**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| |  |  |  | | --- | --- | --- | | In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan.  In the Matter of the Application of The Dayton Power and Light Company d/b/a  AES Ohio for Approval of Revised Tariffs  In the Matter of the Application of The Dayton Power and Light Company d/b/a  AES Ohio for Approval of Accounting  Authority Pursuant to Ohio Rev. Code  § 4905.13 | )  )  )  )  )  )  )  )  )  )  )  ) | Case No. 22-900-EL-SSO  Case No. 22-901-EL-ATA  Case No. 22-902-EL-AAM | |  |  |

**REPLY BRIEF FOR CONSUMER PROTECTION**

**BY**

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# INTRODUCTION

AES Ohio’s Settlement caters to the interests of the utility and the Signatory Parties, instead of the public interestthat should be paramount. The responsibility of the PUCO and its Commissioners is to the public -- meaning all consumers. It is especially important that the PUCO protect consumers in light of the recent pandemic, the financial hardships it has caused, and the abject poverty experienced by Dayton-area consumers, even before the pandemic.[[1]](#footnote-2)

AES Ohio failed to prove, even under the 2008 Energy Law that has been interpreted so favorably to utilities, that its electric security plan (“ESP”) is more favorable in the aggregate than a market rate offer (“MRO”). The evidence demonstrates the opposite—that a market rate offer would be substantially more favorable to Dayton-area consumers, and all the more so during their struggles with the pandemic and financial crisis.

And the Signatory Parties failed to prove that the Settlement meets the PUCO’s three-part test. The evidence demonstrates the opposite—that the Settlement fails all three parts because it was not the product of serious bargaining among *knowledgeable* parties, it does not benefit consumers or the public interest, and it violates many important regulatory principles and practices.

# II. REPLY

## A. DP&L’s electric security plan is less favorable in the aggregate to consumers than a market rate offer.

One of the few consumer protections in the utility-friendly 2008 Energy Law is the more favorable in the aggregate statutory test. By law (R.C. 4928.143(C)), the electric utility must show that its electric security plan, including all terms and conditions, is more favorable in the aggregate than a market rate offer. AES Ohio bears the burden of proof in this regard.[[2]](#footnote-3) OCC Witness Fortney testified that AES Ohio’s electric security plan, as adopted under the Settlement, failed this test.[[3]](#footnote-4)

Most of the Signatory Parties ignored the statutory test. Walmart, OEG, RESA, OELC, IGS, and Constellation did not even mention the statutory test. So much for those “knowledgeable” parties being considered as part of the PUCO’s three-prong test. OPAE/City of Dayton mentioned the statutory test just in passing.[[4]](#footnote-5) These parties seem content on relying on their foundationless recommendation, per the Settlement, that the PUCO find the electric security plan more favorable in the aggregate.[[5]](#footnote-6)

The PUCO Staff and AES Ohio argue that under the electric security plan there are quantitative benefits not found under a market rate offer.[[6]](#footnote-7) The quantitative benefits they cling to are: (1) the withdrawal of AES Ohio’s request for decoupling deferrals in Case No. 20-140-EL-AAM; and (2) accelerated cost recovery under AES Ohio’s electric security plan.[[7]](#footnote-8) The PUCO Staff and AES Ohio also emphasize qualitative ESP benefits not found in an MRO: reliability improvements, low-income assistance and economic development benefits.[[8]](#footnote-9) OMAEG/Kroger provide similar, but abbreviated, arguments.[[9]](#footnote-10) Additionally, OMAEG/Kroger submit that the PUCO should not consider the short-run costs to consumers of the accelerated riders because that would be against prior PUCO precedent.[[10]](#footnote-11)

The PUCO should reject these unsound arguments. They illustrate a fundamental misunderstanding of how the PUCO itself has conducted the more favorable in the aggregate test.

In singling out the withdrawal of AES Ohio’s decoupling request as a benefit on the ESP side only, AES Ohio, the PUCO Staff, and OMAEG/Kroger ignore reality. It is commonplace for a distribution rate case settlement to include concessions such as withdrawing pleadings or pending PUCO requests.[[11]](#footnote-12) Such a withdrawal CAN be accomplished through an MRO, *coupled with a distribution case*. And, unfortunately, that is the approach affirmed by the Ohio Supreme Court.[[12]](#footnote-13) One need only look at the numerous distribution case settlements[[13]](#footnote-14) where parties have withdrawn other pending requests to see that AES Ohio, PUCO Staff, and OMAEG/Kroger are wrong. And as pointed out by OCC,[[14]](#footnote-15) accelerated cost recovery under an electric security plan requires consumers to pay more quickly than they would otherwise pay under an MRO.[[15]](#footnote-16) So there is no benefit to consumers, only a cost.

This flawed reasoning taints the other arguments of AES Ohio, the PUCO Staff and OMAEG/Kroger as well. These parties allege there are benefits of the ESP not achievable through an MRO, including reliability improvements, low-income assistance and economic development. As OCC Witness Fortney testified, improvements in reliability expected under AES Ohio’s new distribution investment rider are hypothetical and should not be considered by the PUCO.[[16]](#footnote-17) As far as ESP benefits from low-income assistance and economic development, these provisions too can be found in distribution rate case settlements.[[17]](#footnote-18) The manufactured “ESP only” qualitative benefits argued by AES Ohio, the PUCO Staff and OMAEG/Kroger should be considered as available under an MRO and a distribution rate case. These qualitative benefits are truly a “wash” as the PUCO has often described it.

As far as OMAEG/Kroger’s argument that the PUCO should not consider the short-run cost of the accelerated riders to consumers, even they admit that there are times when the PUCO should depart from precedent.[[18]](#footnote-19) Now is that time. The electric security plan under review is three years –short term. Counting the benefits during the period of the plan (three years) makes sense and is consistent with the statutory test under Ohio law, which looks at the electric security plan “so approved, including its pricing and all other terms and conditions.”[[19]](#footnote-20) The pricing and all other terms and conditions are in effect for three years and thus should be measured for three years. And, as noted by OCC Witness Fortney, quoting Marshall Dillon of Gunsmoke, “There’s people out there just barely hangin’on.”[[20]](#footnote-21)

## B. The Settlement fails to satisfy the PUCO’s three-prong settlement standard.

### The Settlement is not the product of serious bargaining between, knowledgeable capable parties.

AES Ohio and other Signatory Parties claim the Settlement was the product of serious bargaining between knowledgeable, capable parties.[[21]](#footnote-22) AES Ohio claims that there are a large number of signatories to this Settlement, that all parties were invited to settlement discussions and allowed to participate, that the settlement discussions lasted many months, and that all parties were represented by experienced counsel.[[22]](#footnote-23) Additionally, AES Ohio points to the fact that it responded to lots of data requests from intervenors.[[23]](#footnote-24)

None of this contradicts OCC’s point that intervening parties were not knowledgeable about the Settlement’s ultimate $160 million cost to their clients. There is no evidence to indicate otherwise. Prior to signing the Settlement, AES Ohio had “not attempted to quantify…benefits” “to each of the customer classes under the Stipulation.”[[24]](#footnote-25) And AES Ohio witness Sharon Schroder testified that AES Ohio quantified “some…but not all” benefits to consumers under the Settlement.[[25]](#footnote-26)

Without understanding the total cost the Settlement imposed on consumers, the Signatory Parties were not “knowledgeable” of its terms. This is true regardless of AES Ohio and other parties’ contentions about the format, length, and numerosity of settlement conversations and the experience of the participating parties. For this reason, as explained more fully in OCC’s initial brief, the PUCO should find the Settlement violates the first prong of its settlement standard.

### The Settlement does not benefit consumers and the public interest.

Next, AES Ohio claims the Settlement benefits consumers and the public interest for four reasons, all of which are wrong. First, AES Ohio claims in its initial brief that the Settlement benefits consumers and the public interest because it provides for a Distribution Investment Rider that “will allow AES OHIO to improve its reliability.”[[26]](#footnote-27) This is not guaranteed. OCC witness Bob Fortney testified that, based on his analysis of five years of spending and CAIDI/SAIFI performance for every investor-owned Ohio electric distribution utility, “there does not seem to be any direct one-to-one connection between spending and safety and reliability.”[[27]](#footnote-28) So, spending a lot of money do not guarantee a utility will meet its reliability targets more often, as AES Ohio incorrectly asserts.

AES Ohio attempts to discredit Mr. Fortney’s conclusion by claiming “he admitted that as compared to the six other Ohio utilities, AES Ohio spent the second lowest amount on reliability, and failed to achieve the Commission’s reliability targets more than other Ohio utilities.”[[28]](#footnote-29) First, this so-called “admission” does not contradict Mr. Fortney’s testimony; it merely replicates it. Exhibit RBF-1, attached to Mr. Fortney’s direct testimony, already identified AES Ohio’s reliability performance and spending levels, along with those of every other investor-owned Ohio electric distribution utility.[[29]](#footnote-30) Second, AES Ohio attacks Mr. Fortney’s analysis of a statewide trend by cherry-picking a single, favorable data point. Individual data points do not disprove Mr. Fortney’s overall conclusion that high levels of spending do not equal better reliability. So, the increased spending provided for in the Settlement may never benefit consumers and the public interest.

Second, AES Ohio provides a list of “specific benefit to consumers” included in the Settlement.[[30]](#footnote-31) While some of these individual provisions may benefit consumers, “the Stipulation must be considered as a package.”[[31]](#footnote-32) This means that the PUCO should consider the impact the Settlement will have on consumers in its totality, rather than by analyzing standalone provisions. That impact is best understood as a $160 million charge to consumers over the next three years.

Even if the PUCO does consider the benefits of the Settlement provisions in isolation, it should find that many terms in fact provide no benefit, or, at most, speculative benefits to consumers and the public interest. Specifically, the following Settlement terms identified by AES Ohio as uniquely beneficial to consumers as a result of its electric security plan, in fact are not:

* **“AES Ohio will provide a Standard Service Offer via a competitive bidding process. Stipulation § III.”[[32]](#footnote-33)**

Providing a standard service offer via a competitive bid process is not a unique benefit of the Settlement because Ohio law (R.C. 4928.141) requires all electric distribution utilities to provide a standard service offer. A standard service offer can be the product of either an electric security plan or a market rate offer.[[33]](#footnote-34) *Either form of a standard service offer involves competitive bidding.* So, AES Ohio would be required to establish a standard service offer via a competitive bidding process even if this Settlement were not approved. Therefore, this provision is not a benefit *of the Settlement.*

* **“AES Ohio will implement a Regulatory Compliance Rider ("RCR") to recover deferred costs. Stipulation § VI.”[[34]](#footnote-35)**

The RCR is a benefit to the utility, not to consumers. The RCR allows AES Ohio to collect $76 million of deferred (*past*) charges from consumers. These charges are unrelated to AES Ohio’s standard service offer to consumers over the next three years.[[35]](#footnote-36) And some of these costs were previously authorized transition costs, which DP&L was only allowed to collect from consumers until December 31, 2010.[[36]](#footnote-37) The RCR allows AES Ohio to collect tens of millions of dollars for past costs, unrelated to current service, and in violation of Ohio law. This benefits AES Ohio, not consumers and is unlawful.

* **“AES Ohio shall implement a Low-Income Assistance Program, which will provide $5.7 million annually to fund (a) weatherization and bill payment assistance programs for low-income customers, and (b) a Disadvantaged Communities Energy Initiative, which will provide funds for energy-related purposes in Qualified Census Tracks. Stipulation § IX.E.”[[37]](#footnote-38)**

While a small number of needy consumers may benefit from the Low-Income Assistance program, it must be noted that AES Ohio collects funding for the program from residential consumers through the Customer Programs Rider.[[38]](#footnote-39) So any benefits provided comes at a cost to the consumers who pay for it. Residential consumers will pay approximately $15 million to fund this benefit. Shareholders provide no funding.

* **“AES Ohio shall continue its Tax Savings Credit Rider, which returns to customers certain amounts associated with tax-law changes in the Tax Cuts and Jobs Act.[[39]](#footnote-40)**

The Tax Savings Credit Rider is not a unique benefit of the Settlement because it already exists. The PUCO approved AES Ohio’s Tax Savings Credit Rider in its September 26, 2019 Opinion & Order in Case No. 19-0572-EL-UNC.[[40]](#footnote-41) AES Ohio is obligated under the PUCO’s Order to continue the rider. Since this Rider already exists, it is not a benefit *of the Settlement* that can be counted.

* **“Upon receiving customer consent, AES Ohio will provide customer data to CRES providers and third-party aggregators so that customers can participate in the PJM ancillary services market. Stipulation § XIII.B. Customers may be able to save money by participating in such programs.”[[41]](#footnote-42)**

Although AES Ohio counts this provision as a Settlement benefit, it is a speculative benefit at best. There is no guarantee that consumers will benefit, by saving money or otherwise, by participating in the PJM ancillary services market. At hearing, AES Ohio Witness Schroder admitted she could not quantify how much money consumers would be able to save, how long consumers would be able to obtain savings, the conditions that would occur for consumers to save money under the program, or if aggregators or CRES providers would pass savings to consumers that participated in the PJM ancillary services market.[[42]](#footnote-43) So, AES Ohio’s assertion that participating in the PJM ancillary services market will benefit consumers by saving them money is speculative. This should not be counted as a benefit of the Settlement.

* **“AES Ohio will eliminate a $25 fee to reconnect a customer when the customer can be reconnected remotely. Stipulation § XIV.”[[43]](#footnote-44)**

AES Ohio is required to eliminate its remote reconnection fee anyway, so doing so is not a consumer benefit *of the Settlement.* The PUCO already found that AES Ohio’s $25 reconnection fee was “premised upon a labor-intensive calculation that is no longer applicable with remote reconnection AMI technology.”[[44]](#footnote-45) The PUCO then directed AES Ohio to eliminate the fee.[[45]](#footnote-46) It is not a benefit of the Settlement that AES Ohio is eliminating a fee the PUCO already ruled it could not charge consumers.

* **“AES Ohio will offer Economic Development Incentives to support new or expanding businesses in its service territory. Those incentives will encourage investments in AES Ohio's service territory and will create more jobs. In addition, recovery of those incentives from customers is capped in the Stipulation. Stipulation § XVII.”[[46]](#footnote-47)**

The Economic Development Incentive (“ECI”) is not a unique benefit to consumers that is produced under the Settlement because Ohio law already provides a better, more consumer protective way for AES Ohio to incentivize businesses to expand into its service territory.

R.C. 4905.31 authorizes the PUCO to approve reasonable electric service arrangements between an electric utility and a mercantile customer or group of mercantile customers. Under existing law, “reasonable arrangements” can include a “sliding scale of charges” based on usage, just as the new Economic Development Incentive does.[[47]](#footnote-48) Ohio Administrative Code, Chapter 4901:1-38, the enabling rules for R.C. 4905.31, details the requirements for reasonable arrangements.

Individual service agreements under the new ECI do not require PUCO approval, as the PUCO will be instead approving a tariff that would apply to all economic development arrangements.[[48]](#footnote-49) Individual arrangements that AES Ohio enters into for reasonable arrangements would not be approved by the PUCO. Indeed, the Settlement only provides for sharing of the service agreements, after they are signed, with one party: the PUCO Staff.[[49]](#footnote-50)

That is vastly different than the current more consumer-protective process prescribed under the Ohio Administrative Code for reasonable arrangements. Under O.A.C. 4901:1-38, applicants may seek reasonable arrangements in the form of unique arrangements, economic development arrangements, or energy efficiency arrangements. For each of these reasonable arrangements, the applicants must submit an application for PUCO approval, accompanied by verifiable information including the rationale for the arrangement,[[50]](#footnote-51) and how the arrangement is reasonable and does not violate R.C. 4905.33 and 4905.35.[[51]](#footnote-52) Applications are required to include an affidavit from the applicant as to the veracity of the information provided in the application.[[52]](#footnote-53) Additionally, customers seeking a reasonable arrangement must show how the arrangement is in the public interest.[[53]](#footnote-54) Importantly, the applicant bears the burden of proof.[[54]](#footnote-55) Once applications are submitted, parties may file a motion to intervene and comments and objections to applications.[[55]](#footnote-56) The PUCO is empowered to “fix a time and place for a hearing if the application appears to be unjust or unreasonable.”[[56]](#footnote-57)

This transparent process, allowing for consumer input, would be swept away, in favor of a behind-closed door dealing, with consumers who pay for these special deals left in the dark. This truly is not a benefit of the Settlement.

* **“AES Ohio agreed to a SEET threshold of 13% during the term of the ESP. Additionally, if AES Ohio agrees to credit any significantly excessive earnings in those years to consumers. Stipulation § XX.”[[57]](#footnote-58)**

The SEET threshold’s benefits for consumers are also speculative. AES Ohio Witness Schroder admitted at hearing that she had not quantified the value of this provision to consumers.[[58]](#footnote-59) Ms. Schroder also admitted she did not know whether quantifying the value to consumers of the SEET threshold was possible or how it could be done.[[59]](#footnote-60) AES Ohio has presented no evidence that consumers are guaranteed to benefit from this part of the Settlement. Indeed, the record reflects that the 13% threshold for establishing refunds to consumers under the profits review test is set so high that it is almost guaranteed to produce zero consumer refunds. This can be seen in AES Ohio’s projections of their earnings during the electric security plan.[[60]](#footnote-61) AES Ohio Witness Schroder testified that AES Ohio’s projected earnings during the ESP term were below 9%.[[61]](#footnote-62)

Separately, AES Ohio claims a third benefit of the Settlement is that it eliminates the Rate Stabilization Charge (“RSC”).[[62]](#footnote-63) But AES Ohio was only authorized to charge consumers for the stability charge until its next standard service offer was established.[[63]](#footnote-64) Any new standard service offer, regardless of whether it was established by an electric security plan or a market-rate offer, would have ended the stability charge to consumers.[[64]](#footnote-65) The elimination of the stability charge was already considered a benefit by the PUCO in Case No. 18-1875-EL-GRD.[[65]](#footnote-66) AES Ohio is wrong that eliminating the RSC is a benefit of this Settlement. At best, the Settlement provides an incremental benefit as the stability charge to consumers will end a year sooner than otherwise planned.[[66]](#footnote-67) However, correspondingly, with the dropping of the stability charge, consumers will then get hit with the distribution rate increase which cancels out any benefit.[[67]](#footnote-68)

The PUCO should not evaluate the terms of the Settlement one by one. However, doing so reveals that many of the terms AES Ohio lists as benefiting consumers and the public interest provide speculative value to consumers or worse, no value at all.

Setting aside specific terms, the Settlement as a package imposes $160 million in new charges to consumers over the next three years.[[68]](#footnote-69) And when the electric security plan rates go into effect, so too does the $75 million distribution rate increase recently approved by the PUCO in Case No. 20-1651-EL-AIR.[[69]](#footnote-70) And, as Mr. Fortney testified, the “current economic conditions caused by Covid, inflation and rising fuel costs” make it a uniquely difficult time for consumers to pay rising utility bills.[[70]](#footnote-71) Taken in the aggregate, as PUCO precedent requires, the $160 million cost of this stipulation is too great for consumers to pay. For this reason, the Settlement does not benefit consumers and the public interest.

Finally, AES Ohio claims it is a benefit to consumers that the Settlement provides for AES Ohio to charge consumers the lowest distribution and transmission rates in the state of Ohio.[[71]](#footnote-72) But, AES Ohio’s distribution rates are already the lowest in the state.[[72]](#footnote-73) AES Ohio consumers would pay the lowest rates in the state even if the PUCO rejected the proposed ESP. For this reason, AES Ohio’s comparatively lower (but still substantial) rates to consumers may provide some benefit to consumers, but they are not a benefit *of the Settlement.* The PUCO should find that the Settlement does not benefit consumers and the public interest.

### The Settlement violates important regulatory practices and principles.

#### Charging consumers for prior RCR deferrals violates numerous important regulatory practices and principles.

As part of the Settlement, the Signatory Parties agreed that AES Ohio can collect $6.5 million in prior charges (“Prior RCR”), some incurred almost twenty-five years ago.[[73]](#footnote-74) Approximately $2.3 million of the charges are previously authorized transition charges, approved for collection from consumers in Case No. 99-1687-EL-ETP et al.[[74]](#footnote-75) By law (R.C. 4928.40(A)) those charges were required to be collected from consumers no later than December 31, 2010. Under R.C. 4928.141, a utility cannot collect costs from consumers for standard service offer that relate to “any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility’s rate plan.” Consequently, the Settlement provision allowing collection of these previously authorized deferred transition costs from consumers violates Ohio law and is thus contrary to regulatory practices and principles.

The other Prior RCR charges relate to green pricing, generation separation and bill format redesign.[[75]](#footnote-76) Under an Ohio Supreme Court ruling,[[76]](#footnote-77) before utilities can charge consumers under an electric service plan, they must identify specifically which provision of law allows the charge to consumers. AES Ohio has the burden of proof in this regard.[[77]](#footnote-78) AES Ohio failed to meet this burden. This was a violation of important regulatory practices and principles.

AES Ohio in its initial brief claims that the deferrals associated with the Prior RCR are authorized under R.C. 4928.143(B)(2)(d) and (h).[[78]](#footnote-79) AES explains that the Prior RCR amounts “relate to a limitation on shopping” under R.C. 4928.143(B)(2)(d) because they “will also be recovered on a nonbypassable basis.”[[79]](#footnote-80) AES Ohio also alleges that the Prior RCR are deferrals as well under R.C. 4928.143(B)(2)(d).[[80]](#footnote-81) And AES believes the Prior RCR stabilizes service or provides certainty because the RCR increases revenues collected by the utility which is “currently operating under financial stress.”[[81]](#footnote-82) With respect to R.C. 4928.143(B)(2)(h), AES Ohio alleges the Prior RCR amounts “relate to distribution service” because AES Ohio says so in its brief (but not in testimony).[[82]](#footnote-83) And AES Ohio also claims that Prior RCR charges amount to single issue ratemaking under subsection (B)(2)(h). AES Ohio also adds that “AES Ohio and its customer expectations regarding reliability are ‘aligned’ and that AES Ohio is placing ‘sufficient emphasis’ on reliability” as required by subsection (B)(2)(h). No other Signatory Party, including the PUCO Staff, even mentioned the $6 million of Prior RCR charges that all AES Ohio consumers will pay under the Settlement. Nor did any of the Signatory Parties identify any statutory basis for the Prior RCR charges to consumers.

Once again, AES Ohio is wrong. AES Ohio’s twisted interpretation of R.C. 4928.143would lead to unjust and unreasonable results in violation of R.C. 4905.22 and is, contrary to R.C. 1.47. And AES Ohio’s interpretation of the ESP statute relies in part on a retrospective instead of a prospective operation. This too is contrary to R.C. 1.48. Under that Rule, a statute is presumed to operate prospectively (not retrospectively), unless specifically stated otherwise.

##### The deferred settlement system implementation and consumer education deferrals are transition costs, which cannot be charged to consumers under Ohio law.

AES Ohio argues that even though it “may have labeled the costs as transition costs in the 1999 case, they do not actually meet the statutory definition of transition costs.”[[83]](#footnote-84) Using a similar tactic, the PUCO Staff argues that there “is a reasonable dispute as to the nature of the costs: the document does not show the costs were ‘transition costs’ under Ohio law, drafted much later, which defines transition cost as costs that are ‘legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in the state.’”[[84]](#footnote-85) These arguments should be rejected quite simply because they are just plain wrong.

AES Ohio and PUCO Staff appear blissfully ignorant of the PUCO Order in the 1999 case.[[85]](#footnote-86) The order specifically discussed at length the consumer education plan and concluded that the plan complies with R.C. 4928.31(A)(5).[[86]](#footnote-87) Similarly, the PUCO discussed AES Ohio’s operational support plan as complying with R.C. 4928.34(A)(9).[[87]](#footnote-88) After that lengthy discussion, the PUCO discussed AES Ohio’s amended transition plan (Part F) as a whole requesting “$699.2 million in transition costs” along with a request to defer recovery of “an additional $28.6 million in accounting related expenses.”[[88]](#footnote-89) The PUCO then discussed R.C. 4928.34(A)(12)[[89]](#footnote-90), which defines transition revenues that a utility may collect from consumers.[[90]](#footnote-91) The PUCO then concluded that the Stipulation (which resolved AES Ohio’s transition plan filing) “establishes reasonable transition charges.”[[91]](#footnote-92) The PUCO further ruled under its “Findings of Fact and Conclusions of Law:”

(8) Pursuant to Section 4928.39, Revised Code, the total allowable transition costs for DP&L, as agreed to and referenced in the Stipulation, are reasonable and include the recovery of $699.2 million of CTC and RTC costs and an additional $28.6 million in accounting related expenses.

\* \* \*

(10) DP&L’s transition plan, as modified by the Stipulation and this order, satisfies the requirements of SB 3, and is approved for the reasons and to the extent set forth herein.[[92]](#footnote-93)

The PUCO concluded its findings with a summation of its Order:

It is, therefore,

ORDERED, That DP&L’s transition plan as amended on February 28, 2000 and April 20, 2000 and the Stipulation filed on June 1, 2000 are approved to the extent set forth in this opinion and order and subject to final approval of DP&L’s compliance tariffs.[[93]](#footnote-94)

Notwithstanding the PUCO Staff and AES Ohio’s arguments otherwise, the Commission DID find the consumer education plan and operational support plan to be transition costs. And the PUCO authorized AES Ohio to collect those costs from consumers.

AES Ohio’s argument violates R.C. 4903.10 because, if AES Ohio disagreed with the PUCO’s ruling, it should have filed an application for rehearing. It did not and now it is way beyond the thirty-day period to apply for rehearing. Given the PUCO’s findings, the legal doctrines of collateral estoppel and res judicata prohibit the unwarranted attack on the PUCO order. AES Ohio and the PUCO Staff should not be permitted to relitigate these issues. The PUCO has spoken. AES Ohio did not appeal the PUCO order. Enough said.

##### AES Ohio incorrectly argues that the deferred settlement system implementation and consumer education deferrals are not barred by the “notwithstanding” clause of R.C. 4928.143(B).

AES Ohio claims that the deferred costs, even transition costs, are not barred by the two notwithstanding clauses of R.C. 4928.143(B). AES Ohio is wrong. AES Ohio cites to the 2018 Ohio Supreme Court Opinion, *In re Ohio Power Co*., 155 Ohio St.3d 326, 2018-Ohio-4698, ¶ 19 to support its mistaken argument.

While the Court did address the notwithstanding provision under R.C. 4928.143(B), it explicitly acknowledged the countervailing provision prohibiting “previously authorized” transition charges in R.C. 4928.141(A). Under that provision, a standard service offer made through an ESP “shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility’s rate plan.”[[94]](#footnote-95) Finding that section “inapplicable” because the transition charges were not “previously authorized allowances for transition costs,” the Court rejected OCC’s claim to protect consumers from paying transition charges.[[95]](#footnote-96) But here, there are “previously authorized allowances for transition costs,” making the Court’s ruling *In re Ohio Power* distinguishable and not controlling.

When R.C. 4928.141(A) is applicable, as it is here, it clearly bars the transition charges AES Ohio seeks to collect from its consumers. The words in this subsection are specific, and clear. “Previously authorized allowances” for transition costs cannot be collected in an electric security plan once the period for utility collection from consumers is over. Under R.C. 4928.40, the period for AES Ohio to collect these previously authorized transition charges from consumers ended thirteen years ago.

To be clear, the notwithstanding provision of R.C. 4928.143(B) does NOT cancel the prohibition on collecting previously authorized transition charges from consumers under R.C. 4928.141. In fact, the first twelve words of R.C. 4928.143 convey the opposite: “For the purpose of complying with section 4928.141 of the Revised Code\*\*\*.” It would make no sense for R.C. 4928.143 to be internally inconsistent, yet that is what happens under AES Ohio’s interpretation. AES Ohio would have the PUCO believe that the General Assembly knowingly contradicted itself by establishing a need to comply with R.C. 4928.141 (in subsection (A) of R.C. 4928.143) and yet in the very next subsection (4928.143(B)) allow the opposite-- where the utility could disregard the mandates of R.C. 4928.141. Thankfully, statutory interpretation does not work that way.

Instead, in keeping with the principle of in pari materia,[[96]](#footnote-97) where there is doubt or ambiguity, the PUCO must interpret R.C. 4928.143(B) in relation to R.C. 4928.141(A) which addresses the same issues. Considering those statutes together and interpreting them harmoniously leads to the inescapable conclusion that the “notwithstanding” clause cannot allow previously authorized transition charges to be collected from consumers in a utility’s electric security plan. Similarly, under R.C. 1.51, where there appears to be a conflict between a special or local provision (R.C. 4928.141) and a general provision (R.C. 4928.143(B)), the provisions are to be construed to give effect to both. If there is an irreconcilable conflict, the special provision prevails unless the general provision is a later adoption and there is a manifest intent that it prevails. Either way, AES Ohio’s argument fails.

##### AES Ohio’s deferred settlement system implementation and consumer education deferrals are not includable as a provision under 4928.143(B)(2)(h).

AES Ohio alleges that the Prior RCR costs are “distribution costs.”[[97]](#footnote-98) It appears to base its conclusion on the fact that the charge is nonbypassable or unavoidable, and thus by default must be a distribution charge. These costs, though, no matter how you slice them, are costs of generation incurred by AES Ohio in order to unbundle the components of electric service under S.B.3. The PUCO so held in its prior order, discussed above, when it classified these costs as transition costs. There is nothing distribution-related at all to customer education costs or settlement system implementation costs.

The PUCO in reviewing this issue must be mindful of the Ohio Supreme Court decision in *Ohio Consumers’ Counsel v. PUC.[[98]](#footnote-99)* There the PUCO was reversed when it placed generation costs (the rate stabilization charge) into its distribution service tariffs. It found that actual generation costs should be included in generation tariffs. Because these deferrals are generation deferrals, and not distribution deferrals, they are not a “[p]rovision regarding the utility’s distribution service” which is a prerequisite of R.C. 4928.143(h). So even if the deferrals are considered “single issue ratemaking” under subsection (B)(2)(h), it doesn’t matter because the threshold of relating to the utility’s distribution service is not met.

And finally, in AES Ohio’s final grasp at straws, it adds that “AES Ohio and its customer expectations regarding reliability *are* ‘aligned’ and that AES Ohio *is* placing ‘sufficient emphasis’ on reliability” as required by subsection (B)(2)(h).[[99]](#footnote-100) While the interests of consumers and AES Ohio *may become aligned* *in the future* *if* consumer funding under AES Ohio’s DIR acts produces increased reliability,[[100]](#footnote-101) it is ludicrous to assert that currently AES’s interest in reliability is currently aligned with its consumers.[[101]](#footnote-102)

AES Ohio has failed to meet its Ohio mandated reliability standards for the past four years and has been assessed forfeitures for its failure to comply with these reliability standards.[[102]](#footnote-103) AES Ohio has complained loudly (and repeatedly) that because of its financial stress it has not been able to invest in its distribution system, hence its reliability has suffered.[[103]](#footnote-104)

A key benefit to the Settlement is supposed to be improved reliability. There would be no need to charge consumers hundreds of millions of dollars for distribution investment if the reliability of AES Ohio’s distribution system is not in jeopardy. The PUCO should see through the façade that AES Ohio puts up in this regard. It should reject this argument, just as it did when AES Ohio raised the same argument in its distribution base rate case, where the PUCO stated: “Furthermore, it bears repeating that AES Ohio is statutorily obligated to furnish necessary and adequate service. R.C. 4905.22”[[104]](#footnote-105)

##### AES Ohio’s Prior RCR charges are not “a limitation on shopping” under R.C. 4928.143(B)(2)(d). Nor do they stabilize service or provide certainty.

AES Ohio alleges that the Prior RCR charges to consumer are a “limitation on shopping” under R.C. 4928.143(B)(2)(d) because they “will also be recovered on a nonbypassable basis.”[[105]](#footnote-106) And AES Ohio contends that the Prior RCR stabilizes service or provides certainty because the RCR increases revenues collected by the utility which is “currently operating under financial stress.”[[106]](#footnote-107) These claims too are unfounded. AES Ohio misinterprets the PUCO holdings construing a “limitation on customer shopping.”

The PUCO’s numerous rulings allowing collection of consumer funded subsidies for utilities’ interests in coal plants (through a Power Purchase Agreement Rider (PPA/PSR)) under R.C. 4928.143(B)(2)(d) were premised on the charges serving as a “financial limitation on shopping.”[[107]](#footnote-108) The PUCO explained that the charges would function as a financial restraint on consumers completely relying on the retail market for the pricing of retail electric generation service.[[108]](#footnote-109) It was said the consumers’ bills would reflect a price for generation service that is based in part on the cost of the coal plants as well as based on the retail market price. The PUCO also found that a properly conceived PPA rider could provide a significant financial hedge that stabilizes rates and protects all customers from market-based price volatility.[[109]](#footnote-110) The PPA rider was intended to function as a countercyclical hedge, so that in rising price environment, credits would be passed through to consumers; in a declining price environment, charges would be passed through to consumers.[[110]](#footnote-111)

But none of this holds true for the Prior RCR charges that AES Ohio alleges are a limitation on customer shopping under R.C. 4928.143(B)(2)(h). The justification that the prior RCR charges are also non-bypassable like the coal plant subsidy charges is true but that is where all the similarities end.

The Prior RCR charges do not function as a financial restraint on consumers’ complete reliance on the retail market for the pricing. Nor do the Prior RCR charges reflect a price for *generation service* that is based in part on the cost of the coal plants as well as the retail market price. (Instead, showcasing an internal inconsistency, AES Ohio claims the Prior RCR charges are distribution charges.[[111]](#footnote-112)) The Prior RCR charges do not stabilize rates or protect consumers against market volatility. They do not provide a countercyclical hedge in a rising price environment. They are simply past uncollected generation costs that AES Ohio should have collected in a different forum, at a different time.

Any rate stabilization arguments of AES Ohio prove too much. According to AES Ohio, these Prior RCR charges stabilize rates because they give AES Ohio revenues.[[112]](#footnote-113) But that sort of interpretation essentially renders the stabilization requirement a nullity. Any revenues received by a utility could be said to stabilize rates. As the PUCO noted, in construing whether a charge met the criteria for “bypassability” under R.C. 4928.143(B)(2)(d), nearly any charge may be bypassable or non-bypassable. And so, it ruled that “bypassability” alone is insufficient to fully meet the criteria of R.C. 4928.143(B)(2)(d).[[113]](#footnote-114) The PUCO should apply similar reasoning here and find that stability, as defined by AES Ohio, is insufficient to meet the criteria of R.C. 4928.143(B)(2)(d).

##### v. Prior RCR costs are not deferrals that have the effect of stabilizing or providing certainty to consumers during the next three years of AES Ohio’s electric security plan.

In interpreting statutes, R.C. 1.48 states that all statutes shall be presumed to be prospective in operation unless expressly made retrospective. Applying this rule to R.C. 4928.143(B)(2)(d) leads to only one conclusion: the charges listed in this subsection must be shown prospectively to “stabilize or provide certainty regarding retail electric service.” That is just not the case for the Prior RCR deferrals. No way. No how. The Prior RCR costs, which were incurred nearly 25 years ago, would provide absolutely no stabilizing effect or certainty for the consumers who will take service under AES Ohio’s electric security plan (ESP IV) in 2023-2026.

### b. The Settlement violates the ESP statutes (R.C. 4928.141 and 4928.143) by allowing AES Ohio to collect for past generation costs related to its ownership share of two coal plants, incurred during prior ESPs, which would not have the effect of stabilizing or providing certainty regarding retail electric service during AES Ohio’s ESP IV.

In its Initial Brief, OCC argued that the Settlement violated several important regulatory practices and principles by allowing AES Ohio to collect prior coal plant subsidy costs from consumers. OCC explained that the Settlement violated R.C. 4928.141 and 4928.143 because these costs were incurred during prior ESP’s and therefore would not provide certainty or stability to AES Ohio consumers during the upcoming term of ESP IV, 2023-2026.

OCC’s Initial Brief distinguished the narrow circumstances where a utility has been allowed to collect coal plant subsidy charges under R.C. 4928.143. OCC demonstrated that the OVEC deferral did not qualify for collection under any of these limited circumstances. OCC further explained that AES Ohio did not follow proper protocol for recording this deferral on its books. OCC’s Initial Brief also showed how the coal plant subsidy deferral violated R.C. 4905.13, the law of the case doctrine, the doctrines of collateral estoppel and res judicata and established regulatory accounting practices.

AES Ohio argued in its Initial Brief that the OVEC costs are legal under R.C. 4928.143(B)(2)(d) as a “limitation on customer shopping,” citing *In re Application of Ohio Power Co.[[114]](#footnote-115)* This argument has no merit. The *Ohio Power Co.* case actually supports OCC’s position, not AES Ohio’s position. *Ohio Power Co.* stands for the proposition that a utility can collect coal plant subsidy costs from consumers through an ESP only if the coal plant subsidy costs are *incurred* *during the same ESP term when the costs will be collected.*

AES Ohio’s Initial Brief further argues that the OVEC costs are legal under R.C. 4928.143(B)(2)(d) because they are a “deferral.” AES Ohio’s statutory interpretation is not supportable. This section allows for deferrals in an ESP but only to the extent that the deferrals are otherwise lawful under R.C. Chapter 4928. Otherwise, the “deferral” exception would swallow the entire chapter. Such a construction would be contrary to the requirements of R.C. 1.47 that the entire statute is intended to be effective, and that a just and reasonable construction should result.

One necessary component for AES Ohio’s “deferral” argument is that AES Ohio must have properly recorded a deferral on its books for the coal plant subsidy charge. Here AES Ohio’s legal argument misstates the actual facts of the case.

First, AES Ohio states that “AES Ohio began recording [the OVEC costs] as a deferral in 2014.”[[115]](#footnote-116) To the contrary, AES Ohio’s internal accounting memo states: “The generation separation order was issued in September 2014…\* \* \* However, at the time of the order, we were not yet comfortable that recovery was 75% probable and we continued to expense the demand not recoverable through the FAC.”[[116]](#footnote-117) The internal accounting memo further states: “In December 2015, we recorded a long-term regulatory asset and a reduction of fuel expense for $10.4 million, covering the period of October 2014 through December 2015…”[[117]](#footnote-118)

Second, AES Ohio’s argument departs from the actual facts by arguing that it still has a $28.9 million deferral on its books for the coal plant subsidy charge.[[118]](#footnote-119) This claim in AES Ohio’s brief is contrary to what AES Ohio told the U.S. SEC in its Form 10-K and what AES Ohio told the FERC in its FERC Form 1.

AES Ohio told the U.S. SEC in its Form 10-K:

*During the third quarter of 2022, AES Ohio recorded a $28.9 million reduction to this regulatory asset as a charge to Net purchased power cost in the Condensed Consolidated Statements of Operations in accordance with the provisions of ASC 980.[[119]](#footnote-120)*

AES Ohio told the FERC in its FERC Form 1:

*During the third quarter of 2022, AES Ohio recorded a $28.9 million reduction to this regulatory asset as a charge to Net purchased power cost in the Condensed Consolidated Statements of Operations in accordance with the provisions of ASC 980.[[120]](#footnote-121)*

The September 2022 write-off explains the odd feature of the Settlement, where parties agreed that AES Ohio could collect the coal plant subsidy deferral “which reflects the balance of that deferral as of July 31, 2022.”[[121]](#footnote-122) Why did AES Ohio need the Settlement to state that it could collect the OVEC costs as reflected on its books “as of July 31, 2022”? The answer is that the coal plant subsidy deferral was written down to zero in September 2022. The Form 10-K and the FERC Form 1 make this quite clear.

AES Ohio’s Initial Brief also argues that the coal plant subsidy deferral is legal under R.C. 4928.143(B)(2)(d) as “standby service.”[[122]](#footnote-123) This argument has no merit. The deferral collects coal plant subsidy costs incurred during 2014-2017, when AES Ohio’s consumers received service under other ESP’s. Ohio law requires that AES Ohio must provide its standard service offer through a written tariff.[[123]](#footnote-124) AES Ohio did not produce any tariff or any other evidence to show that the OVEC plants operated as standby service during 2014-2017.

If AES Ohio is arguing that the OVEC plants will provide standby service for consumers under ESP IV, this argument has no merit. AES Ohio will collect the cost that it currently incurs for the OVEC plants through the Legacy Generation Rider.[[124]](#footnote-125) AES Ohio cannot collect the 2014-2017 coal plant subsidy costs from current consumers as a “standby service” because the 2014-2017 OVEC costs were not incurred for the purpose of providing standby service to consumers under ESP IV in 2023-2026. This would violate the prohibition against using an ESP to collect past generation costs incurred during prior electric security plans, as argued by OCC in its Initial Brief. This would also violate R.C. 1.48, which states that a statute is presumed to be prospective unless expressly made retrospective.

Next, AES Ohio argues that the coal plant subsidy deferral is legal under R.C. 4928.143(B)(2)(d) because it allows AES Ohio to increase its revenues and achieve financial stability.[[125]](#footnote-126) According to AES Ohio, collecting more revenue will better enable it to provide reliable distribution service.[[126]](#footnote-127) This violates the requirement of R.C. 1.48 that R.C. 4928.143(B)(2)(d) must be construed to operate prospectively. Moreover, if AES Ohio’s argument prevailed, then any possible ESP provision would be legal because any ESP provision would increase the utility’ revenues, making it more financially stable. This contravenes Ohio Supreme Court precedent[[127]](#footnote-128) that only those items specifically listed in R.C. 4928.143 can be included in an ESP. This would also violate the precept of R.C. 1.47(C) that a statute must be interpreted so as to achieve a just and reasonable result.

AES Ohio further argues that the coal plant subsidy carrying costs are legal under R.C. 4928.143(B)(2)(d) because the statute specifically refers to “carrying costs.”[[128]](#footnote-129) This argument is meritless. Once again, the argument violates the requirement of R.C. 1.48 that R.C. 4928.143(B)(2)(d) must be applied prospectively. In addition, AES Ohio can only collect carrying costs on an item which is otherwise legal under R.C. 4928.143(B)(2)(d). AES Ohio ignores the point that generation costs can only be collected under limited circumstances and cannot be collected when the generation costs were incurred during prior ESP’s.

Further, AES Ohio never deferred the carrying costs on its books and never sought PUCO approval to defer the carrying costs. Even if R.C. 4928.143 otherwise allowed AES Ohio to collect carrying costs on generation costs incurred during a prior ESP (which it does not), AES Ohio would be barred from collecting such costs because it never obtained PUCO approval to defer the carrying costs and never recorded the carrying costs on its books. So, allowing AES Ohio to collect the carrying costs would not only violate R.C. 4928.143, but it would also violate the prohibition against retroactive ratemaking.

### By allowing AES Ohio to collect three-year-old decoupling revenues, the Settlement violates R.C. 4903.10 and R.C. 4905.13. This also violates the important legal doctrines of law of the case, collateral estoppel, and res judicata. This is also inconsistent with prior Supreme Court and PUCO precedent and important regulatory principles and practices.

The decoupling deferral balance consists of: (1) $742,733 of unrecovered 2018 revenues previously included in AES Ohio’s former decoupling rider (authorized under ESP III); and (2) $13,054,188 of deferred decoupling revenues from January 1, 2019 through December 18, 2019, when AES Ohio withdrew from its ESP III.[[129]](#footnote-130) The Settlement provides for AES Ohio to withdraw its claim for decoupling revenues post-December 18, 2019.[[130]](#footnote-131) OCC argued in its Initial Brief that the Settlement violated several important regulatory practices and principles by allowing AES Ohio to collect these deferred decoupling revenues.

AES Ohio argues that the decoupling deferrals were lawful under R.C. 4928.143(B)(2)(h) because they were distribution-related revenue decoupling/single-issue ratemaking provisions which are allowed in an ESP.[[131]](#footnote-132) While the PUCO could authorize a utility to collect decoupling revenues in an ESP, this can only occur if the utility has met certain preconditions, as AES Ohio did when it collected decoupling revenues under ESP III. These preconditions include having a decoupling rider approved and obtaining PUCO approval to defer decoupling revenues. AES Ohio complied with these requirements at the time of ESP III but did not do so here. Consequently, the Settlement violates important regulatory principles and practices by allowing AES Ohio to collect these decoupling revenues.

AES Ohio next argues that it should be allowed to collect decoupling revenues because the procedural history for the decoupling deferrals is identical to the procedural history for the uncollectible amounts, which the PUCO approved in AES Ohio’s distribution rate case.[[132]](#footnote-133) Yet this argument is based on an incomplete review of the facts. It is true that ESP III provided for collection of both decoupling revenues and uncollectibles. AES Ohio lost the authority to collect these revenues when it withdrew from ESP III.[[133]](#footnote-134) But the important distinction is that AES Ohio’s most recent distribution rate case authorized AES Ohio to collect uncollectible amounts but did not authorize AES Ohio to collect decoupling revenues. If AES Ohio had wanted to collect decoupling amounts, it would have had to obtain approval to do so, which it failed to do.

AES Ohio also argues that the decoupling revenues (and prior RCR costs) are legal under R.C. 4928.143(B)(2)(h) as distribution revenues.[[134]](#footnote-135) Once again, however, AES Ohio ignores the fact that it lost its authority to collect these revenues when it withdrew from ESP III.[[135]](#footnote-136) To the extent that AES Ohio wanted a rider to collect new decoupling revenues, it could have sought this authority. Even so, this would have only allowed AES Ohio to collect decoupling revenues prospectively.

OMAEG/Kroger argue that the Settlement lawfully allows AES Ohio to collect the pre-2019 decoupling revenues, which cover a different time period than the post-2019 decoupling revenues which PUCO Staff opposed in Case No. 20-140-EL-AAM.[[136]](#footnote-137) OMAEG/Kroger is correct in pointing out that the post-2019 decoupling revenues were opposed by PUCO Staff because, among other reasons, AES Ohio had no rider in place to collect the post-2019 decoupling revenues.[[137]](#footnote-138) But this is a distinction without a difference. AES Ohio had a rider in place to collect the pre-2019 decoupling revenues but AES Ohio gave up any claim to collect such revenues when it withdrew from ESP III.[[138]](#footnote-139) As a result, OMAEG/Kroger’s argument must fail.

## C. The Settlement is unjust and unreasonable for failing to provide a stand-alone SSO auction for residential consumers.

In its Initial Brief, OCC argued that the Settlement is unjust and unreasonable for failing to provide a stand-alone SSO auction for residential consumers because this could help mitigate SSO Competitive Bid Process prices.[[139]](#footnote-140) The testimony of OCC Witness Wilson and Constellation Witness Indukuri supported this argument with their analysis of wholesale electricity pricing trends and default auction practices in other restructured states.

Constellation’s Brief explained how the PUCO could improve the Competitive Bid Process by adopting two proposals: separating the auctions by customer class (with residential and small commercial consumers grouped together) and by placing upper and lower limits on the tranches suppliers can bid on.[[140]](#footnote-141) Constellation discussed how holding a separate SSO auction for residential and small commercial consumers would mitigate price risk for both consumers and suppliers.[[141]](#footnote-142) Constellation also reviewed how other states in the PJM footprint also break out the SSO auctions by customer class due to the benefits provided by this approach.[[142]](#footnote-143) OCC supports Constellation’s recommendation for separating the SSO auction by customer class and takes no position on Constellation’s recommendation for load caps.

AES Ohio argues (page 28 of its Brief) that any changes to the SSO Competitive Bid Process structure should be addressed in Case No. 17-957-EL-SSO. This argument fails because it does not recognize that the PUCO approves a utility’s Competitive Bid Process in an SSO case! Changes to the Competitive Bid Process would therefore need to be approved in an SSO case. Indeed, AES Ohio Witness Schroder testified that it’s reasonable to consider improvements in the competitive bidding process within the scope of ESP proceedings.[[143]](#footnote-144)

The SSO must include “all competitive retail electric services necessary to maintain essential electric service, including a firm supply of electric generation service.”[[144]](#footnote-145) The SSO may be in the form of a market rate offer, which must include a competitive bidding process to procure the electricity supply.[[145]](#footnote-146) In the alternative, the SSO may be in the form of an ESP.[[146]](#footnote-147) In recent years, the ESP’s approved by the PUCO have included a process for obtaining the electricity supply through a Competitive Bid Process.[[147]](#footnote-148) As a result, the argument by AES Ohio that the PUCO should make changes to the Competitive Bid Process in Case No. 17-957-EL-SSO should be rejected.

IGS and OEG argued against the OCC/Constellation proposals on the ground that holding separate auctions by customer class and placing limits on the tranche load could increase risk for consumers and suppliers instead of mitigating risk.[[148]](#footnote-149) However, IGS and OEG presented no evidence to support its conclusions. Nor did IGS or OEG respond to the point that the other states in the PJM footprint have successfully used class specific SSO auctions for many years. For these reasons, IGS and OEG’s arguments against a stand-alone SSO auction for residential consumers should be rejected.

OCC notes that OEG’s arguments against a stand-alone SSO auction are self-serving. The whole point of separating the SSO auction by customer class is to avoid lower-cost customer classes subsidizing the service provided to higher-cost customer classes.[[149]](#footnote-150) If stand-alone SSO auctions for residential consumers could mitigate their price risk, it stands to reason that this could increase the price risk faced by commercial and industrial consumers. Yet commercial and industrial consumers are sophisticated consumers of energy and can mitigate their price risk through financial tools such as hedging and forward contracts. The safety net of default SSO pricing is not nearly as important for sophisticated customers who frequently shop. It is vitally important for residential consumers.

# III. CONCLUSION

The PUCO is supposed to regulate for the benefit of everyone in Ohio. The PUCO says that its mission is “to assure all residential and business consumers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choices.”[[150]](#footnote-151) It can live up to that mission by following the law and adopting OCC’s consumer protection recommendations instead of the flawed Settlement, which is not in the public interest and violates so many important regulatory practices and principles.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply Brief for Consumer Protection was served on the persons stated below via electronic transmission this 5th day of June 2023.

*/s/ Maureen R. Willis*

Maureen R. Willis

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The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. *See* <https://www.development.ohio.gov/files/research/p7005.pdf>. [↑](#footnote-ref-2)
2. R.C. 4928.143(C)(1). [↑](#footnote-ref-3)
3. OCC Ex. 2 at 4, 5. [↑](#footnote-ref-4)
4. OPAE/City of Dayton Brief at 2-3. [↑](#footnote-ref-5)
5. Signatory Parties Ex. 1 at 35, ¶ XXIV. [↑](#footnote-ref-6)
6. AES Ohio Brief at 24-28; PUCO Staff Brief at 14-16. [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. *Id*. [↑](#footnote-ref-9)
9. OMAEG/Kroger Brief at 20-21. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. *See, e.g.,* *In the Matter of Application of Dayton Power and Light Company to Increase Its Distribution Rates*, Case No. 15-1830-EL-AIR, Stipulation and Recommendation at 5 (June 18, 2018) (DP&L agreed to withdraw its request in a separate case related to tax savings from TCJA); *In the Matter of the Application of Duke Energy Ohio for an Increase in Distribution Rates*, Case No. 21-887-EL-AIR, et al., Stipulation and Recommendation at 18 (Sept. 19, 2022) (Duke agreed not to pursue any further challenges to supplier-consolidated billing in other docketed cases so long as the PUCO approved the stipulation); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 11-351-EL-AIR, et al., Joint Stipulation and Recommendation at 8 (Nov. 23, 2011) (AEP agreed to withdraw pending application to recover PIPP installment payments). [↑](#footnote-ref-12)
12. *In re Application of Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, ¶ 25-27 [↑](#footnote-ref-13)
13. *See* footnote 11, supra. [↑](#footnote-ref-14)
14. OCC Ex. 2 at 7. [↑](#footnote-ref-15)
15. OCC Brief at 5-6. [↑](#footnote-ref-16)
16. OCC Ex. 2 at 30. [↑](#footnote-ref-17)
17. *See, e.g*., *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 21-887-EL-AIR, et al., Stipulation and Recommendation at 16, 24 (Sept. 19, 2022) (including provisions for energy efficiency/DSM for low income consumers and weatherization assistance); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates,* Case No. Duke, 12-1682-EL-AIR, et al., Stipulation and Recommendation at 9 (April 2, 2013) (providing for weatherization funding to PWC and OPAE); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for an Increase in Electric Distribution Rates,* Case No. 11-351-EL-AIR, et al., Joint Stipulation and Recommendation at 7 (Nov. 23, 2011) (including provision for low-income bill payment assistance funding). [↑](#footnote-ref-18)
18. *See* OMAEG/Kroger Brief at 21, footnote 10-9. [↑](#footnote-ref-19)
19. R.C. 4928.143(C). [↑](#footnote-ref-20)
20. OCC Ex. 2 at 21. [↑](#footnote-ref-21)
21. AES Ohio Brief at 2-4; PUCO Staff Brief at 7-9; Walmart Brief at 3-6; OELC Brief at 2; IGS Brief at 6; Ohio Energy Group Brief at 3; OMAEG/Kroger Brief at 8-10. [↑](#footnote-ref-22)
22. AES Ohio Brief at 2-4. [↑](#footnote-ref-23)
23. AES Ohio Brief at 3; AES Ohio Ex. 1 at 5-7. Notably, the majority of the discovery (approximately 60%) was posed by OCC. Signatory Parties Ex. 1 at 2. [↑](#footnote-ref-24)
24. OCC Ex. 6. [↑](#footnote-ref-25)
25. Tr. I at 88. [↑](#footnote-ref-26)
26. AES Ohio Brief at 4. [↑](#footnote-ref-27)
27. OCC Ex. 2 at 29. [↑](#footnote-ref-28)
28. AES Ohio Brief at 6. [↑](#footnote-ref-29)
29. OCC Ex. 2 at RBF-1. [↑](#footnote-ref-30)
30. AES Ohio Brief at 7-10. [↑](#footnote-ref-31)
31. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, In the Form of An Electric Security Plan*, Case No. 16-1852-EL-SSO (Apr. 25, 2018) at ¶ 239. [↑](#footnote-ref-32)
32. AES Ohio Brief at 7. [↑](#footnote-ref-33)
33. R.C. 4928.143. [↑](#footnote-ref-34)
34. AES Ohio Brief at 8. [↑](#footnote-ref-35)
35. Signatory Parties Ex. 1 at § VI. [↑](#footnote-ref-36)
36. R.C. 4928.141(A); 4928.40(A); *see also* OCC Initial Brief at 20-21. [↑](#footnote-ref-37)
37. AES Ohio Brief at 8. [↑](#footnote-ref-38)
38. Signatory Parties Ex. 1 at § IX. [↑](#footnote-ref-39)
39. AES Ohio Brief at 8. [↑](#footnote-ref-40)
40. *In the Matter of the Application of the Dayton Power and Light Company’s Implementation of Certain Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 19-572-EL-UNC, Opinion & Order (Sept. 26, 2019) at 5. [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. Tr. I at 99-100. [↑](#footnote-ref-43)
43. AES Ohio Brief at 9. [↑](#footnote-ref-44)
44. *In the Matter of the Application of the Dayton Power and Light Company for a Limited Waiver of Rule 4901;1-18-06(A)(2), Ohio Administrative Code*, Case No. 21-1234-EL-WVR, Finding and Order at ¶ 29. (May 17, 2023). [↑](#footnote-ref-45)
45. *Id.*  [↑](#footnote-ref-46)
46. AES Ohio Brief at 9. [↑](#footnote-ref-47)
47. Signatory Parties Ex. 1 at XVII(A)(1). [↑](#footnote-ref-48)
48. Tr. I at 101 (Schroder). [↑](#footnote-ref-49)
49. Signatory Parties Ex. 1 at 32, XVII A.5. [↑](#footnote-ref-50)
50. O.A.C. 4901:1-38-03(A)(2); 4901:1-38-04(A)(2); 4901:1-38-05(A)(1), (B)(2). [↑](#footnote-ref-51)
51. O.A.C. 4901:1-38-03(A)(3); 4901:1-38-04(A)(3); 4901:1-38-05(A)(1), (B)(2). [↑](#footnote-ref-52)
52. O.A.C. 4901:1-38-03(A)(3), (B)(3); 4901:1-38-04(A)(3); 4901:1-38-05(B)(1). [↑](#footnote-ref-53)
53. O.A.C. 4901:1-38-03 (A)(2)(g); 4901:1-38-04(A)(2)(f); 4901:1-38-05(B)(1)(c). [↑](#footnote-ref-54)
54. O.A.C. 4901:1-38-03(A)(3); 4901:1-38-04(A)(3); 4901:1-38-05(A)(1). [↑](#footnote-ref-55)
55. O.A.C. 4901:1-38-03(E); 4901:1-38-04(D); 4901:1-38-05(F). [↑](#footnote-ref-56)
56. O.A.C. 4901:1-38-03(C); 4901:1-39-04(B); 4901:1-38-05(B)(3). [↑](#footnote-ref-57)
57. AES Ohio Brief at 10. [↑](#footnote-ref-58)
58. Tr. I at 115-116. [↑](#footnote-ref-59)
59. *Id.*  [↑](#footnote-ref-60)
60. *See* Direct Testimony of Claire E. Hale at 9, CEH Ex. 1-3 (Sept. 27, 2022). [↑](#footnote-ref-61)
61. Tr. I at 117. [↑](#footnote-ref-62)
62. AES Ohio Brief at 12. [↑](#footnote-ref-63)
63. *In re Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case No. 08-1094-EL-SSO, et al., Opinion & Order (Dec. 18, 2019). [↑](#footnote-ref-64)
64. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Plan to Modernize its Distribution Grid*, Case No. 18-1875-EL-GRD, et al., Opinion and Order at 63 (June 16, 2021) (where the PUCO stated AES Ohio’s next ESP “is expected to terminate all rate stability charges”). [↑](#footnote-ref-65)
65. *Id*. [↑](#footnote-ref-66)
66. *See* Tr. I at 103-104 (Schroder). [↑](#footnote-ref-67)
67. *See In the Matter of the Application of the Dayton Power and Light Company to Increase Its Rates for Electric Distribution*, Case No. 20-1651-EL-AIR, et al., Opinion and Order at ¶ 224 (Dec. 14, 2022). [↑](#footnote-ref-68)
68. OCC Ex. 8. [↑](#footnote-ref-69)
69. *In the Matter of the Application of the Dayton Power and Light Company to Increase Its Rates for Electric Distribution*, Case No. 20-1651-EL-AIR, et al., Opinion and Order (Dec. 14, 2022). [↑](#footnote-ref-70)
70. OCC Ex. 2 at 20. [↑](#footnote-ref-71)
71. AES Ohio Brief at 13. [↑](#footnote-ref-72)
72. AES Ohio Ex. 1 at 19. [↑](#footnote-ref-73)
73. Signatory Parties Ex. 1 at 40-41. [↑](#footnote-ref-74)
74. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition  
    Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues  
    as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al.,  
    Opinion and Order at 27 (Sept. 21, 2000); Tr. I at 139-141 (Schroder); OCC Ex. 9. [↑](#footnote-ref-75)
75. Signatory Parties’ Ex. 1 at 40-41. [↑](#footnote-ref-76)
76. *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 32. [↑](#footnote-ref-77)
77. R.C. 4928.143(C). [↑](#footnote-ref-78)
78. AES Ohio Brief at 14. [↑](#footnote-ref-79)
79. AES Ohio Brief at 13. [↑](#footnote-ref-80)
80. *Id.* at 15. [↑](#footnote-ref-81)
81. *Id*. at 19. [↑](#footnote-ref-82)
82. *Id.* at 20. [↑](#footnote-ref-83)
83. AES Ohio Memorandum in Opposition to OCC Motion at 6 (May 25, 2023). [↑](#footnote-ref-84)
84. PUCO Staff Memorandum Contra at 3 (May 25, 2023). [↑](#footnote-ref-85)
85. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition  
    Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues  
    as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al.,  
    Opinion and Order (Sept. 21, 2000). [↑](#footnote-ref-86)
86. *Id*. at 25-26. [↑](#footnote-ref-87)
87. *Id*. at 18-22. [↑](#footnote-ref-88)
88. *Id*. at 27, 40. [↑](#footnote-ref-89)
89. The PUCO Staff is obviously mistaken in its assertion that Ohio law defining transition cost collection was “drafted much later.” *See* PUCO Staff Memorandum Contra OCC Motion at 3 (May 25, 2023). [↑](#footnote-ref-90)
90. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition  
    Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues  
    as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al.,  
    Opinion and Order at 27. [↑](#footnote-ref-91)
91. *Id*. at 29. [↑](#footnote-ref-92)
92. *Id.* at 40. [↑](#footnote-ref-93)
93. *Id*. [↑](#footnote-ref-94)
94. *In re Ohio Edison Co.*, 2018-Ohio-4698, ¶ 22, 23. [↑](#footnote-ref-95)
95. *Id.* [↑](#footnote-ref-96)
96. *See, e.g. Consumers’Counsel v. Publ. Util. Comm.* (1983), 6 Ohio St.3d 405, 412 (R.C. 4905.18 and R.C. 4909.15 must be read in pari materia); *In the Matter of the Application of Ohio Power Company for Approval of Its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 16-574-EL-POR, Finding and Order at ¶ 43 (Feb. 26, 2020) (where the PUCO found it necessary that H.B.6 and R.C. 4928.66 be read in pari materia); *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Opinion at \*9 (June 15, 1989) (Title 49 public records provisions must be read in pari materia with R.C. 1333.51); *In the Matter of the Application of Christi Water System, Inc.*, Case No. 88-1264-WW-ATA, Finding and Order at \*2 (Oct. 28, 1988) (R.C. 4909.171 and R.C. 4909.17 must be read in pari materia). [↑](#footnote-ref-97)
97. AES Ohio Opposition to OCC Motion at 9. [↑](#footnote-ref-98)
98. 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 17-26. [↑](#footnote-ref-99)
99. AES Ohio Brief at 21 (emphasis added). [↑](#footnote-ref-100)
100. OCC Witness Fortney testified that although that is theoretically what can happen, the benefits are hypothetical at this time. OCC Ex. 2 at 29-30. [↑](#footnote-ref-101)
101. Nonetheless, PUCO Staff Witness Nicodemus asserts the interests are aligned. PUCO Staff Ex. 7 at Question 14. But a close reading of his testimony shows that he relies heavily upon AES Ohio’s *commitment under the Settlement to improve* *in the future* service reliability and resiliency of the grid for all consumers. [↑](#footnote-ref-102)
102. PUCO Staff Ex. 7 at Question 10 (Nicodemus). [↑](#footnote-ref-103)
103. AES Ohio Brief at 15. [↑](#footnote-ref-104)
104. *In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution*, Case No. 20-1651-EL-AIR, Opinion and Order at 86 (Dec. 14, 2022). [↑](#footnote-ref-105)
105. AES Ohio Brief at 13. [↑](#footnote-ref-106)
106. *Id*. at 19. [↑](#footnote-ref-107)
107. *See, e.g., In the Matter of Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer pursuant to R.C. 4828.143*, Case No. 124-841-EL-SSO, Opinion and Order at 108-110 (Apr. 2, 2015). [↑](#footnote-ref-108)
108. *Id.* [↑](#footnote-ref-109)
109. *Id*. at 106-107. [↑](#footnote-ref-110)
110. *Id.* [↑](#footnote-ref-111)
111. AES Ohio Brief at 21. [↑](#footnote-ref-112)
112. AES Ohio Brief at 19-20. [↑](#footnote-ref-113)
113. *See, e.g*., *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to provide a Standard Service Offer*, 2016 Ohio PUC LEXIS 270\*, Case No. 14-1297-EL-SSO, Opinion and Order at \*263 (Mar. 31, 2016). [↑](#footnote-ref-114)
114. 2018-Ohio-4698 ¶¶ 28-31. [↑](#footnote-ref-115)
115. AES Ohio Brief at 16. [↑](#footnote-ref-116)
116. OCC Ex. 4 at 5. [↑](#footnote-ref-117)
117. *Id.* [↑](#footnote-ref-118)
118. AES Ohio Brief at 16. [↑](#footnote-ref-119)
119. OCC Ex. 3 at Attachment LM-4 at 113 (emphasis added) (Morgan). [↑](#footnote-ref-120)
120. OCC Ex. 19 at 53 (emphasis added). [↑](#footnote-ref-121)
121. Stipulation and Recommendation at 15. [↑](#footnote-ref-122)
122. AES Ohio Initial Brief at 18. [↑](#footnote-ref-123)
123. R.C. 4928.15(A). [↑](#footnote-ref-124)
124. R.C. 4928.148. [↑](#footnote-ref-125)
125. AES Ohio Initial Brief at 19. [↑](#footnote-ref-126)
126. *Id.* [↑](#footnote-ref-127)
127. *In re Application of Columbus S. Power Co*., 0 128 Ohio St.3d 512, 2011-Ohio-1788. [↑](#footnote-ref-128)
128. *Id.* [↑](#footnote-ref-129)
129. Staff Ex. 1 at 5 (Borer). [↑](#footnote-ref-130)
130. Signatory Parties Joint Ex. 1 at 16. [↑](#footnote-ref-131)
131. AES Ohio Brief at 20-21. [↑](#footnote-ref-132)
132. AES Ohio Brief at 11. [↑](#footnote-ref-133)
133. *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, Second Finding and Order (Dec. 18, 2019). [↑](#footnote-ref-134)
134. *Id.* at 20. [↑](#footnote-ref-135)
135. *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, Second Finding and Order (Dec. 18, 2019). [↑](#footnote-ref-136)
136. OMAEG/Kroger Initial Brief at 18-19. [↑](#footnote-ref-137)
137. *Id.* [↑](#footnote-ref-138)
138. *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, Second Finding and Order (Dec. 18, 2019). [↑](#footnote-ref-139)
139. OCC Brief at 68-70. [↑](#footnote-ref-140)
140. Constellation Brief at 4-10. [↑](#footnote-ref-141)
141. *Id.* at 12-18. [↑](#footnote-ref-142)
142. *Id.* at 18-21. [↑](#footnote-ref-143)
143. Tr. I at 90. [↑](#footnote-ref-144)
144. R.C. 4928.141(A). [↑](#footnote-ref-145)
145. R.C. 4928.142. [↑](#footnote-ref-146)
146. R.C. 4928.143. [↑](#footnote-ref-147)
147. *See, e.g., In the Matter of the Application of The Dayton Power and Light for Approval of Its Electric Security Plan*, Case No. 16-395-EL-SSO, Second Finding and Order (Oct. 20, 2017). [↑](#footnote-ref-148)
148. IGS Brief at 9; OEG Brief at 5-9. [↑](#footnote-ref-149)
149. OCC Ex. 1 at 20 (Wilson). [↑](#footnote-ref-150)
150. <https://puco.ohio.gov/wps/portal/gov/puco/about-us/resources/mission-and-commitments>. [↑](#footnote-ref-151)