BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates.	)))	Case No. 20-1651-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority.	))))	Case No. 20-1652-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 20-1653-EL-ATA

POST HEARING BRIEF OF DIRECT ENERGY BUSINESS LLC AND DIRECT ENERGY SERVICES LLC

Direct Energy Business, LLC and Direct Energy Services, LLC (collectively, Direct)[1] submit this Initial Post-Hearing Brief in accordance with the schedule established at the conclusion of the evidentiary hearing.

I. INTRODUCTION

AES Ohio's proposed tariffs authorize the Company to collect a $5 fee every time a customer switches to or from standard service offer (SSO) generation service, or from one competitive retail electric supplier (CRES) to another.[2] This fee is unsupported, unlawful, and must be struck from the proposed tariffs. Staff 's adjustment to account for these fees would shift part of the revenue requirement from retail customers to CRES suppliers and must also be rejected.

[1] NRG Energy Inc. acquired the North American assets of Centrica on January 4, 2021, including Direct Energy Business, LLC and Direct Energy Services, LLC.

[2] P.U.C.O. 17, Electric Distribution Service, Sheet No. D34 (Switching Fee Rider) at 2.

II. ARGUMENT

"The language of R.C. 4909.15 is unequivocal. Rate increases are based on costs of rendering utility service during the test period."[3] "If the revenues received by the utility during the test year are less than the gross annual revenues to which the utility is entitled, the commission is required to fix new rates that will raise the necessary revenue."[4] Regarding proof of a revenue deficiency, "[t]here is no doubt that this burden is on the applicant utility."[5] AES bears the burden of proving that the switching fees is reasonable; Direct does not bear the burden of proving the fee unreasonable.[6]

AES seeks to recover most of its test year revenue requirement through rates and charges assessed to retail customers. Although switching fees will recover only a small portion of AES's alleged revenue deficiency (approximately $228,000, according to Staff's calculations)[7], this comparatively small figure does not exempt the fees from the requirements of Ohio law. Just as all other "rates, fares, tolls, rentals, and charges," the switching fees, too, are subject to R.C. Chapter 4909.[8] "*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 [Commission]."[9] As discussed below, AES has not satisfied its burden of demonstrating that the

[3] Office of Consumers' Counsel v. Public Util. Comm'n, 67 Ohio St. 2d 372, 374 (1981).

[4] Cincinnati Gas & Elec. Co. v. Pub. Util. Comm., 86 Ohio St. 3d 53, 53 (1999).

[5] City of Akron v. Public Util. Comm'n, 55 Ohio St. 2d 155, 157 (1978).

[6] *See id*. and R.C. 4909.18.

[7] Tr. Vol. V at 1147.

[8] R.C. 4909.15(A).

[9] R.C. 4905.22 (emphasis added).

switching fee is just and reasonable.

A. The switching fee lacks evidentiary support.

AES's Schedule D34 (Switching Fee Rider) imposes "a switching fee of five dollars ($5) for every switch to an AGS"[10] as well as "for returning to the Standard Service Offer." Under Sheet No. G8, "[t]he AGS will be required to pay the Switching Fees on behalf of the Customer." Schedule G8 also authorizes the switching fee "for any changes made by either a Customer or an authorized agent to a different AGS."[11] Thus, the switching fee would apply not only a switch from AES's SSO to Direct, but a switch from Direct to IGS (or any other supplier) or Direct back to the SSO.

Schedules D34 and G8 are legacy rate schedules; AES proposed no changes in its filing. Nevertheless, AES's filing triggered an obligation for Staff to "cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and all matters connected therewith."[12] The Switching Fee Rider is part of the "application" and "exhibits," and the proposed switching fees are undoubtably "connected" with AES's request for rate relief. "R.C. 4909.18 [] places the burden upon the applicant to prove all issues raised in its application."[13]

AES's filing implicitly seeks authorization to continue collecting switching fees, but the company has offered no evidence that the fee is necessary to recover costs not otherwise recovered through base rates. For its part, Staff admits that it did not examine whether the switching fee is just and reasonable. In commenting on a proposed adjustment to reduce the

[10] AES's tariffs use to the term "alternative generation supplier" (AGS) to refer to CRES suppliers.

[11] P.U.C.O. 17, Electric Generation Service, Sheet No. G8 at 30.

[12] R.C. 4909.19(C) (emphasis added).

[13] Ohio Edison Co. v. Public Util. Comm., 63 Ohio St. 3d 555, 558 (1992).

revenue requirement by the amount of switching fee revenue received during the test year (discussed in more detail below), Staff acknowledged that the adjustment "does not attempt to comment on the necessity of, or the policy associated with, CRES provider fees."[14] The Commission cannot lawfully authorize a charge for which there is no record support.

The switching fee continues to exist as a matter of regulatory inertia rather than law or reason. "Suffice it to say, some factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders."[15] There is no factual support for AES's $5 switching fee. A Commission-approved rate or charge is presumptively just and reasonable for two years, not two decades.[16]

AES and Staff will probably argue (as they have in the past) that there is no need to scrutinize supplier fees because the fees have been in place for many years and AES is not proposing to change the amount. These arguments ignore the fundamental purpose of rate proceedings. "Rate increases are based on costs of rendering utility service *during the test period*."[17] Historically, the Commission has authorized rates of return of 12% or more for electric utilities.[18] If AES had proposed a 12% rate of return based on the legacy rate decision in its 1981 rate case, it would have been run out of the Commission on a rail. And rightfully so. The Commission must decide an authorized rate of return in this case based on test year conditions. Whether a $5 switching fee is just and reasonable is also a function of test year conditions, not the conditions from decades ago. Those conditions have changed drastically. And in any event,

[14] Staff Ex. 6 at 7.

[15] *Tongren v. Public Util. Comm'n*, 85 Ohio St. 3d 87, 89–90 (1999).

[16] See R.C. 4909.03.

[17] *Office of Consumers' Counsel v. Public Util. Comm'n*, 67 Ohio St. 2d 372, 374 (1981) (emphasis added).

[18] See Dayton Power & Light Co. v. Pub. Utilities Comm'n, 4 Ohio St. 3d 91, 105 (1983).

rate orders are never permanent. As a matter of law, "the commission may rescind, alter, or amend an order fixing any rate, fee, toll, charge, rental, classification, or service, or any other order made by the commission."[19]

The switching fee came into being as a result of the settlement of AES's ETP case.[20] The introduction of retail choice required electric utilities to "unbundle" rates into separate charges for transmission, distribution, and generation service. Retail choice imposed new costs on utilities that were not accounted for in legacy rates, so the introduction of switching fees to recover these costs made sense. The $5 figure was reached through negotiation, not because a cost study or other evidence supported that figure.

Fast forward 20+ years. Customer choice has become a permanent fixture of retail electric service in Ohio. Tens if not hundreds of millions have been spent to upgrade computers, hire and train personnel, and otherwise integrate retail choice as part of backbone utility operations. The same people and equipment that support SSO customers also support choice customers. AES does not account for these costs separately—and never has in any of the 3 distribution rate cases[21] or 3 ESP cases[22] filed since 1999. There is no evidence that base rates are insufficient to recover *all* costs incurred by AES to serve both SSO and choice customers. Switching fee revenue merely provides a windfall to AES, above and beyond its cost of service. Staff proposes an adjustment to mitigate this windfall, but, as explained next, Staff's approach is misguided.

B. Staff's Switching Fee adjustment should be rejected.

[19] R.C. 4909.15(F).

[20] *In the Matter of the Application of the Dayton Power and Light Company,* Case Nos. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000) at 7.

[21] *See generally* Case Nos. 20-1651-EL-AIR, et al.; 15-1830-EL-AIR, et al.; and 05-0276-EL-AIR, et al.

[22] *See generally* Case Nos. 16-0395-EL-SSO, et al.; 12-0426-EL-SSO, et al.; and 08-1094-EL-SSO, et al.

Staff proposes an adjustment to reduce the total revenue requirement by approximately $228,000, to account for test year switching fee revenue. This adjustment does not deprive AES of revenue. The adjustment merely shifts responsibility for $228,000 of the total revenue requirement from retail customers to CRES suppliers.[23] This is despite Staff's admission that "Staff elected not to review whether supplier fees should be an appropriate revenue source."[24]

Staff's proposed adjustment *assumes* that the supplier fees and associated revenue are reasonable, without supporting evidence that this is so. Given the lack of evidence that this *is* so, the switching fees must be removed from AES's tariffs. If the switching fees are eliminated, Staff's adjustment must also be eliminated. AES will still recover its total test year revenue requirements, but the revenues will be recovered from customers (through base rates) rather than CRES suppliers (through switching fees). Considering the *de minimus* level of switching fee revenue compared to other revenues, the ratepayer impact of eliminating Staff's adjustment would barely be noticeable.

C. If the Commission approves the Supplier Fee Rider as filed, it must clarify responsibility for switching fees to the SSO.

Sheet No. G8 says that AES may charge the switching fee contained in Schedule D34 and that "[t]he AGS will be required to pay the Switching Fee on behalf of the Customer." Schedule D34 imposes the switching fee not only for migration from the SSO, but migration to the SSO. AES is not an "AGS" under the tariff, so responsibility for the switching fee is as clear as mud for switches from a CRES supplier to AES.

As currently worded, Schedule D34 arguably requires the former CRES supplier to pay $5 when a customer returns to the SSO. The tariff says the fee is payable by "the AGS," without

[23] *See* Staff Ex. 6 at 7; Tr. Vol. 1 at 39.

[24] Tr. Vol. V at 1144.

limitation to an AGS receiving a customer. To the extent this provision also applies to an AGS returning a customer to SSO service, the unfairness of this provision should be obvious.

Similar ambiguity arises in situations involving a switch from one AGS to another. "The AGS" could be read as encompassing both the former supplier and the new one. The tariff does not specify which is responsible for the supplier fee.

Notably, AES has disclosed that despite the tariff provision requiring a $5 switch fee for customers returning to the SSO, AES does not levy this fee.[25] The fee is not optional; it is required. So if the Commission approves the tariff, it must also direct AES to enforce it. If CRES suppliers are forced to pay $5 for every customer that migrates from the SSO, then AES must pay $5 every time a customer returns to the SSO. The question then becomes, to whom is the $5 payable? The tariff essentially renders the generation provider the collection agent for a fee owed by the customer. In this same spirit, equitable application of the tariff requires AES to charge each returning customer $5.

The better course of action is to eliminate the switching fee entirely. The switching fee is a stealth tax on shopping that has long outlived its usefulness. There is no evidence the fee is necessary to recover incremental costs not already recovered in distribution rates.

III. CONCLUSION

AES has not met its burden of proving that switching fees are just and reasonable. Accordingly, the Commission should modify the Switching Fee Rider and Schedule G8 to eliminate switching fees.

[25] Tr. Vol. I at 40-42.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post Hearing Brief was served by electronic mail this 4th day of March, 2022 to the following:

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