

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Case No. 08-1094-EL-SSO
	:	

In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
	:	

In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	:	Case No. 08-1096-EL-AAM
	:	

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC
	:	

**AES OHIO'S MEMORANDUM IN OPPOSITION TO THE APPLICATION FOR
REHEARING BY OFFICE OF THE OHIO CONSUMER'S COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") seeks rehearing from the Commission's June 15, 2022 Seventh Entry on Rehearing, arguing that the Commission excused AES Ohio's alleged non-compliance with the Commission's August 11, 2021 Sixth Entry on Rehearing. The Seventh Entry on Rehearing authorized AES Ohio to file an updated version of its Rate Stabilization Charge ("RSC") tariff, which AES Ohio proposed last July pursuant to the Commission's order in its June 16, 2021 Fifth Entry on Rehearing. The Commission ruled in the Seventh Entry on Rehearing that the tariff would be effective upon filing.

As demonstrated below, AES Ohio has substantially complied with the Commission's orders to include language in its tariff that the RSC is "refundable to the extent permitted by law." June 16, 2021 Fifth Entry on Rehearing, ¶64; August 11, 2021 Sixth Entry on

Rehearing, ¶¶51-53. Moreover, there is no dispute that AES Ohio has fully complied with the most recent and currently operative entry on rehearing. June 15, 2022 Seventh Entry on Rehearing, ¶¶28-29.

As explained below, AES Ohio would not object to any clarification by the Commission on rehearing that the effective date of the current RSC tariff dates back to August 11, 2021, consistent with the Sixth Entry on Rehearing.

In the Fifth Entry on Rehearing (¶¶52, 64), the Commission held that it "has no statutory authority to make rates and charges subject to refund at [its] discretion," but in an effort not "to evade Supreme Court review" and in light of "the extraordinary circumstances in this case," the Commission directed AES Ohio to update its RSC tariff to propose language to make the charge subject to refund "to the extent permitted by law." Pursuant to that order, on July 16, 2021, AES Ohio filed a redline tariff explaining that the RSC would be subject to refund "to the extent permitted by law."

Both OCC and AES Ohio filed applications for rehearing from the Fifth Entry on Rehearing,¹ which were denied in the Sixth Entry on Rehearing (¶50). Also in the Sixth Entry on Rehearing, ¶48, the Commission approved the updated tariff. It is correct that AES Ohio did not take the additional administrative step of filing a final version of the redline tariff until after the Seventh Entry on Rehearing was issued. Nevertheless, the updated tariff was approved in the Sixth Entry on Rehearing (¶48). Indeed, as the Commission further held, "If OCC files an appeal

¹ AES Ohio argued in its application for rehearing that the Commission should not have ordered AES Ohio to update its tariff with language that the RSC is refundable "to the extent permitted by law." AES Ohio does not waive that argument, or any other arguments that the RSC is both lawful and not subject to refund.

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 on Rehearing.*" Sixth Entry on Rehearing, ¶47 (emphasis added).

AES Ohio has thus substantially complied with the Commission's orders. The Commission has held that a violation has not occurred if a party substantially complies with the applicable requirement. *E.g., In the Matter of the Application of the AEP Ohio Transmission Co.*, Opinion, Order and Certificate, Case No. 17-2085-EL-BTX, ¶¶12, 83 (Sept. 20, 2018) (finding that substantial compliance with a Commission rule had occurred when the utility inadvertently failed to provide notice of particular deadlines, when the utility had otherwise complied with the notice requirements). *Accord: Valley Greyhound Lines, Inc. v. Public Utilities Com.*, 148 Ohio St. 603, 606-07, 76 N.E.2d 608 (1947) (affirming Commission's finding that applicants' joint application to amend certificate of public convenience to substitute successor company was in "substantial compliance" with applicable statute).

In the Seventh Entry on Rehearing, pp. 7-8, the Commission again approved that tariff and authorized AES Ohio to file a final version. On June 22, 2022, AES Ohio complied with that order.

AES Ohio recognizes the importance of complying with Commission orders and the need to maintain final versions of its tariffs in all required dockets. AES Ohio further stresses that it did not, and would not, deliberately disobey or disregard an order of the Commission. Thus, AES Ohio would not oppose an order on rehearing clarifying that its current RSC tariff became effective as of the date of the Sixth Entry on Rehearing, i.e., August 11, 2021. Doing so would eliminate any and all prejudice claimed by OCC in its application for rehearing.

OCC (pp. 17, 19) asks the Commission to order AES Ohio to refund \$60 million to customers and to penalize AES Ohio \$9.4 million. The Commission should reject that request for the following six separate and independent reasons.

First, as shown above, AES Ohio is in compliance or substantial compliance with the Commission's orders. There is no basis to penalize AES Ohio.

Second, there is no evidence suggesting that AES Ohio acted in bad faith or that it deliberately disobeyed the Commission's order.

Third, the fact that AES Ohio has agreed not to oppose a Commission order clarifying that the tariff was effective as of the date of the Sixth Entry on Rehearing eliminates the alleged prejudice that OCC claims in its application.

Fourth, as to OCC's request for a refund of the RSC, refunds are unlawful under Ohio law. R.C. 4905.32. There has been no holding by this Commission or the Supreme Court that the RSC was unlawful, or that the RSC could be subject to refund.

Fifth, OCC's request for refunds and penalties is a significant overreach. To AES Ohio's knowledge, the Commission has never issued sanctions of the magnitude that OCC seeks here, and OCC cites no precedent for such severe sanctions, particularly in the absence of any prejudice. There is no evidence of bad faith by AES Ohio or injury to any of its customers. There is thus no basis to sanction AES Ohio here.

Sixth, OCC cannot establish a statutory violation here. AES Ohio charged customers the amounts included in its tariffs, so it has not violated R.C. 4905.22 or 4505.32. AES Ohio has substantially complied with the Commission's orders, so it has not violated R.C.

4905.04. Nor is there any evidence under R.C. 4905.56 that any employee or agent of AES Ohio "willfully" failed to comply with any Commission order.

Finally, OCC argues repeatedly that AES Ohio relied on or argued that the tariff filed on July 16, 2021, was not approved, as stated in the Fourth Merit Brief filed by AES Ohio with the Ohio Supreme Court four months ago on March 8, 2022.² The point is the Brief was not an argument, but rather, a "clarification." With 20/20 hindsight, the clarification may have been inartful, but the underlying point is accurate. Neither the Commission nor the Supreme Court has ruled that any of the rates collected by AES Ohio after August 11, 2021 are subject to refund. Indeed, the Commission has expressly rejected OCC's arguments that it has any discretion to make the RSC subject to refund as having "no basis in law." Fifth Entry on Rehearing, ¶63. If the Supreme Court holds *both* that the RSC is unlawful *and* that the Commission had the power to authorize any refund of the charge, then and only then may it be subject to refund; in that event, a tariff has been filed consistent with the Commission's most recent Seventh Entry on Rehearing with language authorizing refunds "to the extent permitted by law." However, that language is not operative today because no refund has been ordered. The rate has not changed and its refundability, if any, remains reviewable by the Supreme Court.

² One wonders why if OCC believes AES Ohio's and the Commission's conduct was so "unfair," "curious," "inappropriate," "continuing," "unlawful," "illegal," and "inexplicable" (Application for Rehearing, pp. 1, 2, 6, 9, 10 and 20), OCC did not raise the issue immediately after the Commission's Sixth Entry on Rehearing on August 11, 2021. It is certainly plausible that OCC, like the Commission and AES Ohio, viewed the Company's July 16, 2021 filing as compliant, especially when OCC's minimum position (*id.* at pp. 11, 17 and 22) is acceptable to AES.

Respectfully submitted,

/s/ Christopher C. Hollon

Christopher C. Hollon (0086480)

AES OHIO

1065 Woodman Drive

Dayton, OH 45432

Telephone: (937) 259-7358

Telecopier: (937) 259-7178

Email: christopher.hollon@aes.com

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

FARUKI PLL

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3747

Telecopier: (937) 227-3717

Email: jsharkey@ficlaw.com

djireland@ficlaw.com

Counsel for AES Ohio

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing AES Ohio's Memorandum in Opposition to the Application for Rehearing by Office of the Ohio Consumer's Counsel has been served via electronic mail upon the following counsel of record, this 25th day of July, 2022:

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

Counsel for Staff of the Commission

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

Counsel for Ohio Energy Group

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

Counsel for The Ohio Manufacturers'
Association Energy Group

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

Counsel for The Kroger Company

Maureen R. Willis
Ambrosia E. Wilson
John Finnigan
The Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215
maureen.willis@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov

Counsel for The Office of the Ohio
Consumers' Counsel

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

Counsel for the University of Dayton

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

Counsel for Industrial Energy Users-Ohio

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

Counsel for Ohio Partners for
Affordable Energy

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

Counsel for Retail Energy Supply
Association

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

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

Counsel for Walmart Inc.

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

Counsel for IGS Energy

Evan Betterton
Michael Nugent
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Evan.betterton@igs.com
Michael.nugent@igs.com

Counsel for Interstate Gas Supply, Inc.

N. Trevor Alexander
Steven Lesser
Mark T. Keaney
Kari Hehmeyer
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
41 South High Street, Suite 2600
Columbus, OH 43215-6164
talexander@beneschlaw.com
slesser@beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@beneschlaw.com

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

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

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

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

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

Counsel for Armada Power, LLC
Constellation NewEnergy, Inc.
Constellation Energy Commodities
Group, Inc.
and Nationwide Energy Partners, LLC

Counsel for The City of Dayton
and Honda Development & Manufacturing
of America, LLC
Chris Tavenor
ENVIRONMENTAL LAW & POLICY
CENTER
1145 Chesapeake Avenue, Suite 1
Columbus, OH 43212-3449
ctavenor@elpc.org

Counsel for Environmental Law & Policy
Center

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

Counsel for The Ohio Hospital Association
Kara Herrnstein
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
kherrnstein@bricker.com

Counsel for ChargePoint, Inc.

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

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

Attorneys for Nationwide Energy
Partners LLC

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

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

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

Counsel for One Energy Enterprises, LLC

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

7/25/2022 3:07:39 PM

in

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

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