

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

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

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

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## I. INTRODUCTION AND SUMMARY

The Commission should grant 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 ("Motion") for the following separate reasons.

1. Jurisdiction: Supreme Court precedent establishes that the August 27, 2021 Notice of Appeal by Office of the Consumers' Counsel filed in this matter deprives the Commission of jurisdiction to "set aside" its prior orders. *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. Following that Notice of Appeal, The Office of the Ohio Consumers Counsel ("OCC") asked the Commission to vacate AES Ohio's current electric security plan ("ESP I"), but that plan was reinstated by the Commission's December 18, 2019 Second Finding and Order in this matter. The Commission does not have jurisdiction to "set aside" that Order.

2. A Rate Freeze is Not an ESP Term: When AES Ohio terminated ESP II and ESP III, the Commission was required by statute (*i.e.*, it "shall issue such order") to implement AES Ohio's "most recent standard service offer." R.C. 4928.143(C)(2)(b) (emphasis added). A "standard service offer" is "only" an offer approved under R.C. 4928.142 or, as here, R.C. 4928.143. R.C. 4928.141(A). There is no provision in R.C. 4928.143 that would authorize the Commission to implement a distribution rate freeze, and it would be unconstitutional for that section to allow the Commission to implement a rate freeze. Indeed, although OCC argues that a rate freeze is an ESP term, OCC does not identify any language in the ESP statute that would authorize a rate freeze, dooming its argument. The rate freeze was not reinstated when ESP II and ESP III were terminated and the Commission reinstated AES Ohio's "most recent standard

service offer" because the rate freeze was not an ESP term. Finding and Order (Aug. 26, 2016); Second Finding and Order (Dec. 18, 2019).

3. The Rate Freeze Terminated Before the Second Finding and Order: OCC argues that the Commission modified the February 24, 2009 Stipulation and Recommendation in this case (the "2009 Stipulation") in its December 18, 2019 Second Finding and Order because that order did not expressly reinstate the rate freeze. The problem with OCC's argument is that it proves too much – prior Commission orders in 2012 and 2016 extended and reinstated ESP I, without mentioning the rate freeze. By OCC's own logic, those orders terminated the rate freeze. Entry (Dec. 19, 2012); Finding and Order (Aug. 26, 2016); Second Finding and Order (Dec. 18, 2019).

4. OCC Has Waived its Rate Freeze Arguments: OCC waived any arguments it may have had related to the rate freeze when it failed to raise such arguments in its comments in this case, in its January 17, 2020 Application for Rehearing following the Second Finding and Order, or in AES Ohio's 2015 rate case (Case No. 15-1830-EL-AIR, *et al*). OCC also waived the issue when it failed to file its Notice of Withdrawal within 30 days of the Commission's Fifth Entry on Rehearing (June 16, 2021), which denied OCC's Application for Rehearing.

5. OCC Admits that it "Agreed" that AES Ohio Could File a Rate Case: AES Ohio's Motion showed that OCC agreed in AES Ohio's 2015 rate case that AES Ohio could file a future rate case. OCC (p. 27) asserts that "OCC's agreement that [AES Ohio] could file a rate case is not binding here." Memorandum Contra DP&L's Motion to Strike OCC's Notice of Its Termination and Withdrawal From a 2009 Settlement of an Electric Security Plan by Office

of the Ohio Consumer's Counsel (Oct. 15, 2021). OCC reasons that the Stipulation in the 2015 rate case provided that it could not be relied upon in other matters. OCC ignores the fact that the June 18, 2018 Stipulation and Recommendation in the 2015 rate case expressly provides that the agreement may be cited in other matters "to enforce the terms of this Stipulation," which is what AES Ohio is doing here. *In re The Dayton Power and Light Company*, Case No. 15-1830-EL-AIR, et al., Stipulation and Recommendation (June 18, 2018), p. 16.

6. The Relief that OCC Seeks Is Barred by Law: OCC erroneously asserts that the 2009 Stipulation in this case grants to it the power to terminate ESP I through the filing of its September 10, 2021 Notice of Termination and Withdrawal from the February 24, 2009 Settlement ("Notice of Termination"). That result is barred by law. Specifically, after AES Ohio terminated ESP III, the Commission was required to implement AES Ohio's "most recent standard service offer" (*i.e.*, ESP I), which shall remain in effect "until a subsequent offer is authorized." Second Finding and Order (Dec. 18, 2019), ¶ 26.

## **II. OCC'S NOTICE OF APPEAL DEPRIVES THE COMMISSION OF JURISDICTION TO "SET ASIDE" ITS ORDER REINSTATING ESP I**

As demonstrated in AES Ohio's Motion (p. 2-4), OCC's Notice of Appeal in this case deprives the Commission of jurisdiction to "set aside" its prior orders, including the Second Finding and Order. *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 ("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). *Accord: Diltz v. Crouch*, 173 Ohio St. 367, 368,

182 N.E.2d 315 (1962) (administrative agency lacks authority to "modify" its prior order while an appeal was pending).

In its Notice of Termination (pp. 9-10), OCC asks that ESP I (and its associated riders) be declared void. The Commission reinstated ESP I in its December 18, 2019 Second Finding and Order in this case. OCC's Notice of Termination, thus, asks to "set aside" an order of the Commission, even though its Notice of Appeal deprived the Commission of jurisdiction to do so.

OCC argues (p. 5) that it "is not asking the PUCO to reconsider any decision." OCC ignores the jurisdictional bar on "set[ting] aside" a Commission decision while a case is on appeal. As shown above, the relief that OCC seeks would "set aside" the order reinstating ESP I.

OCC's claim (p. 5) that the Stipulation "is a contract like any other" is simply false. Unlike a contract, a Stipulation is not effective until the Commission issues an order approving it. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992). *Accord*: Ohio Adm.Code 4901-1-30(A) ("Any two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding.") (Emphasis added.) And the Commission is barred from setting aside any orders while OCC's appeal is pending.

Finally, OCC's claim (p. 6) that "[i]t would be the height of absurdity to rule that the PUCO lacks jurisdiction" is an argument that OCC should make to the Supreme Court, as the Court's decisions plainly establish that the Commission lacks jurisdiction to act on OCC's Notice of Termination.

### III. A RATE FREEZE IS NOT AN ESP TERM

When AES Ohio terminated ESP II,<sup>1</sup> the Commission was required ("shall") to implement AES Ohio's "most recent standard service offer." R.C. 4928.143(C)(2)(b). *Accord: Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus ("the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive[s] a construction other than [its] ordinary usage"). There is no dispute that AES Ohio's most recent standard service offer at that time was ESP I.<sup>2</sup> Nor is there any dispute that the 2009 Stipulation that resolved ESP I (and three other cases) included a distribution rate freeze through December 31, 2012.<sup>3</sup>

However, the fact that the rate freeze was a term of the 2009 Stipulation does not necessarily mean that the rate freeze was a term of AES Ohio's "most recent standard service offer." The issue before the Commission is whether the distribution rate freeze was a term of AES Ohio's "standard service offer" under R.C. 4928.143(C)(2)(b), such that the rate freeze was reinstated when AES terminated ESP II.<sup>4</sup> As demonstrated below, the only way that OCC can prevail on this issue is if the Commission interprets the word "shall" to mean "may" or the word

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<sup>1</sup> Finding and Order (Aug. 26, 2016), p. 8 ("Accordingly, with the termination of *ESP II*, the Commission finds that [AES Ohio] shall implement the provisions, terms, and conditions of *ESP I*, along with any expected increases or decrease in fuel costs, pursuant to R.C. 4928.143(C)(2)(b).") (Emphasis added.)

<sup>2</sup> *Id.*

<sup>3</sup> 2009 Stipulation, ¶ 18 ["AES Ohio's] distribution base rates will be frozen through December 31, 2012."). *Accord: Opinion and Order* (June 24, 2009), p. 5 (same).

<sup>4</sup> While standard service offers may be terminated pursuant to R.C. 4928.143(C)(2) upon material modification by the Commission, thus requiring reinstatement of the utility's most recent standard service offer, such applications can be resolved with other types of matters. Thus, the terms in a stipulation recommending approval of a standard service offer can be broader than the standard service offer itself. *E.g., In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, *et al.*, Opinion and Order (Dec. 19, 2018) (resolving a standard service offer application and a distribution rate case application, among other matters).

"only" to mean "some, but not all." If the Commission gives the words "shall" and "only" their plain meanings, then AES Ohio prevails.

The Commission should conclude that R.C. 4928.143 does not authorize a distribution rate freeze for two reasons.

First, 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 division authorizes the Commission to implement provisions "regarding" distribution service, nothing in that division authorizes an actual rate freeze. If the General Assembly intended to grant the Commission that extraordinary power, then it would have said so. It did not. The fact that the remaining terms of division (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. R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); *Gabbard v. Madison Local Sch. Dist. Bd. of Ed.*, Slip Op. No. 2020-0612, 2021-Ohio-2067, ¶ 28; *State v. Aspell*, 10 Ohio St.2d 1, 225 N.E.2d 226 (1967), paragraph two of the syllabus.

Second, when interpreting a statute, the Commission must interpret its language in a way that does not violate the Constitution. *Buchman v. Bd. of Edn.*, 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (1995) ("A court is bound to give a constitutional rather than an unconstitutional construction to a statute."); *State v. Keenan*, 81 Ohio St.3d 133, 150, 689 N.E.2d 929 (1998) (declining to adopt the challenger's interpretation of a statute "when an equally plausible alternative reading of the statute would avoid any constitutional problems."); *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 27 ("[I]f an ambiguous statute is susceptible of two interpretations and one of the interpretations comports with the Constitution, then that reading of the statute will prevail[.]"); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955) ("[W]here the validity of an act is assailed, and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former so as to bring the act into harmony with the Constitution.") (citation omitted).

It is well settled that a public utility has a constitutional right to a rate increase if its rates are not sufficient to earn a reasonable return. *Bluefield Water Works & Improvement Co. v. Public Service Comm.*, 262 U.S. 679, 690, 43 S.Ct. 675 (1923) ("[r]ates 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") (emphasis added); *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").

It would thus plainly be unconstitutional for the ESP statute to authorize the Commission to implement a distribution rate freeze. The Commission is required "to give a constitutional rather than an unconstitutional construction to a statute," and should thus conclude that R.C. 4928.143 does not grant the Commission the extraordinary (and unconstitutional) power to implement a distribution rate freeze.

The fact that the ESP statute does not authorize the Commission to implement a rate freeze necessarily establishes that the rate freeze expired when the Commission reinstated ESP I, for these reasons:

1. When AES Ohio terminated ESP II, the Commission was required ("shall") to implement AES Ohio's "most recent standard service offer." R.C. 4928.143(C)(2)(b) (emphasis added).
2. A "standard service offer" is "only" an offer approved under "R.C. 4928.143." R.C. 4928.141(A) (emphasis added).<sup>5</sup>
3. R.C. 4928.143 does not (and cannot) grant to the Commission the extraordinary (and unconstitutional) power to implement a distribution rate freeze.
4. Therefore, when the Commission reinstated AES Ohio's "most recent standard service offer," it did not and could not reinstate the rate freeze.

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<sup>5</sup> R.C. 4928.141(A) also refers to plans approved under R.C. 4921.142 as a standard service offer. AES Ohio has never had a plan approved under that section, so that section is irrelevant here.

In other words, following AES Ohio's termination of ESP II, the Commission was required ("shall") to implement the terms of AES Ohio's "most recent standard service offer." R.C. 4928.143(C)(2)(b). A "standard service offer" is "only" an offer approved under "R.C. 4928.143." R.C. 4928.141(A). To determine whether a rate freeze was reinstated when ESP I was reinstated, the Commission must determine whether R.C. 4928.143 would authorize a rate freeze. Since there is no provision in the ESP statute that would authorize a rate freeze, the rate freeze was not reinstated when ESP I was reinstated.

Therefore, the rate freeze was already terminated before ESP III was terminated. The Commission's Second Finding and Order did not modify the Stipulation when it reinstated ESP I, yet did not continue the rate freeze because the rate freeze was already terminated.

OCC asserts (pp. 14-15) that the rate freeze was an ESP term. However, OCC's argument is more notable for what it does not say. Specifically, for a rate freeze to be an ESP term, there must be language in the ESP statute that would authorize a rate freeze. OCC does not even claim that any language in R.C. 4928.143 would authorize a rate freeze. OCC's failure to identify any specific language in R.C. 4928.143 that would purportedly authorize a rate freeze dooms OCC's claim that the statute authorizes a rate freeze.

OCC's assertion (p. 15) that each term in the 2009 Stipulation is an ESP term is not only inconsistent with the law (see above), but also, is inconsistent with the reality of how large cases are litigated before the Commission.

Specifically, AES Ohio's application in the case commonly referred to as "ESP I" actually constituted four cases:

08-1094-EL-SSO -- Application for Approval of ESP I.

08-1095-EL-ATA -- Application for Tariff Approval.

08-1096-EL-AAM -- Application for Accounting Authority.

08-1097-EL-UNC -- Application for Approval of Corporate Separation Plan.

AES Ohio's Application did not request an extension of the rate freeze.

Some of the terms of the 2009 Stipulation were plainly related to particular cases. For example, ¶ 1 of that Stipulation provided that AES Ohio's rate plan was extended; that term of the Stipulation was plainly related to AES Ohio's request for approval of its ESP in Case No. 08-1094-EL-SSO.

As another example, ¶ 5 of the 2009 Stipulation authorized carrying charges on certain amounts; that term related to AES Ohio's request for accounting authority in Case No. 08-1096-EL-AAM.

Other terms of the 2009 Stipulation do not relate directly to any of those four cases. For example, under ¶ 26(a) "[AES Ohio] agrees that the aggregated load of all The Kroger Company stores . . . qualifies them as mercantile customers." That term does not logically relate to any of the four case numbers in that proceeding.

The point is that just because a term is included in the 2009 Stipulation does not mean that it is an ESP term. Terms in the 2009 Stipulation may relate to the ESP, to the other three cases, or to none of the four cases.

And as demonstrated above, the "only" terms that would be part of a "standard service offer" would be those terms that were authorized by "R.C. 4928.143." R.C. 4928.141(A). Since R.C. 4928.143 does not authorize a rate freeze, a rate freeze was not a term of AES Ohio's "most recent standard service offer" (R.C. 4928.143(C)(2)(b)), and thus was not reinstated when ESP I was reinstated.

OCC's argument (p. 9) that AES Ohio has taken inconsistent positions in Case No. 12-3266-EL-AAM is not true. In that case, AES Ohio asked to implement a rider to recover storm costs pursuant to the 2009 Stipulation. Dec. 21, 2012 Application, p. 1. AES Ohio assumed in that case that the rate freeze was applicable, and asked the Commission to allow recovery of storm costs pursuant to an exception to the rate freeze. However, whether the rate freeze was applicable was not an issue in that case, because AES Ohio would have sought the same relief (recovery of storm costs) either way.

OCC also asserts (p. 15) that the fact that the Commission held that a provision from the 2009 Stipulation authorizing a storm rider was an ESP term somehow shows that a rate freeze is an ESP term. The defect in OCC's argument is that the ESP statute does authorize a storm rider. R.C. 4928.143(B)(2)(h) (authorizing "single issue ratemaking"). The storm rider is thus an ESP term. In contrast, the ESP statute does not (and cannot) authorize a rate freeze, so the rate freeze is not an ESP term.

OCC's reliance (pp. 16-18) on past Commission decisions is misplaced because nobody raised the issue in those cases of whether the terms at issue were ESP terms or not. Past Commission decisions that assumed without deciding that particular terms were ESP terms have

no precedential value on the issue here, since no party raised the issue of what was an ESP term in those cases.

**IV. THE COMMISSION HAS NOT MODIFIED THE ESP I STIPULATION**

AES Ohio's Motion (pp. 4-5) demonstrated that OCC has no rights under ¶ 37 of the 2009 Stipulation because the Commission's December 18, 2019 Order did not "modif[y]" the 2009 Stipulation. Specifically, ¶ 37 of the 2009 Stipulation granted to the Signatory Parties certain rights if "the Commission rejects or modifies" that Stipulation. The Commission should conclude that its Second Finding and Order (Dec. 18, 2021) did not modify the 2009 Stipulation for two reasons.

First, the 2009 Stipulation expressly states (¶ 18) that the rate freeze terminates on December 31, 2012. The Commission did not modify that Stipulation by failing to extend the rate freeze in the December 18, 2019 Order. OCC (p. 7) acknowledges that AES Ohio made that argument, but OCC never responds to it. (OCC's arguments on pages 8-13 respond to AES Ohio's arguments on pages 5-9.)

Second, OCC has no rights under ¶ 37 because the Commission approved the ESP I Stipulation without modification. June 24, 2009 Opinion and Order, p. 13. The Commission's recent order reinstating ESP I was made pursuant to R.C. 4928.143(C)(2)(a) & (b), and the ESP I Stipulation gives OCC no rights in response to an order under those sections. Again, OCC acknowledges that AES Ohio made that argument (p. 7), but OCC never responds to it.

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

AES Ohio's Motion (pp. 5-12) showed that the rate freeze was terminated before the Commission's Second Finding and Order. Thus, when the Commission reinstated AES Ohio's "most recent Standard Service Offer" (R.C. 4928.143(C)(2)(b)) after AES Ohio terminated ESP III, the rate freeze term was not reinstated because it had already been terminated.

The Commission should reject OCC's arguments on that issue for the following reasons.

A. **The Rate Freeze Was Not Extended in 2012**

As the Commission knows, its December 18, 2019 Order reinstated ESP I, but made no mention of the rate freeze.

In its Notice of Termination, OCC asserts (p. 3) that the Commission "failed to preclude [AES Ohio] from implementing future 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." *Id.*

OCC similarly asserts in its Notice of Termination (p. 7) that the Commission's December 18, 2019 Order – which, again, 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 Second Finding and Order "failed to adopt" the rate freeze and thus "modified the 2009 Stipulation" –

proves too much. Specifically, in 2012, the Commission extended AES Ohio's then-current rates when ESP I was set to expire before ESP II was approved. Entry (Dec. 19, 2012). Just like in its Second Finding and Order (Dec. 18, (2019), the Commission made no mention of the rate freeze in its Entry extending AES Ohio's then-current rates. *Id.*

OCC asserts (pp. 8-11) that the rate freeze was extended in 2012, but OCC ignores the fact that its own logic establishes that the Commission's failure to mention the rate freeze in its Entry (Dec. 19, 2012) compels the conclusion that the rate freeze was not extended.

OCC also claims (p. 11) that AES Ohio sought to have the rate freeze extended in 2012. Not so. AES Ohio asked only that its then-current rates be extended. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, *et al.*, 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 ) (moving "for an Order that will continue DP&L's current rates during 2013" until implementation of ESP II). It made no mention of the rate freeze.

**B. The Rate Freeze Was Not Reinstated in 2016**

Assuming the rate freeze survived the 2012 extension, the rate freeze did not survive the Commission's 2016 Finding and Order that reinstated ESP I. Finding and Order (Aug. 26, 2016). Like the Commission's Second Finding and Order (that reinstated ESP I after ESP III was terminated), the Commission's Finding and Order (which reinstated ESP I after ESP II was terminated) made no mention of a rate freeze. *Id.* Using OCC's own reasoning, the Commission modified the 2009 Stipulation in its 2016 Finding and Order when it did not order AES Ohio to freeze its distribution rates when ESP I was reinstated. The rate freeze was thus terminated in 2016.



**VI. OCC WAIVED ANY RIGHT IT MAY HAVE HAD TO WITHDRAW FROM THE 2009 STIPULATION**

Assuming for the sake of argument that OCC had a right to withdraw from the 2009 Stipulation, AES Ohio's Motion (pp. 12-16) demonstrated that OCC waived that right for the following reasons:

- A. In filings that OCC made in response to AES Ohio's Notice of Withdrawal of Its Application in Case No. 16-395-EL-SS0 Pursuant to R.C. 4928.143(C)(2)(a) (Nov. 26, 2019), 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 Fifth Entry on Rehearing (June 16, 2021) 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**

OCC does not dispute (p. 19) that it failed to raise the rate freeze issue in comments after AES Ohio filed its notice to terminate ESP III. OCC asserts (pp. 18-19) that its failure to do so should be forgiven because the 2009 Stipulation did not require it to raise the issue in its comments.

However, OCC was required by the 2009 Stipulation to raise the issue in its application for rehearing to preserve it. 2009 Stipulation, ¶ 37. And controlling precedent from the Ohio Supreme Court establishes that a party 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."). OCC thus waived the issue by not raising it in its comments.

**B. OCC Failed to Seek Rehearing**

OCC asserts (pp. 20-21) that it did seek rehearing in its January 17, 2020 application on the rate freeze issue. However, the Commission has already rejected that argument. Sixth Entry on Rehearing (Aug. 11, 2021) at ¶ 40 (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*").

**C. OCC's Notice of Withdrawal Was Not Timely**

Assuming for the sake of argument that OCC properly raised the rate freeze issue in its January 17, 2020 application, OCC was required to file its notice of withdrawal within 30 days of an entry denying that application. 2009 Stipulation, ¶ 37. The Commission denied that application on June 16, 2021, and OCC did not file its notice until September 10, 2021, well after the 30-day deadline.

OCC asserts (pp. 21-25) that it filed its notice within 30 days of the August 11, 2021 Sixth Entry on Rehearing. However, the Stipulation very clearly required OCC to seek rehearing within 30 days of the Commission entry denying rehearing. That Commission entry was issued on June 16, 2021, and OCC missed the deadline to file its Notice. OCC should not be allowed to extend the deadline to file its Notice of Termination by seeking rehearing on the same issues. *E.g., In re Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, *et al.*, Ninth Entry on Rehearing (Oct. 11, 2017), ¶ 24 (holding that "R.C. 4903.10 does not allow persons who enter

appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue").

OCC's reliance (pp. 24-25) upon an argument made by AES Ohio is misplaced. In that case, the issue was whether rehearing applications by parties other than the party seeking to withdraw would preclude withdrawal from the Stipulation. *ESP III*, The Dayton Power and Light Company's Motion to Strike Notice of Withdrawal from the Amended Stipulation (Oct. 26, 2018), pp. 1-2. In any event, AES Ohio withdrew its argument on that issue, so the issue was never decided. *ESP III*, The Dayton Power and Light Company's Reply in Support of Motion to Strike Notice of Withdrawal from the Amended Stipulation (Nov. 7, 2018), p. 2, n.2.

**D. OCC Failed to Raise the Rate Freeze Issue in Its Comments**

OCC concedes (p. 26) that it is "arguably true" that it should have raised the rate freeze issue in AES Ohio's 2015 rate case. As the Commission has already held, OCC's failure to do so bars OCC from raising the rate case issue now. Fifth Entry on Rehearing (June 16, 2021), ¶ 19.

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

AES Ohio's motion demonstrated that OCC agreed in the 2015 rate case that AES Ohio could file another distribution rate case. OCC asserts (p. 27) that "OCC's agreement that [AES Ohio] could file a rate case is not binding on this case." OCC reasons that the distribution rate case could not modify the ESP case.

However, OCC has conceded (p. 27) that it agreed in the 2015 rate case that AES Ohio could file a future rate case. Having agreed to that – and having received concessions in the 2015 rate case Stipulation – OCC should not now be able to walk away from that agreement.

OCC argues (p. 27) that the terms of the 2015 rate case Stipulation preclude AES Ohio from relying upon it here. However, OCC ignores the fact that the Stipulation provided that AES Ohio may do so "as necessary to enforce the terms of this Stipulation." 2009 Stipulation, ¶ 35. That is exactly what AES Ohio is doing here.

The Commission should thus hold OCC to its bargain in the 2015 rate case, and preclude OCC from terminating the 2009 Stipulation based upon that bargain.

#### **VIII. THE RELIEF OCC SEEKS IS BARRED BY LAW**

AES Ohio's Motion to Strike demonstrated that the relief that OCC seeks – that ESP I and its associated riders be terminated – is barred by law. Specifically, when AES Ohio terminated ESP III, the Commission was required by R.C. 4928.143(C)(2)(b) to implement ESP I, including its "terms, and conditions." ESP I must remain in effect "until a subsequent offer is authorized." *Id.*

OCC argues (pp. 31-32) that the 2009 Stipulation requires the Commission to terminate ESP I; however, that would be a clear violation of R.C. 4928.143(C)(2)(b) which requires the Commission to reinstate ESP I and leave it in place "until a subsequent offer is authorized." The Stipulation cannot violate the law.

**IX. OCC HAS NO RIGHT TO TERMINATE THE 2009 STIPULATION**

OCC (pp. 3-4) makes the odd argument that AES Ohio has no right to challenge OCC's notice of withdrawal/termination. However, as demonstrated above, OCC has no right to withdraw from or terminate the 2009 Stipulation. AES Ohio certainly has a right to oppose OCC's attempt to assert rights that it does not have.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing The Dayton Power and Light Company's (d/b/a/ AES Ohio) Reply in Support of 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 29th day of October, 2021:

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Summary: Reply The Dayton Power and Light Company's (d/b/a AES Ohio) Reply  
in Support of Motion to Strike the Notice of Termination and Withdrawal from the  
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