BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval to Defer Distribution Decoupling Costs.	: : :	CASE NO. 20-0140-EL-AAM

REPLY BRIEF OF THE DAYTON POWER AND LIGHT COMPANY (d/b/a AES OHIO)

Michael J. Schuler (0082390)
AES OHIO
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

Jeffrey S. Sharkey (0067892)
(Counsel of Record)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
chollon@ficlaw.com

Counsel for AES Ohio

(willing to accept service by email)

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I. THE COMMISSION SHOULD RESPECT THE BARGAIN STRUCK IN THE 2015 RATE CASE

AES Ohio's Initial Brief demonstrated that the Commission should grant AES Ohio's request to defer the Decoupling Amounts because the parties to the Company's 2015 distribution rate case (Case No. 15-1830-EL-AIR) agreed that AES Ohio would recover those amounts. Specifically, in that case, AES Ohio abandoned its plan to implement a higher customer charge, and in exchange, most of the other parties in that case (including all of the parties to this case) agreed that AES Ohio would implement a Decoupling Mechanism. Direct Testimony of Tyler A. Teuscher ("AES Ohio Ex. 2"), pp. 6-7; May 4, 2021 Transcript of Hearing ("Tr.") 96, 98, 123 (Teuscher); Tr. 185-86 (Willis).

Significantly, in their initial briefs, neither Staff nor the Intervenors dispute AES Ohio's core point – i.e., that they agreed in the 2015 distribution rate case that AES Ohio would withdraw its proposal to implement a higher customer charge, and in exchange, would implement a Decoupling Mechanism. Rates were set in that rate case assuming that AES Ohio would recover the Decoupling Amounts, and AES Ohio would not recover its approved revenue requirement without the opportunity to recover those amounts. Tr. 32 (Nyhuis); Tr. 136-37 (Teuscher).

Nor do Staff or the Intervenors claim that customers would be injured if the Decoupling Amounts were recovered through a deferral and later recovery, as opposed to being recovered through the Decoupling Rider (as originally agreed). In either event, AES Ohio would recover the same amounts that Staff and the Intervenors agreed should be recovered.

It is also critical that neither Staff nor the Intervenors claim that any statute or Supreme Court decision bars the Commission from granting AES Ohio's deferral request.[1] R.C. 4905.13 grants the Commission broad discretion to regulate a utility's accounting practices, including the authorization of deferrals. Further, a deferral creates a regulatory asset, and a regulatory asset can be created "pursuant to an order . . . of the public utilities commission." R.C. 4928.01(A)(26). The Commission thus has broad discretion in this matter, and should grant AES Ohio's request for the reasons identified in its Initial Brief.

OCC (p. 1) asserts that AES Ohio's request to defer the Decoupling Amounts would be "a double whammy for Dayton consumers" and that AES Ohio wants to "have its cake and eat it too." OCC's "double whammy" argument ignores reality.

Specifically, the first "whammy" to which OCC refers purportedly occurred in AES Ohio's Electric Security Plan ("ESP") cases (Case Nos. 16-0395-EL-SSO, et al. and 08-1094-EL-SSO, et al.). In 2019, in those cases, the Commission (1) invalidated the Distribution Modernization Rider ("DMR"); (2) invalidated the Decoupling Rider; (3) invalidated the Distribution Investment Rider ("DIR"); (4) invalidated the Reconciliation Rider; (5) invalidated the Regulatory Compliance Rider; and (6) invalidated the Uncollectible Rider.[2] OCC advocated for all of those results.[3] While OCC did not win every issue in those ESP cases – it opposed the

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[1] The only exception is that OMAEG (pp. 8-9) and Kroger (pp. 14-15) make the puzzling argument that AES Ohio's deferral request is barred by R.C. 4928.01(A)(26). However, as discussed in the text, that section permits a regulatory asset to be created "pursuant to an order . . . of the public utilities commission." AES Ohio is seeking such an order in this case; if the Commission issues such an order, then that Section would be satisfied.

[2] In re The Dayton Power and Light Company, Case No. 16-395-EL-SSO, et al. ("ESP III"), Supplemental Opinion and Order (Nov. 21, 2019), ¶ 110; In re The Dayton Power and Light Company, Case No. 08-1094-EL-SSO, et al. ("ESP I"), Second Finding and Order (Dec. 18, 2019), ¶ 36).

[3] ESP III, Supplemental Brief by OCC (Aug. 1, 2019), p. 1; ESP I, Memorandum Contra by OCC (Dec. 4, 2019), pp. 7-11; ESP I, Motion to Reject Tariffs by OCC (Dec. 4, 2019), pp. 13-14.

Rate Stabilization Charge being reinstated – OCC received significant wins in those cases. There thus is no "whammy" to customers in the ESP cases.

The second "whammy" to which OCC refers would be implementing the rate structure that OCC itself advocated for. Specifically, OCC repeatedly and vigorously opposed higher customer charges,[4] and advocated for a decoupling mechanism.[5] OCC got what it asked for -- the Stipulation and Recommendation in AES Ohio's rate case included a lower customer charge and decoupling.[6] There is no "whammy" to customers if they have to pay rates under a rate structure that OCC advocated for.

OCC is thus the party that is trying to "have its cake and eat it too." OCC got most of what it wanted in the ESP cases. OCC also got the rate structure that it wanted in the rate case. OCC should not be allowed to walk away from its rate case agreement.

Intervenors appear to conflate the concept of rider recovery from regulatory asset deferral by focusing on the ESP III case and not on the rate case Stipulation, which stands on its own as a reason to allow AES Ohio to defer the Decoupling Amounts. OMAEG at pp. 8-10, 15-16; Kroger at pp. 3-8. This is most clearly demonstrated by multiple parties pointing to the Commission's Second Finding and Order in ESP I, arguing that:

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[4] In re Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies, Case No. 10-3126-EL-UNC, Finding and Order (Aug. 21, 2013) ("AES Ohio Ex. 13"), p. 4; In re The Dayton Power and Light Company, Case No. 15-1830-EL-AIR, et al., Objections to the PUCO Staff's Report of Investigation by OCC (Apr. 11, 2018) (AES Ohio Ex. 16"), p. 10.

[5] AES Ohio Ex. 13, p. 6.

[6] In re The Dayton Power and Light Company, Case No. 15-1830-EL-AIR, et al., Stipulation and Recommendation (June 18, 2018) ("AES Ohio Ex. 17"), pp. 10-11, 14; Tr. 180 (Willis); Tr. 217 (Lipthratt).

1. The Commission has already rejected AES Ohio's request to continue the Decoupling Rider and "collect" and "recover" the same amounts requested in this proceeding, (OMAEG at pp. 6, 9-10);
2. The Commission already denied AES Ohio's attempt to "charge" the decoupling rider, (OCC at p. 2); and
3. AES Ohio seeks to continue receiving the benefits of the "right to collect" decoupling revenues, (Kroger at p. 9).

But those parties overlook the legal and factual distinction between cost recovery, which was at issue in ESP I, and deferral, which is what is at issue here. Riders, like the Decoupling Rider include actual charges to collect rates; deferrals, on the other hand, are not ratemaking and do not involve actual collection. E.g., In re Vectren Energy Delivery of Ohio Inc., Finding and Order, (Dec. 19, 2007), ¶ 15 (citing River Gas Co. v. Pub. Util Comm., 69 Ohio St.2d 509, 512, 433 N.E.2d 568 (1982) and Office of Consumers' Counsel v. Pub. Util, Comm., 6 Ohio St.3d 377, 379, 453 N.E.2d 673 (1983)). Thus, despite suggestions that AES Ohio is seeking to avoid the costs of its decision to withdraw ESP III (Kroger at p. 9, OCC at p. 1), even with approval of the deferral, the Company will continue not to have rider recovery of the Decoupling Amounts until a subsequent proceeding.

Beyond this distinction, however, the parties misconstrue the issues in this proceeding. AES Ohio does not contest that the result from withdrawing ESP III was cessation of the Decoupling Rider. But the existence of the Decoupling Rider is not the predicate upon which AES Ohio should be allowed to defer the Decoupling Amounts. In fact, as OMAEG and Kroger point out – the Decoupling Mechanism established under the ESP III was an entirely different concept/mechanism built around lost distribution revenues, not a revenue-per-customer

mechanism. OMAEG at pp. 3-4; Kroger at p. 5. One of the bargained for benefits of the rate case Stipulation is that AES Ohio would not only get to implement/recognize the new revenue-per-customer Decoupling Mechanism, but that it could be collected through the Decoupling Rider. Eliminating of the Decoupling Rider should not be read to undermine the entire Decoupling methodology bargained for in the rate case Stipulation.

OMAEG and Kroger also make the circular argument that there is no Commission order authorizing AES Ohio to defer the amounts requested in this case. (OMAEG at pp. 8-10; Kroger at pp. 5-6). This argument misses the entire purpose of this proceeding, which seeks an order clearly bestowing such deferral authority; otherwise, the Company would just defer the matter on the books without such a request. The Rate Case Stipulation provides good reason for the Commission to grant deferral in this proceeding based upon the bargain struck in that case. It is uncontested that the Distribution Rate Case Stipulation did set forth a robust change to rate design in the form of a reduced customer charge and implementation of revenue-per-customer decoupling rate design that could be a positive or a negative compared to the Allowed Revenue Requirement.

It is important for the Commission to understand that AES Ohio's request in this case is not based upon the fact that the Decoupling Rider was included in the now-terminated ESP III Stipulation. For example, the Commission terminated the DMR and the DIR that had previously been approved in the ESP III Stipulation.[7] AES Ohio has not asked for a deferral or alternative recovery mechanisms for those amounts, because there is no independent reason to

[7] ESP III, Supplemental Opinion and Order (Nov. 21, 2019), ¶ 110; ESP I, Second Finding and Order (Dec. 18, 2019), ¶ 36.

allow a deferral or current recovery of those amounts. However, the Decoupling Amounts are different. There is an independent reason to allow a deferral of the Decoupling Amounts – i.e., the agreement reached in the rate case. The Commission should thus conclude that the termination of ESP III (and the Decoupling Rider) does not bar the deferral of the Decoupling Amounts.

II. THE REVENUE V. COST DISTINCTION DOES NOT BAR AES OHIO'S DEFERRAL REQUEST

Staff and Intervenors argue that the Decoupling Amounts are revenues, not costs, and that lost revenues cannot be deferred absent meeting the six-part revenue deferral test. The Commission should reject that argument for the following reasons.

First, the distinction between revenues and costs is irrelevant here, and an example illustrates the point. Specifically, the Decoupling Amounts are calculated on a revenue-per-customer basis. AES Ohio Ex. 17, p. 10. Suppose the fixed costs to serve a particular customer were $50 per month. Suppose further that due to mild weather, AES Ohio collected only $40 from that customer in a given month – meaning there are $10 of costs that were not recovered. Under the revenue-per-customer methodology, that $10 would have been recovered through the Decoupling Rider as revenue. The results of this case should not turn on the meaningless distinction between whether the Decoupling Amounts are the $10 in unrecovered costs (AES Ohio's view) or the $10 in unrecovered revenue (Staff's view). It is the same money.

Second, while Staff and Intervenors claim that the Commission typically does not allow the deferral of lost revenue, they do not cite any Commission decisions that have denied a deferral request on the ground that the request sought a deferral of revenue. OCC went so far as to incorrectly argue that the PUCO generally employs the six-part test, repeatedly confusing the

Commission's Staff for the Commission itself. (OCC at pp. 5-6). Nor do the Intervenors cite any decision where the Commission has adopted the six-part revenue deferral test asserted by Staff. AES Ohio's Initial Brief (pp. 16-18) cited cases in which the Commission has authorized the deferral of lost revenue that was caused by events similar to what caused the Decoupling Amounts here, and where the deferral was not attached to a specific recovery mechanism.

III. THE SIX-FACTOR TEST IS NOT APPLICABLE

AES Ohio's Initial Brief (pp. 11-12) demonstrated that the six-factor test was not applicable here. Even if the test were applicable here, the Decoupling Amounts satisfy it, for the following reasons.

1. "Whether the utility's current rates or revenues are sufficient to cover the costs associated with the related deferrals."

As discussed above, the Decoupling Amounts that AES Ohio seeks to defer in this case are equal to the costs that it incurs to serve customers. Tr. 22, 59-60 (Nyhuis); Tr. 96 (Teuscher). Accord: Tr. 192-93 (revenue requirement equals costs) (Willis); Tr. 225-26 (same) (Lipthratt). AES Ohio's revenues are not sufficient to cover its costs (regardless of whether the Decoupling Amounts are considered to be revenues or costs). Tr. 136 (Teuscher).

2. "Whether the costs requested to be deferred are material in nature."

The Decoupling Amounts are approximately $17 million as of 2020. Tr. 232 (Lipthratt). There is no dispute that that amount is material. Prefiled Testimony of David M. Lipthratt ("Staff Ex. 1"), p. 6. OCC even concedes that the Decoupling Amounts at issue in this

proceeding are material in nature. (OCC at p. 6 stating ". . . the amount of revenues the DP&L [sic] requested deferral authority for is material . . .).

3. "Whether the problem was outside the Company's control."

Staff and Intervenors argue that AES Ohio made a voluntary decision to terminate ESP III. However, AES Ohio made that decision only in response to a Commission decision terminating the DMR, which was outside the Company's control. ESP III, Supplemental Opinion and Order (Nov. 21, 2019), ¶ 110. AES Ohio would not have been able to provide safe and reliable service to its customers if it had continued to operate under ESP III without the DMR. In re Dayton Power and Light Company, Case No. 18-1875-EL-GRD, et al., Opinion and Order (June 16, 2021), ¶ 58 (finding that AES Ohio would not be able to "maintain safe and reliable service" without a financial integrity charge). While AES Ohio made a decision to terminate ESP III, AES Ohio had no other practical choice at that time.

4. "Whether the expenditures are atypical and infrequent."

This factor is satisfied if an "exceedingly rare occurrence" caused the need for the deferral. In re Ohio Power Company, Case No. 20-602-EL-UNC, et al., Finding and Order (May 6, 2020) ("AES Ohio Ex. 21"), p. 19 (factor satisfied because "the COVID-19 pandemic is an exceedingly rare occurrence").

The events that led to AES Ohio's deferral request are "exceedingly rare," and include all of the following:

1. A decision by this Commission invalidating a rider that it had previously approved.
2. A decision by a utility to terminate its ESP and revert to a prior ESP.

3. The invalidated ESP had a place holder rider that the prior ESP to which the utility reverted did not have.

4. The reason for the deferral request is not based upon what happened in either ESP case, but is instead based on events in another case.

All of those factors had to occur to give rise to AES Ohio's deferral request in this case. Each of those factors is unusual, and the confluence of all four is unlikely to ever occur again. Thus, the concerns that granting a deferral in this incredibly unique factual situation will encourage other utilities to withdraw from their ESP is a red herring at best. OCC at p. 7.

5. "Whether the financial integrity of the utility will be significantly and adversely affected."

The amount of the deferral at issue is $17 million through 2020. Tr. 232 (Lipthratt). There is no dispute that that amount is material and therefore would adversely affect the financial integrity of AES Ohio. Staff Ex. 1, p. 6.

6. "Whether the Commission could encourage the utility to do something it would not otherwise do through the granting of the deferral authority."

Staff and Intervenors argue that the Commission should discourage utilities from terminating ESPs while continuing to claim the benefits of the ESP. The Commission should reject that argument for two reasons. First, it is the events in the rate case, not the ESP cases, that give rise to AES Ohio's request here. Second, this is a highly unusual situation that is not likely to occur again. The Commission should not reject AES Ohio's request here based upon the extremely unlikely event that another utility might be in a similar situation in the future.

The Commission should thus conclude that if the six-factor test is applicable here, the requested deferral is consistent with the six-factor test.

IV. THE DEFERRAL REQUEST IS NOT BARRED BY R.C. 4903.10, COLLATERAL ESTOPPEL OR RES JUDICATA

OCC (p. 5) argues that AES Ohio's request is barred by R.C. 4903.10, res judicata and collateral estoppel, because the Commission rejected AES Ohio's request that the Decoupling Rider be continued as part of ESP I. The Commission should reject that argument because the issue in that case is different from the issue in this case.

Specifically, in that case, the Commission concluded that the Decoupling Rider could not continue since it was not included in ESP I, to which AES Ohio had reverted. ESP I, Second Finding and Order (Dec. 18, 2019), ¶ 36.

Here, AES Ohio has not asked for the rider to be continued or reimplemented. Instead, it has asked for a deferral of the amounts that otherwise would have been recovered from that rider. It is well settled that a deferral and rate recovery are different things. Elyria Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 19("The commission's authority pursuant to R.C. 4905.13 over public-utility accounting practices is distinct from the ratemaking statutes in R.C. Chapter 4909. We have upheld the commission's accounting orders when the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding.") (citations omitted); In re The Dayton Power and Light Company, Case No. 16-649-EL-POR, et al., Opinion and Order (Sept. 27, 2017), ¶ 57 ("Further, this Commission's approval of an accounting modification, such as a deferral, does not constitute ratemaking and, thus, does not violate the rule against retroactive ratemaking.") The issues in that case and in this case are thus different.

V. GAAP RULES DO NOT BAR THE DEFERRAL HERE

OMAEG (p. 9) and Kroger (pp. 14-15) argue that the Generally Accepted Accounting Principles ("GAAP") bar AES Ohio's deferral request. Not so, for two reasons.

First, they base their analysis on a Staff Report. However, Staff is no longer relying upon that Report. Staff Initial Brief, p. 2.

Second, AES Ohio witness Nyhuis explained in detail why GAAP rules do not bar AES Ohio's deferral request. March 5, 2021 Direct Testimony of Karin M. Nyhuis ("AES Ohio Ex. 1"), pp. 2-6. In particular, she testified as follows:

> "Q. Does ASC 980-605-25-4 preclude the Commission from allowing DP&L to defer the Decoupling Amounts at issue on its regulatory books?
>
> A. No. The Commission is bound by the Ohio Revised Code regarding what can be deferred on a utility's regulatory books. As discussed above, Section 4928.01(A)(28) of the Ohio Revised Code defines the term 'regulatory asset' as 'the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles . . . .' (Emphasis added.)
>
> Q. Does ASC 980-605-25-4 preclude DP&L from deferring the Decoupling Amounts at issue on its GAAP books?
>
> A. No. ASC 980-605-25-4 establishes GAAP requirements regarding whether a utility can recognize revenues and not whether a utility can record a deferral. . . .
>
> Since ASC 980-605-25-4 merely 'provides guidance for revenue recognition in alternative revenue programs,' that guidance does not address whether DP&L can defer any amounts, such as the Decoupling Amounts at issue in this proceeding. In other words, ASC 980-605-25-4 is guidance on when a company should recognize revenues, not a limit on when it can make a regulatory deferral. . . . ."

AES Ohio Ex. 1, pp. 4-6. No contrary evidence was introduced.

VI. DECOUPLING IS NOT LINKED TO ENERGY EFFICIENCY

OMAEG (pp. 11-12) and Kroger (pp. 10-11) argue that AES Ohio's deferral request should be rejected because the energy efficiency mandates in Ohio have been terminated. As demonstrated in AES Ohio's Initial Brief (pp. 19-20), the Commission should reject that argument for the following reasons:

1. As established by the testimony in this matter, the Decoupling Amounts will change based upon changes in weather, energy efficiency (whether mandated or customer-initiated) or customer usage, and therefore are not linked solely to energy efficiency mandates (AES Ohio Ex. 2, p. 5; Tr. 150-51 (Willis); Tr. 212-13 (Lipthratt)); and

2. Customers remain free to implement their own energy efficiency measures.

3. Even if the Commission ultimately agrees with this argument, energy efficiency mandates existed through December 31, 2020, and the deferral should, at a minimum, be authorized through that date.

Respectfully submitted,

s/ Michael J. Schuler
Michael J. Schuler (0082390)
AES OHIO
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: michael.schuler@aes.com

s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
Christopher C. Hollon (0086480)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
chollon@ficlaw.com

Counsel for AES Ohio

(willing to accept service by email)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of The Dayton Power and Light Company (d/b/a AES Ohio) has been served via electronic mail upon the following counsel of record, this 9th day of July, 2021.

Robert Eubanks
OFFICE OF THE
OHIO ATTORNEY GENERAL
PUBLIC UTILITIES SECTION
30 East Broadway Street, 16th Floor
Columbus, OH 43215
robert.eubanks@ohioattorneygeneral.gov

Counsel for Staff of the Public Utilities Commission of Ohio

Christopher Healey
Ambrosia E. Wilson
Amy Botschner O'Brien
Colleen Shutrump
OFFICE OF THE
OHIO CONSUMERS' COUNSEL
65 East State Street, 7th Floor
Columbus, OH 43215
Christopher.healey@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
amy.botschner.o'brien@occ.ohio.gov
colleen.shutrump@occ.ohio.gov

Counsel for The Office of the Ohio Consumers' Counsel

Kimberly W. Bojko
Thomas V. Donadio
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
Donadio@carpenterlipps.com

Counsel for Ohio Manufacturers' Association Energy Group

Angela Paul Whitfield
Jonathan Wygonski
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps. com
wygonski@carpenterlipps.com

Counsel for The Kroger Co.

s/ Christopher C. Hollon
Christopher C. Hollon

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