, energy efficiency programs and energy resources in this state. Encouraging small business owners regarding energy efficiency programs offered by competitive companies or competitive retail electric suppliers is far different from requiring all customers to pay \$11.9 million per year to the monopoly utility in base distribution rates for a mandatory program. While AES Ohio references R.C. 4928.02(D) as support for its mandatory energy efficiency program,¹⁷ the policies enumerated in R.C. 4928.02 support Commission rejection of AES Ohio’s proposed DSM Customer Program.

Moreover, Ohio law now prohibits utilities from passing on mandatory costs of energy efficiency programs to all customers. R.C. 4928.66 addresses the requirements of the government-mandated energy usage and peak demand reduction benchmarks. In 2017, Senate Bill 310 modified the energy efficiency mandates to authorize certain energy-intensive businesses (self-assessors and those served above primary voltage) to

¹⁷ AES Ohio Ex. 26 (Campbell Testimony) at 6.

opt-out of these mandatory programs. Thereafter, in 2019, House Bill 6 expanded the opt-out opportunity, finding that beginning no later than 2020, all mercantile customer businesses have a right under Ohio law to decide not to participate in a utility-run energy efficiency program. R.C. 4928.66 and 4928.662 further provide that the Commission should unwind the historic mandatory EE/PDR programs once a cumulative savings threshold is met. That threshold was met, so the Commission ordered the electric utilities to unwind all mandatory EE/PDR programs. R.C. 4928.66(G)(3) states that except for the final reconciliation of the riders associated with the mandatory EE/PDR programs, the Commission shall not authorize a cost recovery mechanism for a mandatory EE/PDR program, which is precisely what AES Ohio proposes to do in this case.

AES Ohio's proposed DSM Customer Program is a mandatory EE/PDR program that would recover the costs of the program through mandatory charges to all customers in base distribution rates. Ordinarily, base distribution rates are not bypassable; nor is there a practical way to determine and implement a method for a customer to bypass a portion of a base distribution rate. Accordingly, unless AES Ohio agrees to allow mercantile customers to opt-out of paying all distribution rates (unlikely), the EE/PDR program costs cannot be collected through base distribution rates. And, as noted above, any alternative rider approach would need to have an opt-out opportunity for mercantile customers. The proposed mandatory DSM Customer Program is inconsistent with Ohio law and should, therefore, be rejected. As currently contemplated in Ohio law, there is no statutory authority for AES Ohio to implement a nonbypassable cost recovery mechanism (including distribution rates) for an energy efficiency program such as the DSM Customer Program. The threshold legal questions for the Commission is whether

a mandatory one-size-fits-all energy efficiency program should be run by an incumbent monopoly electric utility and all customers should be forced to pay for it. That answer is no.

ii. The Commission should give no weight to the testimony of AES Ohio witness Mr. Tatham on the claimed benefits and costs of the program.

AES Ohio has not met its burden to demonstrate that the DSM Customer Program is just and reasonable. As will be demonstrated in more detail below, the arguments by AES Ohio in support of this annual \$11,928,167 charge to customers is severely lacking in analysis or evidentiary support. No witness in this proceeding conducted the analysis necessary to support Commission adoption of AES Ohio's proposed DSM Customer Program and, as noted above, even if a witness had conducted the analysis, Ohio law does not currently support mandatory costs being imposed on all customers for utility spending on energy efficiency programs in base distribution rates. Presumably, these are some of the reasons the Staff Report rejected AES Ohio's inclusion of the DSM Customer Program expenses and recommended a reduction in AES Ohio's test year operating expense by the entirety of the proposed annual \$11,928,167 charge to customers.¹⁸

AES Ohio witness Mr. Tatham sponsored AES Ohio's proposed DSM Customer Program. However, Mr. Tatham did not personally conduct the analysis for such programs and there is scant evidence that he reviewed the underlying data. Further, while an expert can rely upon reports or data underlying their expert opinions, Mr. Tatham could not support an expert opinion on the costs or benefits of the specific DSM Customer

¹⁸ Staff Report at 17.

Program and testified primarily to the costs and benefits of energy efficiency programs in general. Mr. Tatham did not personally conduct the analysis regarding AES Ohio's specific DSM Customer Program, nor did he sponsor the reports by the Cadmus Group or Wood McKenzie underlying AES Ohio's proposed DSM Customer Program.¹⁹ The Commission should give no weight to the testimony of AES Ohio witness Tatham on the costs or benefits of AES Ohio's proposed DSM Customer Program because he did not personally conduct the analysis and did not sponsor any reports from the Cadmus Group or Wood McKenzie.

iii. The Commission should give no weight to the hearsay contained within the testimony of AES Ohio witness Mr. Tatham.

The Commission should give no weight to the testimony of Mr. Tatham because it is filled with hearsay and unsubstantiated conclusions. AES Ohio did not conduct the Utility Cost Test ("UCT") or the Societal Cost Test regarding its DSM Customer Program, but instead hired a third party, the Cadmus Group, to conduct the analysis.²⁰ The Cadmus Group itself relied upon another third-party, Wood McKenzie, for market forecasts on energy and capacity savings that might result from the DSM Customer Program.²¹ However, nobody from the Cadmus Group or Wood McKenzie was presented by AES Ohio to support any analysis. Further, no witness testified to the underlying data that was provided to the Cadmus Group or Wood McKenzie to derive their analysis, and the analysis was not introduced into the record. Hearsay is a statement, other than one made

¹⁹ Tr. Vol. III at 605, Lines 21-22; at 606, Lines 10-14; at 609, Lines 3-5, 15-10; at 610, Lines 9-12; at 610, Line 25 through 611, Line 4; at 611, Lines 12-17; at 612, Lines 20-22; at 613, Lines 2-4; at 614, Lines 1-4; at 620, Lines 16-19; at 622, Lines 5-16; at 623, Lines 12-15.

²⁰ Tr. Vol. III at 601, Line 25 through 602, Line 11.

²¹ Tr. Vol. III at 615, Line 16 through 616, Line 17.

by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.²² Mr. Tatham's testimony, both pre-filed and at hearing, is filled with hearsay and unsubstantiated conclusions about the costs and benefits of the DSM Customer Program.

Mr. Tatham himself could not testify to what PJM Interconnection LLC ("PJM") wholesale energy or capacity prices were used to derive any projected energy or capacity savings in the UCT analysis.²³ Further, Mr. Tatham could not testify to which years of forecasted energy or capacity savings were used to derive the UCT analysis – it could have been a 1-year forecast, a 5-year forecast, or a 50-year forecast. While Mr. Tatham testified that Wood McKenzie developed a forecast of energy and capacity prices,²⁴ such forecast was not provided in this case and Mr. Tatham could not testify to its results. All that Mr. Tatham could explain was that Wood McKenzie conducted an analysis of energy and capacity prices for some unidentified period of years, provided its analysis to the Cadmus Group at some point in time, that the Cadmus Group then developed a UCT analysis based upon some unknown underlying data, and the Cadmus Group provided the conclusions of its analysis to AES Ohio. There is no witness in this case that can testify to the analysis conducted by Wood McKenzie or the Cadmus Group, the underlying data that was provided, or the methodology used to derive the conclusions in the final report. Accordingly, the Commission should give no weight to the testimony of Mr. Tatham or to the hearsay evidence of Wood McKenzie or the Cadmus Group on the costs and benefits of AES Ohio's proposed DSM Customer Program.

²² Ohio R. of Evid. 801-803; 801(C).

²³ Tr. Vol. III at 615-617.

²⁴ *Id.* at 615.

II. CONCLUSION

For the reasons set forth above, the Commission should uphold the distribution rate freeze, adopt an ROE at the lower end of the Commission Staff's recommendation, and reject AES Ohio's proposal to charge customers \$11.9 million per year for the DSM Customer Program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Ohio Adm.Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Initial Brief of Industrial Energy Users-Ohio* in Case Nos. 20-1651-EL-AIR, 20-1652-EL-AAM, and 20-1653-EL-ATA was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio to the following parties of record this 4th day of March 2022, via electronic transmission.

/s/ Matthew Pritchard

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Summary: Brief Initial Brief of IEU-OH electronically filed by Mr. Matthew R.
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