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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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The Public Utilities Commission of Ohio should find that AES Ohio is barred from relitigating the provisions, terms, and conditions of ESP I in this distribution rate case. If the Commission considers AES Ohio's arguments in opposition to the distribution rate freeze, then the Commission should uphold the distribution rate freeze as a provision, term, or condition of ESP I that was agreed to and supported by AES Ohio.[1]

Regarding AES Ohio's distribution rates, if the Commission issues an order on AES Ohio's rates, then the Commission should 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), and affirm the Staff Report's rejection of AES Ohio's request to charge customers $11.9 million per year for a mandatory energy efficiency program. Industrial Energy Users – Ohio ("IEU-Ohio") raised and supported each of these

[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).

arguments in its Initial Brief. IEU-Ohio's Reply Brief focuses primarily on the distribution rate freeze and AES Ohio's proposed mandatory $11.9 million annual energy efficiency program, but the omission of a response to issues raised by other parties should not be interpreted as IEU-Ohio's support or opposition to the issue.

I. ARGUMENT

A. AES Ohio is barred by R.C. 4903.10 and the doctrines of Res Judicata and Collateral Estoppel from arguing that the distribution rate freeze is not a provision, term, or condition of ESP I.

AES Ohio is barred by R.C. 4903.10 and the doctrines of Res Judicata and Collateral Estoppel from arguing that the distribution rate freeze is not a provision, term, or condition of ESP I. Pursuant to R.C. 4903.10, a party cannot challenge a decision if it did not seek rehearing of that decision within 30 days. Meanwhile, the doctrines of Res Judicata and Collateral Estoppel "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."[2] Regarding Collateral Estoppel, "[c]ollateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse finding."[3] Similar but separate, "[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."[4] In sum, Ohio law and

[2] *Ohio Power Co*., 2015-Ohio-2056 at ¶ 20 (*quoting Consumers' Counsel v. Pub. Util. Comm*., 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)).

[3] *ESP I*, Third Entry on Rehearing at ¶ 33, (Dec. 14, 2016) (*quoting Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Coyahoga App. No. 54899, 1989 WL 24908).

[4] *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995); *see also O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007).

legal precedents prohibit relitigation of matters that were or could have been litigated in a prior case.

AES Ohio has had numerous prior opportunities to argue that the distribution rate freeze is unjust or unreasonable, or that it is not a provision, term, or condition of ESP I. In the first instance, AES Ohio did not file an application for rehearing within 30 days of the Commission's order adopting the ESP I Stipulation. For this reason alone, R.C. 4903.10 now bars AES Ohio from challenging the Commission's approval of the ESP I stipulation, including the distribution rate freeze.

Further, AES Ohio has now reverted back to ESP I on more than one occasion. Each time that AES Ohio reverted to ESP I, the utility declined to argue that the distribution rate freeze was not a provision, term, or condition of ESP I. On July 27, 2016, AES Ohio filed its first motion to return to ESP I. The Commission granted AES Ohio's first reversion to ESP I, which included reinstatement of both the distribution rate freeze and the rate stabilization charge ("RSC"). AES Ohio did not oppose the distribution rate freeze at that time.

After AES Ohio's first reversion to ESP I, the utility then filed an application for a new ESP. But another opinion by the Supreme Court of Ohio led to AES Ohio withdrawing its application for a new ESP, resulting in AES Ohio reverting to ESP I for a second time. Once again, AES Ohio failed to allege that the distribution rate freeze was not a provision, term, or condition of ESP I. When AES Ohio filed its motion with the Commission to revert back to ESP I for the second time, AES Ohio argued that the Commission shall continue all of the provisions, terms, and conditions of ESP I, and even

argued that "[t]he Commission has no discretion to implement other rates."[5] The window of opportunity for AES Ohio to allege that the distribution rate freeze is not a provision, term, or condition of ESP I is now closed.

Beyond the fact that AES Ohio has passed on numerous opportunities to raise arguments in opposition to the distribution rate freeze, intervening parties have raised such arguments regarding another provision, term, or condition of ESP I - the RSC. AES Ohio's arguments regarding the distribution rate freeze are identical to the Office of the Ohio Consumers' Counsel ("OCC") arguments regarding the RSC, in which OCC argued that the RSC should not continue as a provision, term, or condition of ESP I. On multiple occasions, the Commission has held that OCC is barred from relitigating whether the RSC is a provision, term, or condition of ESP I. At the time of AES Ohio's first reversion to ESP I, the Commission found that parties' arguments both lacked merit and were barred by the doctrines of Res Judicata and Collateral Estoppel.[6] OCC then opposed the RSC on rehearing, and again when AES Ohio reverted to ESP I for the second time. Each time that OCC opposed the RSC, the Commission held that intervening parties are barred from arguing that the RSC is not a provision, term, or condition of ESP I.

> "We note that the fundamental issue in this assignment of error is whether OCC can relitigate the question of whether the RSC is one of the provisions, terms and conditions of ESP I. In the Second Finding and Order the Commission held that OCC cannot relitigate this issue on two separate and independent grounds. One, OCC is barred from relitigating

[5] ESP I, DP&L's Notice of Withdrawal of its Application in Case No. 16-395-EL-SSO Pursuant to R.C. 4928.143(C)(2)(a), (Nov. 26, 2019) at 3.

[6] *ESP I*, Entry on Rehearing (Feb. 19, 2013); Finding and Order (Aug. 26, 2016) at ¶ 23 ("On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of ESP I. No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of ESP I; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel.").

> the RSC by R.C. 4903.10. Two, OCC is barred from relitigating the RSC by res judicata and collateral estoppel."[7]

The Commission should uphold its prior rulings that the provisions, terms, and conditions of ESP I are barred from being relitigated, whether in regard to the RSC or the distribution rate freeze. For the same reasons that the Commission found that OCC was barred from relitigating the RSC, the Commission should find that AES Ohio cannot relitigate whether the distribution rate freeze is a provision, term, or condition of ESP I. To this end, the Commission should respect its prior precedents in order to assure the predictability which is essential in administrative law.[8]

B. The Commission should uphold the distribution rate freeze as a lawful term of ESP I that was agreed to by AES Ohio and approved by the Commission.

1. AES Ohio agreed in a negotiated settlement to forego its right to seek an increase in distribution rates.

The Commission should reject AES Ohio's constitutional arguments regarding the distribution rate freeze. AES Ohio argues that the Commission must reject the distribution rate freeze because it "is bound to give a constitutional rather than an unconstitutional construction to a statute", with the apparent belief that AES Ohio has a constitutional right to implement a distribution rate increase.[9] AES Ohio argues that it has a constitutional right to compensatory rates under *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm*., 262 U.S. 679, 690, 43 S.Ct. 675 (1923). However, AES Ohio misinterprets and misapplies the historic *Bluefield* precedent, and disregards longstanding precedent

[7] *ESP I*, Fifth Entry on Rehearing (June 15, 2021) at ¶ 35.

[8] *In re Application of Ohio Power Co*., 133 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E3d 1060 at ¶ 16 (*quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm*., 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm*., 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)).

[9] *See Buchman v. Bd. of Edn*., 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (1995).

in *Federal Power Com. v. Hope Natural Gas Co*., 320 U.S. 591, 64 S. Ct. 281 (1944) and *Market Street Railway Co. v. Railroad Comm'n of Cal*., 324 U.S. 548 (1945). There is a big difference between government destruction of a constitutional right and a utility independently agreeing to forego a constitutional right in exchange for an annual $76 million per year charge to customers.

The Commission and the Supreme Court of Ohio have long recognized that a public utility can voluntarily agree to lesser rates and lower earnings than which it may otherwise be entitled. For example, in *Hardin-Wyandot Lighting Co. v. Pub. Util. Comm*., 118 Ohio St. 592, 600, 162 N.E. 262 (1928), the Court held that a public utility can lawfully stipulate to accepting a lesser valuation of its plant in setting rates. Similarly, in *Columbus S. Power Co. v. Pub. Util. Comm*., 67 Ohio St.3d 535, 620 N.E.2d 835 (1993), the Court held that the Commission unlawfully ordered the utility to implement a phase-in of costs for converting the Zimmer generating plant from nuclear to coal, but the utility could have voluntarily elected to do so. Beyond Ohio law, *Bluefield* and *Hope Natural Gas* do not guarantee revenues to the utility. In *Market Street Railway*, the United States Supreme Court concluded that the investor interest stated in *Hope Natural Gas* did not protect a nearly defunct rail system from a rate reduction that would not provide the requested return to investors. Pursuant to *Market Street Railway*, no regulated utility has a constitutional claim to increased compensation to offset losses due to market forces or its own voluntary actions: "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic

forces."[10] Accordingly, the due process clause does not protect AES Ohio from losses incurred by market forces or its own independent voluntary actions.

The due process clause protects private industry from government mandates that destroy economic value. Any issues driven by market factors, such as a parent company acquisition and associated acquisition debt, are not in the realm of constitutionally protected actions. Likewise, a voluntary stipulation in which a utility makes an independent decision based upon economic considerations does not violate any constitutional right of the utility. Because AES Ohio supported and voluntarily agreed to a negotiated settlement that included a distribution rate freeze, there has been no governmental taking and AES Ohio has no valid constitutional claim.

Further, the Federal Energy Regulatory Commission ("FERC") and Courts have recognized that since the era of *Hope* and *Bluefield*, the utility regulatory paradigm has changed and that *Hope* and *Bluefield* do not protect the utility from earning less than its costs.

> "[S]ince the era of *Hope* and *Bluefield*, the 'utility regulatory paradigm' ha[s] changed, and that, while in the *Hope* and *Bluefield* era, '[i]t was understood that a utility's ability to provide service to its customers was dependent on its financial health; so as to ensure the provision of service at just and reasonable rates to the utility's customers as required by the Federal Power Act, it was necessary to require that the utility was able to recover its costs and a reasonable profit,' in the era of market-based regulation, 'each market entrant [i]s aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but that at other times, it might earn less than its costs.' . . . [I]n a competitive market, the Commission is responsible only for assuring that [the utility] is provided the opportunity to recover its costs."[11]

[10] *Market Street R. Co. v. Railroad Comm'n of Cal*., 324 U.S. 548, 567 (1945).

[11] *ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 138 FERC ¶ 61027 at ¶ 138-40 (Jan. 19, 2012) (emphasis added).

AES Ohio stills has an opportunity to earn compensatory rates, and indeed AES Ohio still charges customers a $76 million annual RSC.

Finally, this is not even the first distribution rate case in which AES Ohio has agreed to a limitation on its earnings. In its 1991 distribution rate case, AES Ohio (then DP&L) agreed to an "earnings cap" until its next distribution rate case.[12] This was before Ohio enacted the ESP statute, so the earnings cap functioned similar to AES Ohio's agreement in ESP I where it agreed to freeze its distribution rates in exchange for an approximately $76 million annual RSC. In other words, it is not unusual or unconstitutional for a utility to voluntarily agree to a settlement package that includes both costs and benefits, including limitations on future earnings. In the ESP I case, AES Ohio even filed testimony and an Initial Brief in support of the ESP I Stipulation, noting that "it is sound regulatory policy to encourage parties to [Commission] proceedings to resolve issues through negotiated settlements. Moreover, [in a case of substantial magnitude], a stipulated result [is] of even greater benefit than in most proceedings."[13] AES Ohio supported the stipulation that includes the distribution rate freeze and independently agreed to forego any distribution rate increase as part of a negotiated settlement. Upholding the distribution rate freeze agreed to by AES Ohio in exchange for a $76 million annual RSC would not violate any constitutional rights of the utility.

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[12] *In re The Dayton Power & Light Company for Authority to Amend its Filed Tariffs to Increase the rates and Charges for Electric Service*, Case No. 91-414-EL-AIR, Opinion and Order (Jan. 22, 1992) at 6-7.

[13] *ESP I*, Initial Post-Hearing Brief of The Dayton Power and Light Company in Support of the Stipulation and Recommendation (Mar. 26, 2009) at 3-4; citing *In the Matter of the Restatement of the Accounts & Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Nov. 26, 1985) Opinion and Order at 19; *see also*, *In the Matter of the Application of The Dayton Power and Light Co. for Authority to Amend its Filed Tariffs*, Case No. 91-414-EL-AIR, Opinion and Order (Jan. 22, 1992) at 23-26.

2. Any Constitutional analysis of AES Ohio's rates should be conducted on the totality of the utility's earnings.

Any constitutional analysis of AES Ohio's rates requires an evaluation of the entirety of the utility's rates and earnings, including ESP I and the annual RSC charge. In this case, only AES Ohio's distribution rates are under consideration – there is no analysis of the utility's ESP rates or the approximately $76 million annual RSC. Under *Bluefield*, *Hope*, and their progeny, a constitutional analysis of the just and reasonableness of AES Ohio's rates requires consideration of the utility's earnings in total, as well as all of the rates and riders under ESP I. AES Ohio has not presented a judicially recognized basis for finding that a taking would occur if the Commission upholds the distribution rate freeze, but even so, such a basis would require analysis of the totality of AES Ohio's rates. Under *Hope Natural Gas,* in reviewing a takings claim, "[i]t is not theory but the impact of the rate order which counts" and "[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, *judicial inquiry under the Act is at an end*."[14] AES Ohio's claim that it will suffer a constitutional taking if it is not allowed to implement distribution rates fails to consider the totality of its rates, including the approximately $76 million annual RSC.

Further, *Bluefield* and the historic ratemaking precedents contemplate situations where the government (through utility regulatory commissions) orders "confiscatory" rates, but such cases do not contemplate rates and settlement terms voluntarily agreed to by the utility. "The Fifth Amendment does not proscribe the taking of property; it

[14] *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. at 602.

proscribes taking *without just compensation*."[15] To prove that an unconstitutional taking has occurred, AES Ohio must demonstrate that the government forced the taking upon it and that the totality of its rates are unjust and unreasonable.[16] "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."[17] AES Ohio's distribution rates do not constitute the totality of the utility's rates. A regulated utility is not entitled to a guaranteed profit, and a utility "that is unable to survive without charging exploitative rates has no entitlement to such rates."[18]

Further, since much of the electric industry is now subject to market prices rather than fixed rates based upon a cost-of-service approach, the *Bluefield* and *Hope* constitutional analysis are no longer directly applicable.[19] For AES Ohio to prevail on a constitutional takings claim, it must demonstrate not just that the distribution rate freeze results in rates that are unjust and unreasonable, but that the Commission has unconstitutionally forced unreasonable rates upon AES Ohio without just compensation. Instead, the facts of this case are that AES Ohio voluntarily agreed to the distribution rate freeze as a term of a negotiated settlement that also included an approximately $76 million annual RSC charge. AES Ohio has been more than justly compensated for the

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[15] *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (*citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 297, n. 40 (1981) (emphasis added).

[16] *Fed. Power Comm. v. Hope Natural Gas Co*., 320 U.S. 591, 602 (1944) ("It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.").

[17] *Permian Basin Area Rate Cases*, 390 U.S. 747 at 768-770 (1968).

[18] *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (*citing FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 590 (1942) & *Market Street Ry. v. Railroad Comm'n of Cal.,* 324 U.S. 548 (1945)).

[19] *ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 138 FERC ¶ 61027 at ¶ 138-39 (Jan. 19, 2012).

distribution rate freeze, to the tune of $76 million per year which it continues to charge to customers. AES Ohio's ESP I and the annual $76 million RSC must be included in any constitutional analysis of AES Ohio's rates.

3. The doors of the Commission are not closed to AES Ohio for a distribution rate increase.

The Commission should uphold the distribution rate freeze at least until such time as new standard service offer rates are established. In *Hope Natural Gas,* the utility argued that the Federal Power Commission had established rates that were unjust, unreasonable, and unconstitutionally confiscatory.[20] Such arguments were not unlike the arguments AES Ohio has raised against the distribution rate freeze in this case, and the Court noted:

> "It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. . . . Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, **the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments**."[21]

Accordingly, much like *Hope Natural Gas* recognized that the Natural Gas Act contained machinery for rate adjustments, Ohio law and ESP I also contain machinery for AES Ohio to establish new rates. Pursuant to the statutory scheme in R.C. Chapter 4928, AES Ohio is not prohibited from filing an application to establish new standard service offer rates. And by its own terms, the distribution rate freeze will only remain in effect until such time

[20] *Federal Power Com. v. Hope Natural Gas Co*., 320 U.S. 591, 615**,** 64 S. Ct. 281 (1944)

[21] *Id*.

as the Commission establishes new standard service offer rates. As the Court noted in *Hope Natural Gas*, "the doors of the Commission are open."[22]

4. Amending ESP I to end the distribution rate freeze would have a chilling effect on future settlement discussions. Even if the distribution rate freeze is not a term of ESP I, it is still a term of a negotiated settlement agreed to by AES Ohio and approved by the Commission.

The Commission should uphold the distribution rate freeze as a term of a negotiated settlement between AES Ohio, the Commission Staff, and numerous intervening parties. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations, and stipulations are routinely filed in Commission proceedings. Although not binding upon the Commission, the terms of a stipulation are accorded substantial weight.[23] This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the case. The ESP I Stipulation was agreed to by AES Ohio and the vast majority of the intervening parties and was only partially opposed by one party.

The Commission has discussed in numerous cases the standard of review for considering the reasonableness of a stipulation.[24] When considering the reasonableness of a stipulation, the Commission determines if the settlement is: (1) the product of serious bargaining among capable, knowledgeable parties, (2) as a package, in the benefit of ratepayers and the public interest, and (3) in violation of any important regulatory principle or practice. The Supreme Court of Ohio has endorsed the Commission's analysis using

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[22] *Id.*

[23] Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), *citing Akron v. Pub. Util. Comm*., 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

[24] *See, e.g., In re Cincinnati Gas & Elec. Co*., Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co*., Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co*., Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co*., Case No. 88-170-EL-AIR, Opinion and Order (Nov. 26, 1985).

these criteria and stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.[25]

Regarding the ESP I Stipulation, AES Ohio itself filed testimony and briefing in support of the reasonableness of the Stipulation. AES Ohio argued that the ESP I Stipulation is the product of serious bargaining among capable, knowledgeable parties; as a package benefits customers and the public interest; and does not violate any important regulatory principle.[26] In this case, the Commission applied these three criteria and determined that the ESP I Stipulation was reasonable and should be approved.

The Commission should uphold the approved ESP I Stipulation as a negotiated settlement that is the product of serious bargaining, in the benefit of ratepayers and the public interest, and not in violation of any important regulatory principle or practice. Even if the distribution rate freeze is not a provision, term, or condition of ESP I as that term is used in R.C. 4928.143(C)(2)(b), it remains a term of a negotiated settlement agreed to by AES Ohio. If the Commission does not uphold the settlement, it would have a chilling effect on future settlement negotiations in Commission cases. If a utility can ask that certain terms of a settlement be upheld when it is in the utility's best interest (*i.e*. the RSC), but that other terms end when they are not in the utility's best interest (*i.e*. the rate freeze), then the settlement is an illusory agreement that provides no benefit to consumers for their bargain.

The second prong of the Commission's criteria for evaluating the reasonableness of a stipulation is whether the stipulation *as a package* benefits ratepayers and the public interest. In the ESP I case, the RSC and the distribution rate freeze were bargained for

[25] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm*., 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), *citing Consumers' Counsel* at 126.

[26] ESP I, Initial Post-Hearing Brief of DP&L (Mar. 26, 2009).

terms of a package settlement – AES Ohio received the RSC in exchange for providing consumers a guarantee that distribution rates would be frozen. When the Supreme Court of Ohio held that provider of last resort ("POLR") charges like the RSC were unlawful, AES Ohio and the Commission ultimately allowed the RSC to continue as part of this bargained for package.[27] But now that AES Ohio wants to charge consumers more in distribution rates, it argues that the rate freeze is unlawful.

Further, the third prong of the Commission's criteria for evaluating the reasonableness of a stipulation is whether it violates any important regulatory principle. AES Ohio itself argued that the ESP I Stipulation did not violate any important regulatory principle and should be approved.[28] Now, AES Ohio has changed course and argues that the ESP I Stipulation is unconstitutional. It is, of course, an important regulatory principle that Stipulations and Commission orders be constitutional. At the time the ESP I Stipulation was bargained for and agreed to, both AES Ohio and the Commission found that the Stipulation did not violate any important regulatory principle. But now that AES Ohio's bargain is not in its own best interest, it argues that the Stipulation is unconstitutional. While such arguments should be barred by R.C. 4903.10, Res Judicata, and Collateral Estoppel, if the Commission adopts AES Ohio's argument, it will have a chilling effect on future settlement negotiations. For this reason, the Commission should uphold the bargained-for and approved ESP I Stipulation, including the distribution rate freeze.

[27] *ESP I*, Third Entry on Rehearing (Dec. 14, 2016); Fifth Entry on Rehearing (June 16, 2021).

[28] *ESP I*, Initial Post-Hearing Brief of The Dayton Power and Light Company in Support of the Stipulation and Recommendation (Mar. 26, 2009).

C. If AES Ohio cannot fulfill its statutory obligation to provide reliable electric utility service, then pursuant to R.C. 4933.83(B) the Commission should consider whether to revoke its certified franchise and authorize another electric supplier to furnish electric service.

AES Ohio argues that if the distribution rate freeze is implemented, AES Ohio would be forced to make drastic cuts to its reliability-related expenditures, which create new and additional challenges to AES Ohio's ability to provide reliable service.[29] Pursuant to R.C. 4933.83(B), when a utility cannot furnish adequate service, the Commission may, after a hearing and due notice, enter an order specifying in particular the reasons the utility failed to propose to render physically adequate service, and may authorize another electric supplier to provide electric service. Accordingly, if AES Ohio's allegations about making drastic cuts to its reliability-related expenditures are true, then the Commission should reopen the record or hold a hearing to take additional evidence on the financial condition of AES Ohio and its ability to provide adequate service. If AES Ohio cannot provide adequate service to meet the reasonable needs of customers in its certified territory, then the Commission should consider whether to revoke AES Ohio's certified franchise and authorize another electric supplier to provide service under R.C. 4933.83(B).

D. The Commission should deny AES Ohio's request for an $11.9 million annual mandatory energy efficiency program.

The Commission should deny AES Ohio's request for an $11.9 million annual mandatory energy efficiency program because it is unlawful and unreasonable. IEU-Ohio demonstrated in its Initial Brief that the Commission should adopt the Staff Report's recommendation to not approve the program. The mandatory annual $11.9 million

[29] AES Ohio Ex. 95 (Rebuttal Testimony of Storm) at 10.

charge to customers for energy efficiency proposed by AES Ohio is unlawful because it does not include a mercantile opt-out provision, would be a mandatory charge to all customers in violation of R.C. 4928.66, and would violate numerous policies enumerated in R.C. 4928.02. Regarding the policies in R.C. 4928.02 specifically, AES Ohio asserts that these policies support adoption of the energy efficiency program, when in fact it is the policy of the state of Ohio for the Commission to prohibit the recovery of generation-related costs through distribution rates.[30] Beyond the unlawful nature of the program, it would be unreasonable for the Commission to approve AES Ohio's proposal because AES Ohio failed to meet its burden to demonstrate the benefits and costs of the program to customers. AES Ohio relied extensively on hearsay evidence from the Cadmus Group and Wood McKenzie to derive its proposal, but no analysis or underlying data in support of the proposed energy efficiency program was introduced into the record.

Further, the only party in this case that supports AES Ohio's proposal is AES Ohio itself. No customers or customer groups in this case support AES Ohio's proposed energy efficiency program. While Ohio Partners for Affordable Energy ("OPAE") and the Ohio Environmental Council ("OEC") each filed objections regarding the energy efficiency program, neither party chose to file an initial brief in this case.[31] Pursuant to Ohio Adm.Code 4901-1-28(D), "[i]n a rate case proceeding, an objection to a staff report will be deemed withdrawn if a party fails to address the objection in its initial brief." Along with OPAE and OEC withdrawing their objections regarding the $11.9 million annual energy efficiency program, AES Ohio has provided no additional substantive arguments in support of its proposed energy efficiency program. Accordingly, for the reasons

[30] R.C. 4928.02(H); see also, R.C. 4928.02(C), 4928.02(G), and 4928.02(M).
[31] OPAE Objection at 5; OEC Objection at 1, 2.

asserted by IEU-Ohio in its Initial Brief, the Commission should uphold the Staff Report's recommendation and reject AES Ohio's request for an $11.9 million annual mandatory energy efficiency program.

II. CONCLUSION

The Commission should find that AES Ohio's arguments in opposition to the distribution rate freeze are barred by R.C. 4903.10 and the doctrines of Res Judicata and Collateral Estoppel. The Commission should not allow AES Ohio to relitigate matters that have already been decided, or that could have been raised previously but have been forfeited. However, if the Commission does consider AES Ohio's arguments in opposition to the distribution rate freeze, the Commission should uphold the distribution rate freeze as a provision, term, or condition of ESP I that was agreed to by AES Ohio in a negotiated settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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