

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid	:	CASE NO. 18-1875-EL-GRD
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In the Matter of the Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2)	:	CASE NO. 18-1876-EL-WVR
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods	:	CASE NO. 18-1877-EL-AAM
	:	
In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018	:	CASE NO. 19-1121-EL-UNC
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In the Matter of the Application of The Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019	:	CASE NO. 20-1041-EL-UNC
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In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)	:	CASE NO. 20-0680-EL-UNC
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**THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO'S  
MEMORANDUM IN OPPOSITION TO THIRD APPLICATION FOR REHEARING  
BY OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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For the second time in these consolidated proceedings, The Office of the Ohio Consumers' Counsel ("OCC") seeks rehearing regarding the Commission's consideration of the

capital requirements of future committed investments in this state by The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") under R.C. 4928.143(F). Compare Third Application for Rehearing by Office of Ohio Consumers' Counsel (Nov. 5, 2021), pp. 2-6 with Application for Rehearing by Office of the Consumers' Counsel (July 16, 2021), pp. 27-33. For the second time, the Commission should reject OCC's arguments and reaffirm that its offset of any purported excess earnings against the Company's future capital commitments is consistent with the discretion provided under the statute. Second Entry on Rehearing (Oct. 6, 2021), ¶ 37. Accord: Opinion and Order (June 16, 2021), ¶¶ 68-69.

I. OCC'S APPLICATION FOR REHEARING VIOLATES R.C. 4903.10

As a threshold matter, the arguments raised by OCC in its Third Application for Rehearing either (1) could have been raised in its initial Application for Rehearing and were not, or (2) were, in fact, raised in that Application for Rehearing. Such untimely arguments are either waived or impermissibly seek rehearing upon rehearing, in violation of R.C. 4903.10.

Section 4903.10 provides, in pertinent part:

"After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in that proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission."

Accord: Ohio Adm.Code 4901-1-35(A). Although the statute allows applications for rehearing, the Commission has repeatedly concluded that it "does not allow persons who enter appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue." In re The Dayton Power and Light Co., Case No. 16-395-EL-SSO, et al. ("ESP III Case"), Fourth Entry on Rehearing (Nov. 7, 2018) at ¶ 17 (citing Ormet Primary Aluminum Corp., et al. v. S. Central

Power Co. and Ohio Power Co., Case No. 05-1057-EL-CSS, et al., Second Entry on Rehearing (Sept. 13, 2006) at pp. 3-4; In re The East Ohio Gas Co. d.b.a. Dominion East Ohio and Columbia Gas of Ohio, Inc., Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at p. 4).

In its Third Application for Rehearing, OCC argues (p. 2) that the Commission "erred by denying consumers \$61.1 million in refunds of [AES Ohio's] significantly excessive profits, including by using an unlawful and unreasonable 'offset' of refunds, in violation of R.C. 4928.143(F)," and that consideration of future capital commitments under R.C. 4928.143(F) should be limited to establishing a SEET threshold (i.e., a term that does not appear in the statute). Yet, in its initial Application for Rehearing, OCC similarly argued (p. 27) that the Commission erred in "den[ying] consumers refunds under the Significantly Excessive Earnings Test despite a PUCO finding that DP&L's profits were significantly excessive as compared to comparable companies to the tune of \$61 million," and further made the same "threshold" argument. The Commission rejected this argument. Second Entry on Rehearing (Oct. 6, 2021), ¶ 37 ("R.C. 4928.143(F) does not limit our consideration of [AES Ohio's] future capital investments in the manner that OCC advocates—there is no legislative direction that requires that the consideration be limited to creating a slight adjustment in the SEET calculation. Instead, the statute provides the Commission broad discretion as to the manner in which it considers future capital commitments.").

Since OCC could have raised the arguments in its Third Application for Rehearing in its initial Application for Rehearing, the Commission should deny OCC's Third Application for Rehearing as procedurally barred, either because they should have been raised in the initial application or they were raised in the initial application. R.C. 4903.10.

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN DETERMINING WHETHER AES OHIO'S EARNINGS WERE SIGNIFICANTLY EXCESSIVE

Pursuant to R.C. 4928.143(F), "[c]onsideration also shall be given to the capital requirements of future committed investments in this state." Pursuant to that clause, the Commission found that AES Ohio's future committed investments established that no refunds should be required:

"Further, we agree with Staff as to the conclusion that customer refunds are not necessary (or appropriate), notwithstanding the earnings amounts above the SEET threshold calculations, due to [AES Ohio]'s commitment to make substantial capital expenditures as part of its \$267.6 million SGP Phase 1 expenditures over the next four years that are in addition to the AES capital commitments to [AES Ohio] in the combined amount of \$300 million (Staff Ex. 1 at 10-11; Stipulating Parties Ex. 1, ¶ 2, 4). R.C. 4928.143(F) directs that consideration shall be given to the capital requirements of future committed investments in this state. With the approval of the Stipulation, [AES Ohio] is committing to a future committed investment of \$267.6 million, the great majority of which (\$249 million), are capital expenditures (Stipulating Parties Ex. 1 at 4-5, Ex. 1). R.C. 4928.143(F) does not specify a formula or the specific manner in which the Commission should consider future committed investments in this state. Given the magnitude of the committed investment, the Commission finds that it is appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment. Therefore, we will offset \$3.7 million for 2018 and \$57.4 million for 2019 for a total of \$61.1 million of the capital expenditures included within the \$267.6 million of SGP Phase 1 expenditures. We further find that offsetting future committed capital investments in grid modernization against excessive earnings is consistent with state policy to encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, smart grid programs, and implementation of advanced metering infrastructure. R.C. 4928.02(D)."

Opinion and Order, ¶ 68.

OCC asserts (p. 6) that the "[c]onsideration" sentence would allow the Commission to have "slightly increased" the SEET threshold, but bars the Commission from offsetting earnings above the threshold with future committed investments. As shown in AES Ohio's Opposition<sup>1</sup> to OCC's initial Application for Rehearing, the Commission should reject that argument for the following reasons.

First, the Commission is required to "[c]onsider[]" future investments, but the statute does not require that those incentives be considered in any particular manner. The statute does not limit how the Commission is required to "[c]onsider[]" those future committed investments, and thus grants the Commission broad discretion as to how it will consider those investments.

Second, given that the Commission is required to consider "capital requirements of future committed investments," it is reasonable to use those requirements to offset any earnings above the threshold, since refunds would interfere with AES Ohio's ability to make those investments. AES Ohio Ex. 7, pp. 26-28 (Dec. 23, 2020 Garavaglia Test.) (if the Commission required AES Ohio to make refunds, "[AES Ohio] would not be able to pursue grid modernization at all. In fact, [AES Ohio] would struggle to raise the capital needed to simply maintain its distribution and transmissions systems.").

As the Commission recognized in its Second Entry on Rehearing:

"In affirming the offset, we clarify that the \$61.1 million in offset amounts shall not be considered in reducing the Company's right to pursue recovery of its \$249 million SGP investment through its

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<sup>1</sup> Memorandum of The Dayton Power and Light Company d/b/a AES Ohio in Opposition to The Office of the Ohio Consumers' Counsel's Application for Rehearing (July 30, 2021), pp. 45-48.

IIR, nor otherwise considered as a future limitation toward the Company's right to pursue recovery of SGP costs. In support of this finding, we stress that the consideration of SEET amount offsets is unique to each EDU. As such, we reject OCC's argument that our prior ruling in *In re the Application of Columbus Southern Power for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC, controls our assessment of DP&L's circumstance in this case. As DP&L points out, its financial condition is such that ordering refunds of excess earnings would not only preclude the future grid modernization that we approved, but it would also strain the Company's ability to maintain its distribution and transmission systems. This circumstance is unique to our consideration of the SEET offset issue impacting DP&L, and we rely on it in support of our decision contra the refunds that OCC seeks. Further, we also reject OCC's claim that the offset amounts should be used to reduce the Company's right to recover the full amount (\$249 million) of its SGP investment through its IIR. As we previously described, R.C. 4928.143(F) provides broad discretion concerning how we are to consider a company's future committed investments. DP&L's commitment to implementing the SGP as part of the negotiated settlement in this case is highly beneficial to its customers. Achieving these benefits is fostered by authorizing DP&L to pursue the full recovery for its SGP capital investment through its IIR without requiring any reductions as a result of the SEET. Stated another way, requiring any reduction in capital investments as a result of the SEET would have a chilling effect on the Company's future committed investment, which is inconsistent with the public policy benefits that are provided for in R.C. 4928.143(F)."

Second Entry on Rehearing, ¶ 40 (emphasis added).

Third, the fact that the Commission considered future capital requirements one way in a prior case does not establish that the capital requirements need to be considered the same way in this case. That is particularly true since there was evidence in this case that AES Ohio could not implement its capital investments if it was required to issue refunds (id.), while there was no such evidence in the case to which OCC cites.

The Commission should again reject OCC's attempt (p. 2) to recast the Opinion and Order as somehow finding that AES Ohio had significantly excessive earnings for 2018 and 2019. In reality, the Commission made the exact opposite finding. Opinion and Order, ¶ 64 ("We adopt Staff's recommendation that that DP&L did not have significantly excessive earnings in 2018 or 2019, noting that this determination requires more than a mere calculation of income amounts that exceed ROE thresholds.") (emphasis added). Since AES Ohio did not have significantly excessive earnings, no refund is warranted under R.C. 4928.143(F).

III. CONCLUSION

For the foregoing reasons, the Commission should deny OCC's Third Application for Rehearing.

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 Memorandum in Opposition to Third Application for Rehearing by Office of the Ohio Consumers' Counsel, has been served via electronic mail upon the following counsel of record, this 15th day of November, 2021:

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Summary: Memorandum The Dayton Power and Light Company d/b/a AES Ohio's  
Memorandum in Opposition to Third Application for Rehearing by Office of the Ohio  
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