

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
	:	
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority	:	CASE NO. 20-1652-EL-AAM
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	CASE NO. 20-1653-EL-ATA
	:	

---

**THE DAYTON POWER AND LIGHT COMPANY  
D/B/A AES OHIO'S MEMORANDUM IN OPPOSITION TO  
MOTION TO DISMISS APPLICATION FOR A RATE INCREASE BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

Jeffrey S. Sharkey (0067892)  
(Counsel of Record)  
D. Jeffrey Ireland (0010443)  
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  
djireland@ficlaw.com  
chollon@ficlaw.com

*Counsel for AES Ohio*

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMISSION SHOULD DENY OCC'S MOTION AS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE ESP I CASE .....	4
III. THE COMMISSION SHOULD DENY OCC'S MOTION AS UNTIMELY .....	6
IV. THE COMMISSION SHOULD DENY OCC'S MOTION BECAUSE OCC FORFEITED ANY ARGUMENT TO ENFORCE THE RATE FREEZE .....	7
A. OCC Did Not Seek to Extend the Rate Freeze When the Commission Extended the Rates of ESP I in the December 19, 2012 Entry .....	8
B. OCC Did Not Seek to Reinstate the Rate Freeze When the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP II.....	9
C. OCC Did Not Seek to Dismiss the 2015 Distribution Rate Case .....	10
D. OCC Did Not Seek to Reinstate the Rate Freeze before the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP III .....	12
V. THE RATE FREEZE WAS NOT A PROVISION, TERM OR CONDITION OF ESP I.....	13
VI. THE COMMISSION SHOULD DENY THE MOTION BECAUSE THE RATES THAT HAD BEEN FROZEN PURSUANT TO THE ESP 1 STIPULATION HAVE ALREADY CHANGED, AND IT ISN'T PRACTICAL TO REVERT BACK TO 1991 BASE RATES .....	16
VII. OCC'S MOTION IS BARRED BY OCC'S CONDUCT IN OTHER PROCEEDINGS.....	17
VIII. THE COMMISSION SHOULD DENY OCC'S MOTION BECAUSE THE 2015 DISTRIBUTION RATE CASE EFFECTIVELY MODIFIED THE RATE FREEZE.....	19
IX. CONCLUSION.....	20

## **I. INTRODUCTION AND SUMMARY**

The Commission should reject the untimely attempt by The Office of the Ohio Consumers' Counsel ("OCC") to prevent The Dayton Power and Light Company d/b/a AES Ohio from implementing new base distribution rates under R.C. Chapter 4909.<sup>1</sup> AES Ohio filed its Application in this proceeding on November 30, 2020; thereafter, the Commission's Staff performed an extensive investigation pursuant to R.C. 4909.19(C), culminating in the 207-page Staff Report filed on July 26, 2021. Meanwhile, OCC moved to intervene on December 7, 2020 and served 10 sets of discovery requests, including 151 interrogatories with countless sub-parts and 138 requests for production of documents. In response, AES Ohio has produced more than 11,000 pages of documents to OCC. Now, just weeks before the evidentiary hearing is set to begin, OCC claims that those efforts were all for naught, demanding dismissal under a 2009 rate freeze<sup>2</sup> that could have been raised at the outset of the case. The Commission should not reward OCC's eleventh-hour Hail Mary attempt, for the following separate and independent reasons.

First, just last week, the Commission rejected the very arguments that OCC now raises in its Motion, *i.e.* that the Commission should apply the 2009 rate freeze to prevent AES Ohio from changing base distribution rates set in 2018 in *In re The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR, *et al.* ("*2015 Distribution Rate Case*"). *ESP I Case*, Sixth Entry on Rehearing (Aug. 11, 2021) at ¶¶ 36-40. *Accord: ESP I Case*, Fifth Entry on Rehearing (June 16,

---

<sup>1</sup> Aug. 5, 2021 Motion to Dismiss DP&L's Application for a Rate Increase by Office of the Ohio Consumers' Counsel ("Motion").

<sup>2</sup> *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, *et al.* ("*ESP I Case*"), Stipulation and Recommendation (Feb. 24, 2009) ("*ESP I Stipulation*") at 10.

2021) at ¶¶ 17-19. The Commission should not indulge this collateral attack, particularly since it seeks to cure defects in OCC's Applications for Rehearing in ESP I.

Second, OCC's motion to dismiss is not timely, since it could have been filed in this case immediately after AES Ohio filed its application. Under the analogous Ohio Rules of Civil Procedure, a motion to dismiss must be filed within 28 days after an action is instituted.

Third, on four separate occasions, OCC had the opportunity to argue that the rate freeze continued, but OCC failed to do so. OCC thus forfeited any right it may have had to enforce the rate freeze by failing to raise the issue (1) when the Commission granted the Company's "motion to continue its rates, including the rate stabilization charge" in ESP I beyond December 31, 2012 without continuing the rate freeze, and OCC failed to assert that the rate freeze should be continued or seek rehearing,<sup>3</sup> (2) when the Commission granted AES Ohio's "motion to implement previously authorized rates" upon the termination of ESP II without continuing the rate freeze, and OCC failed to assert that the rate freeze should be continued or seek rehearing,<sup>4</sup> (3) during the *2015 Distribution Rate Case*, when OCC failed to assert that the rate freeze remained enforceable, and (4) when the Commission solicited comments regarding the continuation of ESP I upon the termination of ESP III, and OCC failed to assert that the rate freeze should be continued.<sup>5</sup> The rehearing statute and principles of *res judicata* and collateral estoppel preclude enforcement of the 2009 rate freeze now.

---

<sup>3</sup> *ESP I Case*, Entry (Dec. 19, 2012) at 6. *Accord*: *ESP I Case*, Entry on Rehearing (Feb. 19, 2013).

<sup>4</sup> *ESP I Case*, Finding and Order (Aug. 26, 2016), ¶ 30. *Accord*: *ESP I Case*, Third Entry on Rehearing (Dec. 14, 2016).

<sup>5</sup> *ESP I Case*, Entry (Nov. 27, 2019).

Fourth, the ESP statute does not authorize the Commission to approve a distribution rate freeze, which necessarily means that the rate freeze is not an ESP term. Thus, when AES Ohio terminated its application in ESP III, and reverted to ESP I, the rate freeze was not restored because the rate freeze was not an ESP term.

Fifth, in agreeing to the 2009 rate freeze, the parties in the *ESP I Case* contemplated keeping base distribution rates at the level approved in *In re The Dayton Power and Light Co.*, Case No. 91-414-EL-AIR ("*1991 Distribution Rate Case*"). *ESP I Case*, Stipulation and Recommendation (Feb. 24, 2009) ("ESP I Stipulation") at 10. Those rates were changed in the 2015 rate case, and there is no indication in the ESP I Stipulation that the parties intended to have the freeze apply to any future base distribution rates.

Sixth, OCC waived the issue when it asserted in the *Quadrennial Review Case*<sup>6</sup> that AES Ohio's projections in that case should include a rate increase associated with this case. OCC should not be allowed to assert that AES Ohio's projections should include a distribution rate increase when it suits OCC's position in one proceeding, and then later move to dismiss the very distribution rate case in another proceeding, conveniently just weeks after the Commission issued an Order approving the October 23, 2020 Stipulation in the *Quadrennial Review Case*.

Seventh, the Commission (with OCC's assent) effectively modified the rate freeze provision by approving the June 18, 2018 Stipulation and Recommendation in the *2015 Distribution Rate Case*, which expressly contemplated (p. 7) the filing of a new base distribution rate case "on or before October 31, 2022."

---

<sup>6</sup> *In re The Dayton Power and Light Co.*, Case No. 20-680-EL-UNC ("*Quadrennial Review Case*").

For all of these reasons, and as shown more fully below, OCC's Motion to Dismiss should be denied.

**II. THE COMMISSION SHOULD DENY OCC'S MOTION AS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE ESP I CASE**

As the Commission knows, whether the 2009 rate freeze applies to AES Ohio's current base distribution rates is an issue that OCC has been litigating (without success) since January 2019 in the *ESP I Case*. This case is not a do-over docket, and the Commission should not allow OCC to challenge orders from the *ESP I Case* here.

Following the termination of ESP III pursuant to R.C. 4928.143(C)(2)(a), the Commission concluded that it was "bound by the plain language of R.C. 4928.143(C)(2)(b)" to "restore the provisions, terms, and conditions of ESP I which were in effect prior to the effective date of ESP III." *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶¶ 26-27. OCC then sought rehearing, arguing that the Commission erred in "fail[ing] to continue the distribution rate freeze of ESP I." *ESP I Case*, Application for Rehearing of The Office of the Ohio Consumers' Counsel (Jan. 17, 2020) at 6. The Commission rejected that argument, explaining that OCC should have raised the issue in the *2015 Distribution Rate Case*, and that "OCC has offered no compelling argument regarding how the Commission, after approving distribution rates in the [2015] *Distribution Rate Case*, could retroactively modify AES Ohio's rates to the prior levels," *i.e.*, to those set in the *1991 Distribution Rate Case*. *ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) at ¶ 19.

Undeterred, OCC again sought rehearing, this time attempting to recast its previous assignment of error not as seeking to reinstate rates set in the *1991 Distribution Rate Case*, but rather to freeze the rates established in the *2015 Distribution Rate Case*. *ESP I Case*,

Application for Rehearing by Office of the Ohio Consumers' Counsel (July 16, 2021) at 18-21. The Commission denied rehearing, finding that "the plain language of OCC's January 17, 2020 application for rehearing demonstrates that OCC was disputing the rates placed into effect in the *2015 Distribution Rate Case*," and that OCC was improperly seeking "two bites at the apple" and "rehearing of a denial of rehearing of the same issue." *ESP I Case*, Sixth Entry on Rehearing (Aug. 11, 2021) at ¶¶ 33, 40. *Accord: In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, *et al.*, Second Entry on Rehearing (Sept. 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas of Ohio*, Case Nos. 05-1421-GA-PIP, *et al.*, Second Entry on Rehearing (May 3, 2006) at 3); *In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

OCC's Motion to Dismiss in this case is a collateral attack on the Commission's Fifth and Sixth Entries on Rehearing, as OCC seeks a third bite at the apple. In its Sixth Entry on Rehearing, the Commission ruled that OCC could not recast its arguments regarding the 2009 rate freeze that OCC raised in its January 17, 2020 Application for Rehearing. *ESP I Case*, Sixth Entry on Rehearing (Aug. 11, 2021) at ¶ 39. By raising the same issues here, OCC is improperly attempting to cure defects in its *ESP I Case* Applications for Rehearing by litigating forfeited issues, in violation of principles of *res judicata*. *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E. 3d 1060, ¶ 20 ("In Ohio, the doctrine of *res judicata* includes both claim preclusion (historically known as estoppel by judgment) and issue preclusion (traditionally known as collateral estoppel."); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985) ("These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed

upon by a court of competent jurisdiction."). For the same reason, the Motion is an untimely application for rehearing of the *ESP I Case*. R.C. 4903.10 (barring causes of action "arising out of any order of the commission . . . unless such person . . . has made a proper application to the commission for a rehearing"). *Accord: In re The Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, *et al.* ("*ESP III Case*"), Third Entry on Rehearing (Sept. 19, 2018) at ¶ 88 (finding that an untimely motion to reopen proceedings constitutes a failure to meet the statutory deadline for rehearing).

The ESP I case was OCC's opportunity to litigate the terms of ESP I. The Commission ruled in ESP I that OCC had failed to seek rehearing on the issue of whether the rate freeze was an ongoing term of ESP I that would bar this case, and OCC cannot challenge the terms of ESP I in this distribution rate case.

### **III. THE COMMISSION SHOULD DENY OCC'S MOTION AS UNTIMELY**

OCC waited 248 days after AES Ohio filed its Application in this proceeding before filing a motion to dismiss. While this case has been pending, OCC ironically filed to intervene, then served hundreds of discovery requests on the Company, and sat idly by as Staff conducted its investigation pursuant to R.C. 4909.19(C) and sixteen other parties intervened.

Although the Ohio Administrative Rules do not expressly contemplate motions to dismiss general rate proceedings, the Ohio Rules of Civil Procedure allow parties to file a motion to dismiss. Civ.R. 12(B)(6) (motions to dismiss for failure to state a claim upon which relief can be granted). While not binding, the Commission looks to the Civil Rules for guidance "wherever practicable." R.C. 4903.082.



Pursuant to Civ.R. 1(B), the Civil Rules "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." To that end, they require the filing of motions to dismiss within 28 days of service of the summons and complaint. Civ.R. 12(A)(2).

Here, OCC did not file its motion to dismiss until 248 days after AES Ohio filed its application in this matter. OCC's Motion is a legal challenge that could have been raised immediately after the Application was filed. OCC was aware of its legal challenge eleven months before OCC intervened in this proceeding, as it unsuccessfully tried to inject the rate freeze issue into AES Ohio's ESP I case. *ESP I Case*, Application for Rehearing of the Office of the Ohio Consumers' Counsel (Jan. 17, 2020) at 6-8. In the interest of administrative economy and to advance the principles embodied in Rules 1 and 12(B)(6) of the Ohio Rules of Civil Procedure, the Commission should deny OCC's Motion as untimely.

**IV. THE COMMISSION SHOULD DENY OCC'S MOTION BECAUSE OCC FORFEITED ANY ARGUMENT TO ENFORCE THE RATE FREEZE**

By its own terms, the 2009 rate freeze expired on December 31, 2012. *ESP I Stipulation* at 10 ("[AES Ohio's] distribution base rates will be frozen through December 31, 2012."); *ESP I Case*, Opinion and Order (June 24, 2009) at 9 ("Moreover, the Stipulation will freeze distribution rates through December 31, 2012 . . . ."). Over the ensuing decade, OCC had four opportunities to argue that the rate freeze continued beyond that date, but never did. Thus, the 2009 rate freeze was not part of the "most recent standard service offer" that was reinstated following the termination of ESP III under R.C. 4928.143(C)(2)(b), and OCC has forfeited the right to reinstate it.

**A. OCC Did Not Seek to Extend the Rate Freeze When the Commission Extended the Rates of ESP I in the December 19, 2012 Entry**

In the ESP I Stipulation, the parties agreed "to extend AES Ohio's current rate plan through December 31, 2012, except as expressly modified," to continue the RSC rider "through December 31, 2012," and to freeze [AES Ohio's] base distribution rates through December 31, 2012. ESP I Stipulation, pp. 3, 10. However, as December 31, 2012 approached without a new standard service offer in place, AES Ohio filed a motion seeking "an Order that will continue [the Company's] current rates" – including the RSC, until ESP II was approved. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, *et al.* ("ESP II Case"), Motion of Applicant The Dayton Power and Light Company to Continue Briefly Current Rates Until Implementation of Terms of a Commission Order (Nov. 7, 2012) at 1 (emphasis added). Although that Motion was opposed by several parties, including OCC, not a single party sought to extend the rate freeze along with AES Ohio's then-current rates.<sup>7</sup> The Commission ordered that AES Ohio's "motion to continue its rates, including the rate stabilization charge, is granted," and that "the RSC should continue with the ESP until a subsequent standard service offer is authorized." *ESP I Case*, Entry (Dec. 19, 2012), pp. 4, 6. The Commission's Order did not continue the rate freeze. *Id.*

OCC and other parties sought rehearing from that Entry, but again, they did not seek to continue the rate freeze.<sup>8</sup> The Commission denied rehearing without addressing the rate freeze, and no party appealed. *ESP I Case*, Entry on Rehearing (Feb. 19, 2013). The rate freeze

---

<sup>7</sup> *ESP II Case*, Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates (Nov. 23, 2012).

<sup>8</sup> *ESP I Case*, Application for Rehearing by The Office of the Ohio Consumers' Counsel, Industrial Energy Users-Ohio, Ohio Partners for Affordable Energy, OMA Energy Group, Solarvision, The Kroger Company, Ohio Energy Group, Honda of America Manufacturing, Inc., Wal-Mart Stores East, LP and Sam's East, Inc. (Jan. 18, 2013).

thus terminated by its own terms on December 31, 2012, and was not part of the Company's standard service offer when ESP II was approved. *ESP II Case*, Opinion and Order (Sept. 4, 2013).

Therefore, when AES Ohio terminated ESP II,<sup>9</sup> it reverted to the most recent version of ESP I, which did not contain a rate freeze because the rate freeze was not extended when ESP I was extended past December 31, 2012. And when AES Ohio later terminated ESP III and again reverted to ESP I,<sup>10</sup> it reverted to the version of ESP I that was in effect after ESP II was terminated, which did not include a rate freeze for the reasons identified above.

**B. OCC Did Not Seek to Reinstate the Rate Freeze When the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP II**

---

Assuming for the sake of argument that the rate freeze survived the extension of the RSC past December 31, 2012, the rate freeze did not survive the termination of ESP II.

Specifically, in July 2016, while the *2015 Distribution Rate Case* was pending, the Company moved to terminate ESP II pursuant to R.C. 4928.143(C)(s)(a) and to "implement rates . . . that are consistent with the rates that were in effect before the Commission's September 4, 2013 Opinion and Order" in Case No. 12-426-EL-SSO pursuant to R.C. 4928.143(C)(2)(b). *ESP I Case*, Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016) at 1. In response, no party argued that the 2009 rate freeze was part of the Company's "most recent standard service offer" under R.C. 4928.143(C)(2)(b) or

---

<sup>9</sup> *ESP II Case*, Finding and Order (Aug. 26, 2016) at ¶ 17 (granting "[the Company's] motion to withdraw its application for an ESP, thereby terminating it").

<sup>10</sup> *ESP III Case*, Finding and Order (Dec. 18, 2019) at ¶ 24 (ordering that "[the Company's] notice of withdrawal of its application in Case No. 16-395-EL-SSO be approved").

otherwise sought to reinstate the freeze. The Commission granted the Company's Motion and did not extend the rate freeze. *ESP I Case*, Finding and Order (Aug. 26, 2016).

OCC sought rehearing from that Finding and Order, but did not seek to reinstate the rate freeze,<sup>11</sup> and the Commission did not address the rate freeze in its Entries on Rehearing. *ESP I Case*, Entry on Rehearing (Oct. 12, 2016); *ESP I Case*, Third Entry on Rehearing (Dec. 14, 2016). OCC forfeited the right to argue that the rate freeze should have been incorporated into the Company's standard service offer, particularly since the Company had a pending distribution rate case at the time.<sup>12</sup> *E.g.*, *City of Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724 (1999).

Therefore, when AES Ohio terminated ESP III, it reverted to the version of ESP I that was in effect following the termination of ESP II, and that version of ESP I did not include a rate freeze for the reasons set forth above.

### **C. OCC Did Not Seek to Dismiss the 2015 Distribution Rate Case**

In its Fifth Entry on Rehearing in the *ESP I Case*, the Commission correctly declined to reinstate the rate freeze because OCC failed to seek to impose a rate freeze in the *2015 Distribution Rate Case*, finding:

"In the *Distribution Rate Case*, [AES Ohio's] current distribution rates were lawfully established by the Commission pursuant to the specific requirements of Chapter 4909 of the Revised Code. Although we are not persuaded that *Parma* should apply to OCC's failure to raise this issue during the comment period established by the November 27, 2019 Entry in this case, we do find that *Parma* applies to the failure of OCC to raise this issue during the

---

<sup>11</sup> *ESP I Case*, Application for Rehearing by Office of the Ohio Consumers' Counsel (Sept. 26, 2016).

<sup>12</sup> The Application in the *2015 Distribution Rate Case* was filed on November 30, 2015.

*Distribution Rate Case*. While the *Distribution Rate Case* was pending before the Commission, the provisions, terms, and conditions of ESP I were reinstated for the period between September 1, 2016, and October 31, 2017; thus, OCC should have raised this issue, or otherwise preserved its rights, in the *Distribution Rate Case*, where the distribution rates were, in fact, established according to law. It is settled law in Ohio that retroactive ratemaking is not permitted. *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). However, OCC has offered no compelling argument regarding how the Commission, after approving distribution rates in the *Distribution Rate Case*, could retroactively modify [AES Ohio's] rates to the prior levels. Thus, we find that OCC's failure to raise this issue at an earlier juncture, during the *Distribution Rate Case*, constitutes a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, at ¶ 18 (citing *Parma*, 86 Ohio St.3d at 148, 712 N.E.2d 724)."

*ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) at ¶ 19. By failing to enforce the 2009 rate freeze in the *2015 Distribution Rate Case* in the 14 months during which the AES Ohio' operated under ESP I rates, OCC waived this argument. *Id.*

As the Commission observed in its Sixth Entry on Rehearing in the *ESP I Case*:

" . . . OCC elides the fact that it could have sought a stay of the *2015 Distribution Rate Case* if it believed that the rate freeze was still in effect. We also note that, on August 5, 2021, OCC filed a motion to dismiss the application for an increase in rates in *In re the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Case Nos. 20-1651-EL-AIR et al. (*2020 Distribution Rate Case*). The Commission will determine in the *2020 Distribution Rate Case* whether a motion to dismiss is appropriate pursuant to R.C. 4909.18; however, we note that the filing of the motion to dismiss is effectively an admission that OCC had potential remedies in the *2015 Distribution Rate Case*, irrespective of whether the Staff Report had been filed during the time ESP I was in effect.

*ESP I Case*, Sixty Entry on Rehearing (August 11, 2021) at ¶ 39 (emphasis added).

*Res judicata* and collateral estoppel block further argument of this issue.

"*Res judicata* and collateral estoppel 'operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.' *Ohio Power Co.*, 2015-Ohio-2056 at ¶ 20 (quoting *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). 'Collateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings.' Third Entry on Rehearing at ¶ 33 (quoting *Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908). 'The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.' *Grava*, 73 Ohio St.3d at 382, 653 N.E.2d 226 ; *see also O'Nesti*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803. "

*ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) ¶ 38. The Commission held that because OCC was barred by *res judicata* and collateral estoppel from re-litigating issues that had already been decided, "[i]t would be disingenuous for the Commission, as requested by OCC, to modify our prior order . . . based upon arguments which we have found that OCC itself is barred from raising." *Id.* at ¶ 41. OCC is not entitled to an end-run around those principles by raising those arguments here.

**D. OCC Did Not Seek to Reinstate the Rate Freeze before the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP III**

---

Again assuming that the rate freeze issue survived the waivers identified above, OCC should have raised the issue when AES Ohio terminated ESP III. Upon the termination of ESP III, the Commission solicited parties to submit comments regarding the Company's

proposed tariffs to reimplement ESP I rates. *ESP I Case*, Entry (Nov. 27, 2019). OCC filed two memoranda, neither of which sought to enforce the 2009 rate freeze.<sup>13</sup>

Although the Commission questioned in ESP I whether OCC's failure to raise the issue in its comments constituted a waiver,<sup>14</sup> controlling authority by the Supreme Court of Ohio establishes that OCC's failure to raise the issue in its comments constitutes a waiver. *City of Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred."); *Lester v. Leuck*, 142 Ohio St. 91, 92, 50 N.E.2d 145 (1943) ("The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted.") (internal quotation and citation omitted). OCC's failure to raise this argument before its application for rehearing constitutes a forfeiture of it. *Id.*

**V. THE RATE FREEZE WAS NOT A PROVISION, TERM OR CONDITION OF ESP I**

---

It is true that a distribution rate freeze was included in the Stipulation in what is commonly referred to as the "ESP I" case. And it is true that the Stipulation is commonly

---

<sup>13</sup> *ESP I Case*, Memorandum Contra DP&L's Motions to Withdraw Its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (Dec. 4, 2019); *ESP I Case*, Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates by Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group and The Kroger Company (Dec. 4, 2019).

<sup>14</sup> *ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) at ¶ 19.

referred to as the "ESP I Stipulation." But that does not mean that every term in that Stipulation is an ESP term. Only those terms that were authorized by the ESP statute can be ESP terms.

Here, no provision in the ESP statute authorizes the Commission to order a distribution rate freeze. The only provision in the ESP statute that even mentions distribution rates is R.C. 4928.143(b)(2)(h), which states:

"Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."

While that section authorizes the Commission to implement provisions "regarding" distribution service, nothing in that section authorizes an actual rate freeze. If the General Assembly had intended to grant the Commission that extraordinary power, then it would have said so. It did not.

The fact that the remaining terms of Section (B)(2)(h) are narrow grants of authority confirms that the reference to "distribution service" at the beginning of that section



should not be interpreted as granting the extraordinary authority to implement a distribution rate freeze. *E.g.*, *Gabbard v. Madison Local Sch. Dist. Bd. of Ed.*, Slip Op. No. 2020-0612, 2021-Ohio-2067, ¶ 28 ("The ejusdem generis rule encourages the limitation of a general category that follows specifically enumerated items as encompassing only items that are of the same nature as those specifically enumerated."); *State v. Aspell*, 10 Ohio St.2d 1, 225 N.E.2d 226 (1967), paragraph two of the syllabus ("Under the rule of *ejusdem generis*, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms."). *Accord*: R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.")

Indeed, the *only* reason that the rate freeze in the ESP I Stipulation was lawful is that AES Ohio consented to it. A rate freeze without a utility's consent would constitute an unconstitutional taking.<sup>15</sup> That necessarily means that the legal basis for the rate freeze in ESP I was AES Ohio's consent and subsequent Commission approval, *i.e.*, the rate freeze was not authorized by the ESP statute. The rate freeze thus is not an ESP term, and when AES Ohio reverted to ESP I, ESP I does not include a rate freeze.

---

<sup>15</sup> *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679, 690 (1923) ("rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment"); *FPC v. Hope Nat. Gas. Co.*, 320 U.S. 591, 605 (1944) (utility has right to rates that allow it "to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed").

The Commission should thus conclude that a rate freeze is not authorized by the ESP statute, and the rate freeze was thus not a term of AES Ohio's ESP I. Thus, when AES Ohio reverted to ESP I, the rate freeze was not reinstated since it was not an ESP term.

**VI. THE COMMISSION SHOULD DENY OCC'S MOTION BECAUSE THE RATES THAT HAD BEEN FROZEN PURSUANT TO THE ESP I STIPULATION HAVE ALREADY CHANGED, AND IT ISN'T PRACTICAL TO REVERT BACK TO 1991 BASE RATES**

---

In the ESP I Stipulation, the parties agreed that the Company's "distribution base rates will be frozen through December 31, 2012." ESP I Stipulation at 10. Thus, the rates to be frozen were those in place at the time, *i.e.*, the rates approved in the *1991 Distribution Rate Case*. Those rates, however, were changed in 2018 as part of the *2015 Distribution Rate Case*, with OCC's assent. *2015 Distribution Rate Case*, Stipulation and Recommendation (June 18, 2018) at 17. The Commission recently acknowledged that the rate increase was lawful (Sixth Entry on Rehearing at ¶ 40), and OCC concedes (Motion at 11) that "it would be impractical (and potentially unlawful) to undo" it. OCC, therefore, asks the Commission (*id.* at 11-12) to rewrite that unambiguous term and apply the 2009 rate freeze to AES Ohio's 2018 distribution rates.

The Commission should reject that request. There is no language in the ESP I Stipulation suggesting that the parties contemplated that the rate freeze would be applied in that way. Moreover, unlike other rates of ESP I such as the RSC, OCC can point to no order in the past decade in which the Commission recognized the ongoing validity of the rate freeze. Thus, even if the 2009 rate freeze was a term of ESP I (which as shown above, it was not), it does not offer the relief that OCC seeks in this proceeding.

**VII. OCC'S MOTION IS BARRED BY OCC'S CONDUCT IN OTHER PROCEEDINGS**

---

In AES Ohio's recent *Quadrennial Review Case*, AES Ohio provided projections to show that it passed the more favorable in the aggregate and prospective earnings test in R.C. 4928.143(E). *Quadrennial Review Case*, Direct Testimony of R. Jeffrey Malinak (Apr. 1, 2020) 13, 84 (introduced as Ex. 1A at hearing). Those projections included a rate increase associated with this case during the time that AES Ohio was to be operating under ESP I and collecting the RSC. *Quadrennial Review Case*, Direct Testimony of Gustavo Garavaglia M. (Apr. 1, 2020) at 28 (stating that the Company's projections include "future distribution and transmission rate increases") (introduced as Ex. 6A at hearing).

In the *Quadrennial Review Case*, OCC mistakenly concluded that AES Ohio's projections did not include a distribution rate increase, and OCC filed testimony asserting that AES Ohio's projections *should* include the results of a distribution rate increase and that the failure to include such a rate increase in those projections was a "fatal flaw" in AES Ohio's case. *Quadrennial Review Case*, Tr. Vol. III at 409 (Kahal Test.). That testimony was filed while ESP I was in effect. Having taken the position that AES Ohio's projections should include a distribution rate increase, OCC should not be permitted to change its position here and assert that those rates should be frozen.

Indeed, AES Ohio relied on the fact that its distribution rates would not be frozen – in particular, AES Ohio likely could not have agreed to many of the terms in the October 23, 2020 Stipulation and Recommendation that resolved the *Quadrennial Review Case* and other

matters, including the Company's current grid modernization plan,<sup>16</sup> if its distribution rates were to be frozen. OCC should not be permitted to assert that AES Ohio's projections should include a distribution rate increase in a case where AES Ohio made decisions that will require financial commitments for investments in the future under the assumption that its distribution rates were not frozen, and then assert in this case that AES Ohio's distribution rates are frozen. *E.g.*, *Cleveland Elec. Illuminating Co. v. Cleveland*, 8th Dist. Cuyahoga Nos. 60930 and 60943, 1992 Ohio App. LEXIS 5172, at \*21 (Oct. 8, 1992) ("It is a well recognized rule in Ohio that a party cannot be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him.") (citing *Van Dyne v. Fidelity-Phenix Insurance Co.*, 17 Ohio App.2d 116, 127, 244 N.E.2d 752 (7th Dist.1969)).

Further, the Stipulation in the *2015 Distribution Rate Case* provided that AES Ohio must file a distribution rate case by January 1, 2025 or the Infrastructure Investment Rider would be set at zero. *Grid Modernization Case*, Stipulation and Recommendation (Oct. 23, 2020) at 6. OCC did not assert in that case (or seek rehearing) that the distribution rate case could or would be barred by an ESP I rate freeze, which is yet another waiver of the issue by OCC.

Significantly, in comments that OCC recently filed in the Commission's Cost-of-Capital Forum, OCC was critical of utilities waiting too long to file rate cases: "And the evidence shows that Ohio utilities have taken advantage of their right to avoid filing base rate cases. Many Ohio utilities have base rates that have been in effect for many years: more than 12

---

<sup>16</sup> *In re The Dayton Power and Light Co.*, Case No. 18-1875-EL-GRD, *et al.* ("*Grid Modernization Case*").

years for FirstEnergy, Columbia Gas, and Dominion; more than 9 years for AEP Ohio; and more than 7 years for Duke Energy (natural gas)."<sup>17</sup> Indeed, OCC criticized AES Ohio for not filing a rate case while the rate freeze was in effect. *See also Cost of Capital Forum*, Consumer Protection Comments on Charges to Consumers for Utilities' Cost of Capital by Office of the Ohio Consumers' Counsel, p. 2 n. 1 (faulting the Company for "avoid[ing] filing a rate case for 24 years between 1991 and 2015," despite the 2009 rate freeze) (emphasis in original).

**VIII. THE COMMISSION SHOULD DENY OCC'S MOTION BECAUSE THE 2015 DISTRIBUTION RATE CASE EFFECTIVELY MODIFIED THE RATE FREEZE**

---

Assuming that the rate freeze survives the many issues identified above, the Commission (with OCC's assent) effectively modified that provision when the Commission approved the Stipulation and Recommendation in the *2015 Distribution Rate Case*. Specifically, that Stipulation provides that AES Ohio may file a distribution rate case "on or before October 31, 2022" to maintain its Distribution Investment Rider. *2015 Distribution Rate Case*, Stipulation and Recommendation (June 18, 2018) at 7. That Stipulation was signed by OCC (*id.* at 17) and approved by the Commission. *2015 Distribution Rate Case*, Opinion and Order (Sept. 26, 2018). Since that decision came nine years after the 2009 rate freeze was approved in the

---

<sup>17</sup> [https://puco.ohio.gov/static/Stakeholder+Forums/Cost+of+Capital/Office+of+the+Ohio+Consumers%27+Council+\(OCC\)+comments+on+Cost+of+Capital.pdf](https://puco.ohio.gov/static/Stakeholder+Forums/Cost+of+Capital/Office+of+the+Ohio+Consumers%27+Council+(OCC)+comments+on+Cost+of+Capital.pdf) (last visited on Aug. 18, 2021).

*ESP I Case*, it establishes that the Company has the right to file a distribution rate case separate and independent of any order in the Company's standard service offer cases.

Indeed, as the Commission recently acknowledged, OCC knew when it signed ESP I that AES Ohio may have a statutory right to revert to ESP I in the future. *ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) at ¶ 61. ("We agree with [AES Ohio] that when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified and approved a subsequent application for an ESP and [AES Ohio] withdrew that application."). Similarly here, when OCC signed the 2015 rate case Stipulation, it knew or should have known that AES Ohio could revert to ESP I in the future. OCC thus waived any right it may have had to enforce the rate freeze when OCC signed the 2015 rate case Stipulation, which authorized AES Ohio to file this rate case.

## **IX. CONCLUSION**

The Commission should deny OCC's untimely attempt to enforce the 2009 rate freeze and reach a decision on the merits of AES Ohio's Application in this proceeding.

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)

D. Jeffrey Ireland (0010443)

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

djireland@ficlaw.com

chollon@ficlaw.com

*Counsel for AES Ohio*

(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing The Dayton Power And Light Company  
d/b/a AES Ohio's Memorandum in Opposition to Motion to Dismiss Application for A Rate  
Increase by Office of the Ohio Consumers' Counsel has been served via electronic mail upon the  
following counsel of record, this 20th day of August, 2021:

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

Counsel for Staff of the Commission

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

Counsel for Ohio Energy Group

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

Counsel for The Ohio Manufacturers'  
Association Energy Group

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

Counsel for The Kroger Company

Christopher Healey  
Ambrosia E. Wilson  
John Finnigan  
The 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  
john.finnigan@occ.ohio.gov

Counsel for The Office of the Ohio  
Consumers' Counsel

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

Counsel for the University of Dayton



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

Counsel for Industrial Energy Users-Ohio

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

Counsel for Ohio Partners for  
Affordable Energy

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

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

Counsel for Walmart Inc.

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

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

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

Counsel for IGS Energy

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

Counsel for Retail Energy Supply Association

Miranda Leppla  
1145 Chesapeake Avenue, Suite I  
Columbus, OH 43212-3449  
mleppla@theoec.org

Counsel for Environmental Law & Policy  
Center

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

Counsel for The Ohio Hospital Association

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

Counsel for Nationwide Energy Partners,  
LLC

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

Darren A. Craig (Pending Pro Hac Vice)  
Robert L. Hartley (Pending Pro Hac Vice)  
FROST BROWN TODD LLC  
201 North Illinois Street, Suite 1900  
P.O. Box 44961  
Indianapolis, IN 46204  
dcraig@fbtlaw.com  
rhartley@fbtlaw.com

Counsel for Nationwide Energy Partners,  
LLC

Kara Herrnstein  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
kherrnstein@bricker.com

Counsel for ChargePoint, Inc.

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

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

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

Counsel for One Energy Enterprises, LLC

/s/ Christopher C. Hollon  
Christopher C. Hollon

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**8/20/2021 2:57:16 PM**

**in**

**Case No(s). 20-1651-EL-AIR, 20-1652-EL-AAM, 20-1653-EL-ATA**

Summary: Memorandum The Dayton Power and Light Company d/b/a AES Ohio's Memorandum in Opposition to Motion to Dismiss Application for a Rate Increase by The Office of the Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company