BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	:	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC

THE DAYTON POWER AND LIGHT COMPANY D/B/A/ AES OHIO'S MOTION TO STRIKE THE NOTICE OF TERMINATION AND WITHDRAWAL FROM THE FEBRUARY 24, 2009 SETTLEMENT BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio") moves to strike the Notice of Termination and Withdrawal from the February 24, 2009 Settlement by Office of the Ohio Consumers' Counsel (Sept. 10, 2021) ("Notice" or "Notice of Termination/ Withdrawal"). In that Notice, the Office of the Ohio Consumers' Counsel ("OCC") asserts that the Commission's Second Finding and Order ("December 18, 2019 Order") made a material modification to the Stipulation and Recommendation ("ESP I Stipulation") (Feb. 24, 2009) by failing to reinstate a distribution rate freeze from that Stipulation, and that ¶ 37 of that Stipulation grants to OCC the right to withdraw from and terminate that Stipulation in response to that modification.

The Commission should strike OCC's Notice of Termination/Withdrawal for the following reasons:

1. OCC's August 27, 2021 notice of appeal deprives the Commission of jurisdiction in this matter.

2. The Commission has not made a modification to the ESP I Stipulation.

3. The distribution rate freeze was terminated before the Commission's December 18, 2019 Order, so that Order did not modify the ESP I Stipulation by failing to continue the rate freeze.

4. OCC has waived any rights it may have had to terminate or withdraw from the ESP I Stipulation.

5. OCC's arguments are barred by OCC's conduct in other proceedings.

6. R.C. 4928.143(C)(2)(a) & (b) require that ESP I be in place, so the remedy that OCC seeks (that ESP I be terminated) is barred by law.

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MEMORANDUM IN SUPPORT OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO'S MOTION TO STRIKE NOTICE OF TERMINATION AND WITHDRAWAL FROM THE FEBRUARY 24, 2009 SETTLEMENT BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION AND SUMMARY

OCC asserts that the Commission's December 18, 2019 Order made a material modification to the Stipulation ("ESP I Stipulation") in this case because that Order failed to reinstate a distribution rate freeze from that Stipulation. OCC Notice of Termination/Withdrawal at 7. Pursuant to ¶ 37 of the ESP I Stipulation, OCC further asserts that the material modification gives OCC the right to withdraw from and terminate that Stipulation. Notice of Termination/Withdrawal at 7.

The Commission should strike OCC's Notice of Termination/Withdrawal for the following separate and independent reasons.

First, on August 27, 2021, OCC filed a notice of appeal in this proceeding. The Commission thus does not have jurisdiction to act on OCC's Notice of Termination/Withdrawal.

Second, the Commission should conclude that its December 18, 2019 Order did not modify the ESP I Stipulation by failing to reinstate the rate freeze for two reasons.:

1. By its own terms, the rate freeze terminated on December 31, 2012. ESP I Stipulation, ¶ 18. The Commission did not modify the ESP I Stipulation by failing to extend that rate freeze.

2. The Commission's December 18, 2019 Order was issued pursuant to R.C. 4928.143(C)(2)(a) & (b), and the ESP I Stipulation does not give OCC any rights to withdraw/terminate in response to an order issued under that statute.

Third, the rate freeze was previously terminated in 2012 (when ESP I was extended) or 2016 (when ESP II was terminated and ESP I was reinstated). The Commission's

December 18, 2019 Order thus did not modify the ESP I Stipulation by failing to reinstate the rate freeze, because the rate freeze had already been terminated.

Fourth, assuming for the sake of argument that OCC had a right to withdraw/ terminate from the ESP I Stipulation, OCC waived that right for three reasons:

1. In filings that OCC made in response to AES Ohio's November 26, 2019 Notice of Termination of ESP III, OCC failed to assert that the rate freeze should be reinstated when ESP I was reinstated.

2. OCC failed to seek rehearing in its January 17, 2020 application on the issue of whether the rate freeze should be reinstated.

3. Even if OCC had sought rehearing on that issue in its January 17, 2020 application, OCC failed to file its notice of withdraw/termination within 30 days of the Commission's June 16, 2021 Entry that denied that application.

4. OCC failed to file a motion to continue the rate freeze in the 2015 rate case.

Fifth, OCC's arguments here are barred by OCC's conduct in other proceedings.

Sixth, the remedy that OCC seeks – that ESP I and its riders be terminated – is barred by R.C. 4928.143(C)(2)(a) & (b). That section required the Commission to reinstate ESP I and its riders after AES Ohio terminated ESP III. Terminating ESP I is thus barred by statute.

II. OCC'S NOTICE OF APPEAL DEPRIVES THIS COMMISSION OF JURISDICTION

The Commission has no authority to act on OCC's notice because OCC filed a notice of appeal in this matter on August 27, 2021. The Supreme Court of Ohio has repeatedly held that "absent specific statutory authority or rule, official boards or administrative agencies *have jurisdiction to reconsider decisions only until the actual institution of a court appeal*

therefrom or until expiration of the time for appeal." *State ex rel. Borsuk v. City of Cleveland*, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). *Accord*: *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph three of the syllabus ("Generally, administrative agencies have inherent authority to reconsider their own decisions since the power to decide in the first instance carries with it the power to reconsider. *The agencies retain jurisdiction to set aside or otherwise reconsider their decisions until the actual institution of a court appeal* or until expiration of the time for appeal, in the absence of specific statutory limitation to the contrary.") (emphasis added); *State ex rel. Gatlin v. Yellow Freight Sys., Inc.*, 18 Ohio St.3d 246, 249, 480 N.E.2d 487 (1985) (same); *Todd v. Gen. Motors Corp.*, 65 Ohio St.2d 18, 19, 417 N.E.2d 1017 (1981) (same).

In Title 49, the General Assembly adopted a comprehensive framework for review of final orders of the Commission, which includes applications for rehearing and direct appeals to the Supreme Court. R.C. 4903.10 through 4903.13. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. *Accord*: *Penn Cent. Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), paragraph one of the syllabus (holding that the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute"); *Ohio Bus Line, Inc. v. Pub. Util. Comm.*, 29 Ohio St.2d 222, 226, 280 N.E.2d 907 (1972) (holding that the Commission "has only such jurisdiction and authority to act as is vested in it by statute"). No statute in that framework allows the Commission to reconsider its orders while they are pending on appeal before the Supreme Court. Such reconsideration would be

directly inconsistent with the Court's jurisdiction to "reverse[], vacate[], or modif[y]" the Commission's orders. R.C. 4903.13.

The Commission thus does not have jurisdiction to act on OCC's notice as that appeal is now with the Supreme Court.

III. THE COMMISSION APPROVED THE STIPULATION WITHOUT MODIFICATION

Even if the Commission had jurisdiction to act, it should conclude that ¶ 37 of the ESP I Stipulation is not applicable because the Commission's December 18, 2019 Order did not "modif[y]" the ESP I Stipulation. Specifically, ¶ 37 of the ESP I Stipulation granted to the Signatory Parties certain rights if "the Commission rejects or modifies" that Stipulation. The Commission should conclude that its December 18, 2019 Order did not modify the ESP I Stipulation for two reasons.

First, the ESP I Stipulation expressly states (¶ 18) that the rate freeze terminates on December 31, 2012. The Commission did not modify that Stipulation by failing to extend that rate freeze in the December 18, 2019 Order.

Second, the Commission's June 24, 2009 Order in ESP I (p. 13) expressly "adopted" the Stipulation and did not modify it. OCC thus had no rights under ¶ 37 of the Stipulation at that time.

Further, the Commission's December 18, 2019 Order did not modify the ESP I Stipulation. Instead, pursuant to R.C. 4928.143(C)(2)(a) & (b), that Order reinstated ESP I after AES Ohio terminated ESP III. December 18, 2019 Order, ¶¶ 26-27. At no point in that Order did the Commission modify the ESP I Stipulation in the way alleged by OCC. *Id.*

There is nothing in ¶ 37 of the ESP I Stipulation that grants to OCC any rights after the Commission issues an order pursuant to R.C. 4928.143(C)(2)(a) & (b). In fact, ¶37 of the Stipulation expressly acknowledges AES Ohio's right to withdraw pursuant to R.C. 4928.143(C)(2)(a) & (b). OCC could have sought to include rights to withdraw/terminate in response to an order under that section in the ESP I Stipulation, but OCC failed to do so. The Commission should thus conclude that OCC has no rights under ¶ 37 because the Commission approved the ESP I Stipulation without modification, and ¶ 37 is not applicable to a Commission order under R.C. 4928.143(C)(2)(a) & (b).

IV. THE RATE FREEZE WAS TERMINATED BEFORE THE COMMISSION'S DECEMBER 18, 2019 ORDER

In its Notice, OCC asserts (p. 3) that the Commission "failed to preclude [AES Ohio] from implementing further distribution rate increases while ESP I is in effect" and that the Commission thus "fail[ed] to preserve the rate distribution freeze benefits for consumers."

OCC further asserts (p. 7) that the Commission's December 18, 2019 Order – which makes no mention of the rate freeze – "failed to adopt" the rate freeze and thus "rejected or modified the 2009 Stipulation by ruling that [AES Ohio] did not have to honor its distribution rate freeze while ESP I was in effect."

The problem for OCC is that its argument – *i.e.*, that the Commission's December 18, 2019 Order "failed to adopt" the rate freeze and thus "modified the 2009 Stipulation" – proves too much. As demonstrated below, there were thus prior Commission orders that extended or reinstated ESP I that "failed to adopt" the rate freeze. Using OCC's own reasoning, the rate freeze was no longer a component of ESP I when the Commission entered its

December 18, 2019 Order, and that Order did not modify the ESP I Stipulation by failing to reinstate that rate freeze.

A. The Rate Freeze Was Terminated in 2012 as a Component of ESP I

This section demonstrates that the rate freeze terminated in 2012, when ESP I was extended into 2013. The Commission's December 18, 2019 Order thus did not modify the ESP I Stipulation by failing to reinstate the rate freeze, because the rate freeze had already been terminated as a component of ESP I.

In the ESP I Stipulation, the parties agreed to extend AES Ohio's current rate plan through December 31, 2012, 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, 18. 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 [AES Ohio'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). AES Ohio did not ask to extend the rate freeze. Although that Motion was opposed by several parties, including OCC, not a single party asked the Commission to extend the rate freeze along with AES Ohio's then-current rates.[1]

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

[1] *ESP II Case*, Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates (Nov. 23, 2012).

subsequent standard service offer is authorized." *ESP I Case*, Entry (Dec. 19, 2012) at 4, 6. Just like the Commission's December 18, 2019 Order, the Commission's December 19, 2012 Entry made no mention of the rate freeze. OCC claims (p. 7) that the December 18, 2019 Order modified the Stipulation because it "failed to adopt" the rate freeze. The problem for OCC is that using the same reasoning, the Commission's December 19, 2012 Entry "failed to adopt" the rate freeze, so the rate freeze was terminated by that Entry.

OCC and other parties sought rehearing from that Entry, but again, they did not seek to continue the rate freeze.[2] 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 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).

When AES Ohio later terminated ESP II,[3] 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,[4] it reverted to the version of ESP I that was implemented after ESP II was terminated, which did not include a rate freeze for the reasons identified above.

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[2] *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).

[3] *ESP II Case*, Finding and Order (Aug. 26, 2016) at ¶ 17 (granting "[AES Ohio's] motion to withdraw its application for an ESP, thereby terminating it").

[4] *In re The Dayton Power and Light Company, Case No. 16-0395-EL-SSO, et al.* (*"ESP III Case"*), Finding and Order (Dec. 18, 2019) at ¶ 24 (ordering that "[AES Ohio's] notice of withdrawal of its application in Case No. 16-395-EL-SSO be approved").

Therefore, the Commission's December 18, 2019 Order could not and did not modify the ESP I Stipulation by failing to reinstate the rate freeze because the rate freeze had already been terminated in 2012 when it was not extended when ESP I was extended. Further, OCC forfeited any rights it may have had under ¶ 37 when it failed to seek rehearing on the rate freeze issue in response to the Commission's December 19, 2012 Entry.

B. The Rate Freeze Was Terminated in 2016 as a Component of ESP I

Assuming for the sake of argument that the rate freeze survived the 2012 extension of ESP I, this section demonstrates that the rate freeze was terminated in 2016, when ESP II was terminated and ESP I was reinstated. The Commission's December 18, 2019 Order thus did not modify the ESP I Stipulation by failing to reinstate the rate freeze, because the rate freeze had already been terminated.

Specifically, in July 2016, AES Ohio 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. AES Ohio did not ask to reinstate a rate freeze. Id. In response, no party sought to reinstate the rate freeze.

The Commission granted AES Ohio's Motion. *ESP I Case*, Finding and Order (Aug. 26, 2016). Just like the Commission's December 18, 2019 Order, the Commission's August 26, 2016 Order made no mention of the rate freeze. OCC claims (p. 7) that the December 18, 2019 Order modified the Stipulation because it "failed to adopt" the rate freeze.

The problem for OCC is that using the same reasoning, the Commission's August 26, 2016 Order "failed to adopt" the rate freeze, so the rate freeze was terminated by that Entry.

OCC sought rehearing from that Order, but did not seek to reinstate the rate freeze,[5] 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).

Therefore, when AES Ohio terminated ESP II, the version of ESP I that was reinstated did not include a rate freeze. The Commission's December 18, 2019 Order that reinstated ESP I after ESP III was terminated thus could not and did not modify the ESP I Stipulation by failing to reinstate the rate freeze because the rate freeze had already been terminated in 2016 when ESP II was terminated. Further, OCC forfeited any rights it may have had under ¶ 37 when it failed to seek rehearing on the rate freeze issue in responding to the Commission's August 26, 2016 Order.

C. The Rate Freeze Was Not an ESP Term

This section demonstrates that there is a separate and independent reason that the rate freeze was not reinstated in 2016 when ESP II was terminated and ESP I was reinstated.

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 also true that the Stipulation is commonly 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.

[5] *ESP I Case*, Application for Rehearing by Office of the Ohio Consumers' Counsel (Sept. 26, 2016).

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.[6] That necessarily means that the legal basis for the rate freeze in the ESP I Stipulation 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.

The rate freeze thus was not reinstated in 2016 when AES Ohio terminated ESP II and reverted to ESP I because R.C. 4928.143(C)(2)(a) & (b) required the Commission to reinstate "the provisions, terms, and conditions of the utility's most recent standard service offer" (*i.e.*, ESP I), and the rate freeze is not an ESP term. The Commission's December 18, 2019 Order thus could not modify the ESP I Stipulation by failing to reinstate the rate freeze because

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[6] *Bluefield Water Works & Improvement Co. v. Public Service Comm.*, 262 U.S. 679, 690, 43 S.Ct. 675 (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"); *Federal Power Comm. v. Hope Natural Gas. Co.*, 320 U.S. 591, 605, 64 S.Ct. 281 (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 rate freeze had already been terminated in 2016 when AES Ohio reverted from ESP II to ESP I.

V. OCC WAIVED ANY RIGHT IT MAY HAVE HAD TO WITHDRAW FROM THE ESP I STIPULATION

Assuming for the sake of argument that the Commission's December 18, 2019 Order modified the ESP I Stipulation by failing to reinstate the rate freeze (as demonstrated above, the Commission's order did not modify that Stipulation) and that the rate freeze survived OCC's waiver of the issue in 2012 and 2016, this section demonstrates that OCC has waived any rights it may have had under ¶ 37 by failing to assert those rights on a timely basis, for three separate and independent reasons:

A. In filings that OCC made in response to AES Ohio's November 26, 2019 Notice of Termination of ESP III, OCC failed to assert that the rate freeze should be reinstated when ESP I was reinstated.

B. OCC failed to seek rehearing in its January 17, 2020 application on the issue of whether the rate freeze should be reinstated.

C. Even if OCC had sought rehearing on that issue in its January 17, 2020 application, OCC failed to file its notice of withdraw/termination within 30 days of the Commission's June 16, 2021 Entry that denied that application.

D. OCC failed to file a motion to continue the rate freeze in the 2015 rate case.

A. OCC Failed to Raise the Rate Freeze in Its Comments

Upon AES Ohio's termination of ESP III, the Commission solicited parties to submit comments regarding the Company's proposed tariffs to reinstate ESP I rates. *ESP I Case*,

Entry (Nov. 27, 2019). OCC filed two memoranda, neither of which asked the Commission to reinstate the rate freeze.[7]

Although the Commission questioned in ESP I whether OCC's failure to raise the issue in its filings constituted a waiver,[8] controlling authority by the Supreme Court of Ohio establishes that OCC cannot raise an issue for the first time in an application for rehearing. *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 failed to ask that the rate freeze be reinstated in the filings that OCC made before its applications for rehearing (see *supra* n. 7). OCC thus has no rights under ¶ 37 since it failed to preserve the rate freeze issue.

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[7] *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).

[8] *ESP I Case*, Fifth Entry on Rehearing (June 16, 2021) at ¶ 19.

B. OCC Failed to Seek Rehearing

In addition, assuming the rate freeze issue survived the many arguments above, OCC waived the argument that the rate freeze should be reinstated by not raising that issue in its January 17, 2020 application for rehearing. Specifically, pursuant to ¶ 37 of the ESP I Stipulation, to preserve the issue of whether the rate freeze should be reinstated, OCC would have been required to seek rehearing on that issue after the Commission's December 18, 2019 Order.

The Commission has already held that OCC failed to seek rehearing on that issue in OCC's January 17, 2020 application. Specifically, in OCC's January 17, 2020 Application for Rehearing, OCC asserted:

> "[I]n 2018, three years after it filed to increase distribution rates to customers, the PUCO unfroze the distribution rates, increasing distribution charges to [AES Ohio]'s customers. Those increased distribution rates are now part of the continued rates approved by the PUCO in the *2019 Tariff Order*. Not so for the ESP I distribution rate freeze, which the PUCO ignored."

Application for Rehearing (Jan. 17, 2020) at 7. OCC thus asked in that application that the Commission restore the distribution rates that were in effect when the ESP I Stipulation was signed, *i.e.*, to reverse the increase from the 2015 rate case. However, in that January 17, 2020 application, OCC did not ask the Commission to reinstate a rate freeze.

The Commission denied OCC's January 17, 2020 application because OCC failed to assert in the 2015 rate case that a rate freeze barred that rate case. Fifth Entry on Rehearing (June 16, 2021), ¶ 19.

Undeterred, OCC again sought rehearing, asserting that the Commission "misapprehend[ed]" OCC's prior application and attempting to recast its previous assignment of error not as seeking to undo the 2015 rate case, but rather, to freeze the rates established in the 2015 rate case on a going-forward basis. *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.*" *ESP I Case*, Sixth Entry on Rehearing (Aug. 11, 2021) at ¶ 40.

Under ¶ 37 of the ESP I Stipulation, OCC was required to seek rehearing on an issue before OCC could take further steps under that paragraph. Since the Commission has already held that OCC failed to ask that the rate freeze be reinstated in OCC's January 17, 2020 application for rehearing, OCC waived the issue and has no rights under ¶ 37.

C. OCC Failed to File Its Notice on a Timely Basis

As mentioned above, OCC has asserted that its January 17, 2020 application did ask that the rate freeze be reinstated and that the Commission "misapprehend[ed]" that application. Application for Rehearing by Office of the Ohio Consumers' Counsel (July 16, 2021) at 19. Even assuming that OCC was right, OCC still waived the issue because OCC failed to file its Notice of Withdrawal/Termination in a timely manner.

Specifically, assuming for the sake of argument that OCC's January 17, 2020 Application for Rehearing asserted that the rate freeze should be reinstated, the Commission's June 16, 2021 Fifth Entry on Rehearing (¶ 19) denied OCC's Application as to the rate freeze. OCC's deadline to file its Notice of Withdrawal/Termination would have been 30 days after that

June 16, 2021 Entry. ESP I Stipulation, ¶ 37. Since OCC did not file its notice of withdrawal/termination until September 10, 2021, OCC missed its deadline.

In other words, OCC has no right to withdraw/terminate regardless of whether or not it asserted in its January 17, 2020 application that the rate freeze should be reinstated. If OCC failed to raise the issue in that Application (as the Commission found), then OCC failed to seek rehearing as required by ¶ 37 and waived any rights it may have had under that paragraph. On the other hand, if OCC raised that issue in its January 17, 2020 application (OCC's position), then ¶ 37 required OCC to file its Notice of Withdrawal/Termination within 30 days of the Commission's June 16, 2021 Entry denying that Application, which OCC failed to do. OCC thus loses either way.

D. OCC Failed to File a Motion in the 2015 Rate Case

OCC failed to raise the rate freeze issue in the form of a motion to dismiss in the 2015 rate case. AES Ohio was operating under its ESP I for 14 months while the 2015 rate case was pending. At no point, however, did OCC file to enforce a rate freeze or otherwise suspend the rate increase sought in that case. As recognized in the Commission's Sixth Entry on Rehearing (Aug. 11, 2021) at ¶ 39, "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." By failing to raise the issue in a timely fashion, OCC waived the ability to raise and litigate the rate phrase, which means that the rate freeze was terminated before the Commission December 18, 2019 Order.

VI. OCC'S NOTICE IS BARRED BY OCC'S CONDUCT IN OTHER PROCEEDINGS

A. OCC Agreed That AES Ohio Could File a Rate Case

Assuming that OCC's Notice survives the many obstacles identified above, the Commission (with OCC's agreement) effectively eliminated the rate freeze 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 *ESP I Case*, it establishes that AES Ohio has the right to file a distribution rate case separate and independent of any order in AES Ohio'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. Indeed, OCC signed the Rate Case Stipulation within two years after AES Ohio had reverted to ESP 1 the first time, so OCC was on notice as to this issue when it signed the Rate Case Stipulation. 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.

B. OCC's Arguments in the Consolidated Cases Bar OCC's Arguments Here

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). *In re The Dayton Power and Light* Company, Case No. 20-680-EL-UNC, *et al.* ("*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. (April 1, 2020) at 28 (introduced as Ex. 6A at hearing) (stating that the Company's projections include "future distribution and transmission rate increases").

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 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,[9] 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. City of 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)).

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 years for FirstEnergy, Columbia Gas, and Dominion; more than 9 years for AEP Ohio; and more than 7 years for Duke Energy (natural gas)."[10] *Cost of Capital Forum*, Consumer Protection Comments on Charges to Consumers for Utilities' Cost of Capital by Office of the Ohio Consumers' Counsel. Indeed, OCC criticized AES Ohio for not filing a rate case while the rate

[9] *In re The Dayton Power and Light Co.*, Case No. 18-1875-EL-GRD, *et al.* ("*Grid Modernization Case*").

[10] 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).

freeze was in effect. *Id.* at 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).

VII. THE RELIEF THAT OCC SEEKS IS UNLAWFUL

After AES Ohio withdrew from and terminated ESP III,[11] R.C. 4928.143(C)(2)(a) & (b) provided that the Commission was required ("shall") to implement the terms of AES Ohio's "most recent standard service offer." AES Ohio's most recent standard service offer was ESP I, and the Commission issued an order reinstating ESP I pursuant to R.C. 4928.143(C)(2)(a) & (b). December 18, 2019 Order, ¶¶ 26-27.

In its Notice (pp. 9-10), OCC asserts that the Commission should issue an order that terminates ESP I, including the RSC, the Storm Rider and the Infrastructure Investment Rider. However, the Commission was required by R.C. 4928.143(C)(2)(a) & (b) to implement ESP I as it previously existed. The RSC, Storm Rider and Infrastructure Investment Rider were terms of ESP I. The Commission was thus required to reinstate those riders.

OCC's request that the Commission terminate ESP I, including those riders, is thus barred by the mandatory language in R.C. 4928.143(C)(2)(a) & (b).

Finally, OCC misrepresents (p. 3) that the rate stabilization charge was agreed to "in exchange for [AES Ohio]'s commitment not to increase distribution rates while the stability charge was being collected." Nowhere in the Stipulation is there a direct exchange or is the distribution rate freeze directly tied to the existence of the RSC.

[11] *ESP III Case*, Notice of Withdrawal of Its Application (Nov. 26, 2019)

VIII. CONCLUSION

The Commission should strike OCC's Notice of Termination/ Withdrawal for the many reasons identified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company d/b/a/ AES Ohio's Motion to Strike the Notice of Termination and Withdrawal from the February 24, 2009 Settlement by Office of the Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 30th day of September, 2021:

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