

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The : CASE NO. 20-1651-EL-AIR  
Dayton Power and Light Company to Increase  
Its Rates for Electric Distribution :

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

## INITIAL POST-HEARING BRIEF OF AES OHIO

## TABLE OF CONTENTS

|   | <u>PAGE</u> |
|---|-------------|
| I. INTRODUCTION AND SUMMARY .....   | 1           |
| II. A DISTRIBUTION RATE FREEZE WOULD BE UNLAWFUL .....  | 1           |
| A. PROCEDURAL HISTORY .....   | 5           |
| B. THE ESP STATUTE CANNOT AND DOES NOT AUTHORIZE A<br>RATE FREEZE .....   | 6           |
| C. NOT ALL OF THE TERMS OF THE 2009 STIPULATION ARE ESP<br>TERMS .....  | 11          |
| D. THE INTERVENORS WAIVED ANY ARGUMENT THEY MAY<br>HAVE HAD TO ENFORCE A RATE FREEZE .....  | 13          |
| 1. The Intervenor Did Not Seek to Extend the Rate Freeze When the<br>Commission Extended the Rates of ESP I in the December 19,<br>2012 Entry.....                              | 14          |
| 2. The Intervenor Did Not Seek to Reinstate the Rate Freeze When<br>the Commission Authorized AES Ohio to Implement ESP I Rates<br>Following the Termination of ESP II.....     | 16          |
| 3. The Intervenor Did Not Seek to Dismiss the 2015 Distribution<br>Rate Case .....  | 17          |
| 4. The Stipulation From the 2015 Rate Case Authorized AES Ohio to<br>File This Case .....   | 19          |
| 5. The Intervenor Did Not Seek to Reinstate the Rate Freeze before<br>the Commission Authorized AES Ohio to Implement ESP I Rates<br>Following the Termination of ESP III ..... | 20          |
| E. A RATE FREEZE WOULD VIOLATE R.C. 4909.15(E).....   | 21          |
| F. A RATE FREEZE WOULD SEVERELY CHALLENGE AES OHIO'S<br>ABILITY TO PROVIDE RELIABLE SERVICE .....   | 22          |
| 1. AES Ohio Currently is Struggling to Provide Reliable Service .....   | 22          |
| 2. A Rate Freeze Would Make It Difficult, if Not Impossible, for<br>AES Ohio to Provide Reliable Service .....  | 24          |

|      |  |    |
|------|--|----|
| III. | AES OHIO'S OBJECTIONS TO THE STAFF REPORT.....   | 27 |
| A.   | Revenue Requirement.....   | 27 |
| B.   | Rate Base .....  | 27 |
| C.   | Rate of Return.....  | 33 |
| D.   | Operating Income.....  | 39 |
| E.   | Rates And Tariffs.....   | 55 |
| F.   | Rate Design.....   | 57 |
| IV.  | THE COMMISSION SHOULD REJECT RECOMMENDATIONS MADE BY<br>THE INTERVENOR WITNESSES ..... | 59 |
| A.   | OCC Witness Willis.....  | 59 |
| 1.   | Rate Freeze.....   | 59 |
| 2.   | Capitalized Bonuses.....   | 59 |
| 3.   | Capitalized Storm Costs.....   | 60 |
| 4.   | Depreciation Reserve and Expense.....  | 60 |
| 5.   | Trade Association Dues .....   | 61 |
| 6.   | Operating Income.....  | 61 |
| 7.   | Travel and Entertainment.....  | 61 |
| 8.   | Rebuttal Testimony.....  | 61 |
| B.   | OCC Witness Williams.....  | 63 |
| 1.   | Residential Bill Impacts.....  | 63 |
| 2.   | Reliable Service .....   | 63 |
| C.   | OCC Witness Fortney .....  | 64 |
| 1.   | Cost Allocation .....  | 64 |
| 2.   | Customer Charge .....  | 64 |
| D.   | OCC Witness Walters.....   | 65 |
| 1.   | ROE Greater Than 9.7%.....   | 65 |

|    |   |    |
|----|---|----|
| 2. | Mr. Walters' Testimony in Other Proceedings Shows That the Commission Should Consider AES Ohio's Credit Ratings ..... | 65 |
| 3. | The Federal Reserve Has Increased the Federal Funds Rate .....  | 65 |
| 4. | Projected Bond Yields are Rising .....  | 66 |
| E. | Walmart Witness Kronauer.....   | 66 |
| F. | IGS Witness White .....   | 67 |
| 1. | Uncollectible Expenses .....  | 67 |
| 2. | PUCO and OCC Assessments .....  | 68 |
| 3. | Switching Fees .....  | 68 |

**I.                    INTRODUCTION AND SUMMARY**

The Dayton Power and Light Company d/b/a AES Ohio has demonstrated that its current rates are insufficient to enable it to provide adequate service under R.C. 4909.19. The Commission should thus approve AES Ohio's Application in this case.

This Initial Post-Hearing Brief for AES Ohio demonstrates three principal points.

First, it would be unlawful for the Commission to freeze AES Ohio's rates at their current level. In addition, doing so would make it very difficult, if not impossible, for AES Ohio to provide reliable service.

Second, this brief demonstrates that the Commission should reject a number of the recommendations made in the Staff Report.

Third, the Commission should reject recommendations made by intervenor witnesses.

**II.                    A DISTRIBUTION RATE FREEZE WOULD BE UNLAWFUL**

This section demonstrates four principal points.

First, after AES Ohio terminated ESP III, the Commission was required to reinstate the "provisions, terms, and conditions" of AES Ohio's "most recent standard service offer." R.C. 4928.143(C)(2)(b). An SSO includes "[o]nly" those terms "authorized in accordance with" the ESP statute. R.C. 4928.141(A).

Therefore, a term in the 2009 Stipulation and Recommendation<sup>1</sup> that resolved the ESP I case is an ESP term "[o]nly" if it was "authorized" by the ESP statute; such a term would thus constitute a "provision, term, or condition" of ESP I and was reinstated when ESP I was reinstated. However, if a term in the 2009 Stipulation was not "authorized" by the ESP statute, then that term was not a "provision, term, or condition" of ESP I and was not reinstated when ESP I was reinstated.

The Commission should conclude that the ESP statute does not authorize it to implement a distribution rate freeze -- and that a rate freeze thus was not a term of ESP I -- for the following reasons:

a. The ESP Statute is Silent on the Issue: There is no provision in the ESP statute that authorizes the Commission to implement a rate freeze. Indeed, to date, none of the intervenors have even claimed that any specific provision in the ESP statute would authorize the Commission to implement a distribution rate freeze.

b. A Rate Freeze Would be Unconstitutional: Even if there were some ambiguity in the ESP statute (there is not), the Commission "is bound to give a constitutional rather than an unconstitutional construction to a statute."<sup>2</sup> A utility has a constitutional right to compensatory rates,<sup>3</sup> and it would thus be unconstitutional for the ESP statute to authorize the

---

<sup>1</sup> AES Ohio Ex. 69.

<sup>2</sup> *Buchman v. Bd. of Edn.*, 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (1995).

<sup>3</sup> *Bluefield Water Works & Improvement Co. v. Pub. Serv. 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).

Commission to impose a rate freeze. Therefore, even if there were ambiguity in the ESP statute, the Commission must interpret it in a constitutional way, *i.e.*, as not authorizing the Commission to implement a distribution rate freeze.

Second, this section further demonstrates that just because a term is included in the 2009 Stipulation does not mean that the term is an ESP term. Indeed, as the chart below demonstrates, many of the terms of the 2009 Stipulation relate to statutes other than the ESP statute:

|    | <u><b>Term</b></u>  | <u><b>Applicable Statute</b></u> |
|----|---|----------------------------------|
| 1. | AES Ohio shall implement various energy efficiency terms. 2009 Stipulation, ¶¶ 5, 11, 12.         | R.C. 4928.66 (before repeal)     |
| 2. | AES Ohio shall implement an Alternative Energy Rider. 2009 Stipulation, ¶ 6.                      | R.C. 4928.64                     |
| 3. | AES Ohio shall recover carrying charges. 2009 Stipulation, ¶ 7.                                   | R.C. 4905.13                     |
| 4. | AES Ohio shall meet with CRES providers. 2009 Stipulation, ¶ 14.                                  | None                             |
| 5. | Reasonable arrangements must be filed with the Commission. 2009 Stipulation, ¶ 15.                | R.C. 4905.31                     |
| 6. | AES Ohio must seek Commission approval to transfer its interests in OVEC. 2009 Stipulation, ¶ 16. | R.C. 4928.17                     |
| 7. | AES Ohio may apply to provide behind-the-meter services. 2009 Stipulation, ¶ 17.                  | R.C. 4928.17                     |

8. AES Ohio may recover transmission costs. 2009 R.C. 4928.05(A)(2)  
Stipulation, ¶¶ 19.c. and 19.d.

Third, assuming for the sake of argument that a rate freeze were an ESP term (it is not), the intervenors waived the rate freeze issue, as follows:

1. None of the intervenors asked that the rate freeze be extended when ESP I was extended in 2012, and none of them sought rehearing from the Commission's order.
2. None of the intervenors asked that the rate freeze be reinstated when ESP II was terminated and ESP I was reinstated in 2016, and none of them sought rehearing from the Commission's order.
3. The intervenors failed to assert that the rate freeze barred AES Ohio's 2015 rate case, which was pending when ESP I was reinstated in 2016.
4. The Stipulation in AES Ohio's 2015 distribution rate case authorized AES Ohio to file this case; none of the intervenors sought rehearing from the Commission's order approving that Stipulation as to that issue.
5. None of the intervenors asked that the rate freeze be reinstated when AES Ohio terminated ESP III in 2019.

Fourth, a rate freeze would violate R.C. 4909.15(E), which provides that the Commission "shall" implement rates if a utility's rates are inadequate. There is no dispute that AES Ohio's current rates are inadequate, and the word "shall" is mandatory.

Fifth, enforcing a rate freeze would significantly challenge AES Ohio's ability to provide reliable service. AES Ohio has been struggling to provide reliable service, and recently has failed Commission reliability metrics.



AES Ohio is currently operating under an assumption that this case will result in a rate increase, and is spending more than it is recovering in rates. If a rate freeze were to be implemented, then AES Ohio would make best efforts to provide reliable service with available funds, but AES Ohio would be forced to make significant cuts so that it could operate within its current revenue in an environment of rising costs.

Those cuts and their effects are discussed at length in the testimony of AES Ohio witness Storm. As but one example, the majority of AES Ohio's line maintenance and vegetation management work is done by 364 contractors. When a significant storm hits AES Ohio's service territory, AES Ohio redirects those contractors to storm restoration, so those persons are vital to AES Ohio's storm restoration efforts. If a rate freeze were to be implemented, then AES Ohio would be forced to cut 170 of those contractors, a 47% cut. That reduction would significantly impede AES Ohio's ability not only to perform routine line maintenance but also to respond to storms.

As described in detail in Ms. Storm's testimony, AES Ohio would also be forced to make significant cuts to vegetation management, maintenance expenses and capital expenditures. Those cuts would create significant additional challenges to AES Ohio's ability to provide reliable service.

**A. PROCEDURAL HISTORY**

In 2008, AES Ohio filed an application that instituted four cases, only one of which was an ESP:

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.

In 2009, AES Ohio and various other parties signed the 2009 Stipulation that resolved those cases. AES Ohio Ex. 69. Among other things, that stipulation established ESP I for AES Ohio, and implemented a distribution rate freeze "through December 31, 2012." *Id.* at ¶ 18.

In 2013, the Commission approved ESP II for AES Ohio. *In re AES Ohio's Application to Establish ESP II*, Case No. 12-426-EL-SSO, et al. ("*ESP II Case*"), Opinion and Order, pp. 53-54 (Sept. 4, 2013). After one of the riders established in ESP II was ruled unlawful by the Supreme Court of Ohio, AES Ohio terminated ESP II pursuant to R.C. 4928.143(C)(2)(a), and the Commission reinstated ESP I pursuant to R.C. 4928.143(C)(2)(b). *ESP II Case*, Finding and Order, ¶¶ 12-15 (Aug. 26, 2016).

In 2017, the Commission approved ESP III for AES Ohio. *In re AES Ohio's Application for Approval of ESP III*, Case No. 16-395-EL-SSO, et al. ("*ESP III Case*"), Opinion and Order, pp. 60-61 (Oct. 20, 2017). In 2019, after the Commission held that one of the riders in ESP III was not lawful, AES Ohio terminated ESP III pursuant to R.C. 4928.142(C)(2)(a). *ESP III Case*, Finding and Order, ¶ 10 (Dec. 18, 2019). Pursuant to R.C. 4928.143(C)(2)(b), the Commission reinstated ESP I, as it existed in 2017 when ESP III was approved, which was AES Ohio's "most recent standard service offer" at that time. *Id.* at ¶¶ 16-22.

**B. THE ESP STATUTE CANNOT AND DOES NOT AUTHORIZE A RATE FREEZE**

OCC has asserted that the rate freeze was a term of ESP I, and that when ESP I was reinstated in 2019, the rate freeze in the 2009 Stipulation was reinstated. OCC Motion to Dismiss, p. 1 (Aug. 5, 2021). As demonstrated below, the Commission should conclude that the

ESP statute cannot and does not authorize a rate freeze. Therefore, the distribution rate freeze in the 2009 Stipulation was not a term of ESP I, and was not reinstated when ESP I was reinstated.

Specifically, after a utility terminates an ESP pursuant to R.C. 4928.143(C)(2)(a), the Commission is required ("shall") to reinstate "the provisions, terms, and conditions of the utility's most recent standard service offer." R.C. 4928.143(C)(2)(b). "*Only* a standard service offer *authorized in accordance with* Section 4928.142 or *4928.143* [the ESP statute] of the Revised Code, *shall serve as the utility's standard service offer . . .*" R.C. 4928.141(A) (emphasis added).

Therefore, a term in the 2009 Stipulation is an ESP term "[o]nly" if it was "authorized" by the ESP statute; such a term would thus constitute a "provision, term, or condition" of ESP I and was reinstated when ESP I was reinstated. However, if a term in the 2009 Stipulation was not "authorized" by the ESP statute, then that term was not a "provision, term, or condition" of ESP I and was not reinstated when ESP I was reinstated.

Significantly, no party has claimed that *any* specific provision in the ESP statute would authorize the Commission to implement a distribution rate freeze. The Commission should conclude that the ESP statute does not authorize a distribution rate freeze for two reasons.

First, the *only* division in the ESP statute that even mentions distribution service is R.C. 4928.143(B)(2)(h), which authorizes the Commission to approve:

"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. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic . . . significance.") (internal quotation and citation omitted).

Indeed, the fact that the remaining terms of division (B)(2)(h) are specific 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 . . ."); *Gabbard v. Madison Local Sch. Dist. Bd. of Edn.*, 165 Ohio St.3d, 2021-Ohio-2067, 179 N.E.3d 1169 ¶ 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 do so in a way that does not violate the Constitution, if possible. *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.") (citation omitted); *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[.]") (citation omitted); *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).

The ESP statute would be unconstitutional if it authorized the Commission to implement a distribution rate freeze, because rates that do not provide a fair return to a utility constitute a taking in violation of the Fourteenth Amendment to the United States Constitution. *Bluefield Water Works & Improvement Co. v. Pub. Serv. 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); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308, 109 S.Ct. 609 ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."); *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597, 17 S.Ct. 198 (1896) (a rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically

deprive[s] the owner of property without due process of law."); *Transcontinental Gas Pipe Line Corp. v. Fed. Power Com.*, 518 F.2d 459, 464 (D.C. Cir. 1975) ("It is well settled that to deprive public utility investors of a return on capital currently dedicated to public use constitutes an unconstitutional confiscation of property."). *Accord*: Section 19, Article I, Ohio Constitution; *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 66 (interpreting the Ohio Constitution's protection against takings as stronger than the Federal Constitution).

As the Supreme Court of Ohio has explained:

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property."

*Marietta v. Pub. Util. Com.*, 148 Ohio St. 173, 184-185, 74 N.E.2d 74 (1947) (citations omitted).<sup>4</sup>

It would thus plainly be unconstitutional for the ESP statute to authorize the Commission to implement a distribution rate freeze. The Commission must "give a constitutional rather than an unconstitutional construction to a statute," and the Commission

---

<sup>4</sup> If the Commission were to institute a rate freeze, such a freeze would amount to an unconstitutional taking, and AES would be entitled to "just compensation." U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation"); *United States v. 50 Acres of Land*, 469 U.S. 24, 25, 105 S.Ct. 451 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation'... whenever it takes private property for public use."); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710, 119 S.Ct. 1624 (1999) ("As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy."); *Horne v. Dept. of Agric.*, 576 U.S. 351, 358, 376, 135 S.Ct. 2419 (2015) (awarding value of taken property because the Fifth Amendment "protects 'private property' without any distinction between different types") (citation omitted); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-20, 112 S.Ct. 2886 (1992) (reversing judgment of state supreme court overturning award of \$1.2 million in compensation under the Takings Clause).

should thus conclude that R.C. 4928.143 does not purport to grant to it the extraordinary and unconstitutional power to implement a distribution rate freeze.

The Commission should thus conclude that the ESP statute does not and cannot authorize the Commission to implement a rate freeze. The Commission should further conclude that when ESP I was reinstated, the distribution rate freeze was not an ESP term and was not reinstated.

**C. NOT ALL OF THE TERMS OF THE 2009 STIPULATION ARE ESP TERMS**

OCC has asserted that the rate freeze is an ESP term because the rate freeze was included in the 2009 Stipulation. OCC Motion to Dismiss, p. 1. The Commission should reject that argument for the reasons identified above -- *i.e.*, ESP I includes "[o]nly" the terms "authorized" by the ESP statute, and the ESP statute does not authorize a distribution rate freeze.

In addition, OCC's assertion that all of the terms in that 2009 Stipulation are ESP terms is plainly incorrect. As the following chart shows, many (perhaps most) of the terms of the 2009 Stipulation are not ESP terms:

|    | <b><u>Term</u></b>  | <b><u>Applicable Statute</u></b> |
|----|---|----------------------------------|
| 1. | AES Ohio shall implement various energy efficiency terms. 2009 Stipulation, ¶¶ 5, 11, 12. | R.C. 4928.66 (before repeal)     |
| 2. | AES Ohio shall implement an Alternative Energy Rider. 2009 Stipulation, ¶ 6.              | R.C. 4928.64                     |
| 3. | AES Ohio shall recover carrying charges. 2009 Stipulation, ¶ 7.                           | R.C. 4905.13                     |

- |    |   |                    |
|----|---|--------------------|
| 4. | AES Ohio shall meet with CRES providers. 2009 Stipulation, ¶ 14.                                  | None               |
| 5. | Reasonable arrangements must be filed with the Commission. 2009 Stipulation, ¶ 15.                | R.C. 4905.31       |
| 6. | AES Ohio must seek Commission approval to transfer its interests in OVEC. 2009 Stipulation, ¶ 16. | R.C. 4928.17       |
| 7. | AES Ohio may apply to provide behind-the-meter services. 2009 Stipulation, ¶ 17.                  | R.C. 4928.17       |
| 8. | AES Ohio may recover transmission costs. 2009 Stipulation, ¶¶ 19.c. and 19.d.                     | R.C. 4928.05(A)(2) |

Those terms and many others (*see* 2009 Stipulation, ¶¶ 23-37) are not authorized by the ESP statute (R.C. 4928.143) and thus are not ESP terms.

Indeed, as mentioned above, AES Ohio's 2008 application in ESP I actually initiated four separate cases, only one of which was an ESP case:

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.

The Commission should thus conclude that just because a term is included in the 2009 Stipulation, that does not mean that the term is an ESP term. Indeed, OCC witness Willis conceded that a number of the terms in the 2009 Stipulation were not ESP terms. Tr. 854-61.



In addition, OCC has asserted that the "bargain[ ]" struck in the 2009 Stipulation was that AES Ohio would be subject to a distribution rate freeze while it collected the RSC. OCC Motion to Dismiss, pp. 12-13. The Commission should reject that argument for two reasons.

1. The Commission must follow the law, and as demonstrated above, the distribution rate freeze is not an ESP term.
2. OCC ignores the fact that the 2009 Stipulation included (a) generation rates at which AES Ohio would provide SSO service,<sup>5</sup> which rates are now well above market rates; and (b) AES Ohio would recover an Environmental Investment Rider.<sup>6</sup> The "bargain" struck in the 2009 Stipulation thus includes AES Ohio recovering those items. The Commission invalidated those two items several years ago<sup>7</sup> and AES Ohio thus has not been and currently is not receiving the benefit of its "bargain"; the rate freeze thus cannot and should not be reinstated.

**D. THE INTERVENORS WAIVED ANY ARGUMENT THEY MAY HAVE HAD TO ENFORCE A RATE FREEZE**

Assuming for sake of argument that the distribution rate freeze is an ESP term, this section demonstrates that the intervenors waived the rate freeze issue by failing to assert it previously, for the following reasons:

---

<sup>5</sup> AES Ohio Ex. 69, Att. A and B.

<sup>6</sup> Paragraph 1 of the 2009 Stipulation provided that AES Ohio's then-current rate plan would be extended. AES Ohio Ex. 69. "[T]he EIR [was] a provision, term or condition of ESP I." *ESP I case*, Finding & Order, ¶ 22 (Aug. 26, 2016).

<sup>7</sup> *Id.* at ¶¶ 21-22.

1. None of the intervenors asked that the rate freeze be extended when ESP I was extended in 2012, and none of them sought rehearing from the Commission's order.
2. None of the intervenors asked that the rate freeze be reinstated when ESP II was terminated and ESP I was resinstated in 2016, and none of them sought rehearing from the Commission's order.
3. The intervenors failed to assert that the rate freeze barred AES Ohio's 2015 rate case.
4. The Stipulation in AES Ohio's 2015 distribution rate case authorized AES Ohio to file this case; none of the intervenors sought rehearing from the Commission's order approving that Stipulation.
5. None of the intervenors asked that the rate freeze be reinstated when AES Ohio terminated ESP III in 2019.

**1. The Intervenors 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," to continue the RSC rider "through December 31, 2012," and to freeze AES Ohio's base distribution rates "through December 31, 2012." AES Ohio Ex. 69, pp. 3, 4, 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. *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, p. 1 (Nov. 7, 2012) (emphasis added). AES Ohio did not ask that the rate freeze be continued. *Id.*

Although that Motion was opposed by several parties, not a single party asked the Commission to extend the rate freeze along with AES Ohio's then-current rates.<sup>8</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, pp. 4, 6 (Dec. 19, 2012). The Commission's Order did not state that it continued the rate freeze. *Id.*

Several parties sought rehearing from that Entry, but again, they did not ask the Commission to continue the rate freeze.<sup>9</sup> The Commission denied rehearing without addressing the rate freeze, and no party appealed. *ESP I Case*, Entry on Rehearing (Feb. 19, 2013). Since no party asked that the rate freeze be extended, the rate freeze terminated by its own terms on December 31, 2012, and was not part of AES Ohio'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>10</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

---

<sup>8</sup> *E.g.*, *ESP II Case*, Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates (Nov. 23, 2012).

<sup>9</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).

<sup>10</sup> *ESP II Case*, Finding and Order, ¶ 17 (Aug. 26, 2016) (granting "[the Company's] motion to withdraw its application for an ESP, thereby terminating it").

III and again reverted to ESP I,<sup>11</sup> it reverted to the version of ESP I that was in effect when ESP III was approved, which did not include a rate freeze for the reasons identified above.

**2. The Intervenor 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 ESP I 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, AES Ohio moved to terminate ESP II pursuant to R.C. 4928.143(C)(2) 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), p. 1. AES Ohio did not ask for the rate freeze to be reinstated. *Id.*

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

Several parties sought rehearing from that Finding and Order, but did not seek to reinstate the rate freeze,<sup>12</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

---

<sup>11</sup> *ESP III Case*, Finding and Order, ¶ 24 (Dec. 18, 2019) (ordering that "[the Company's] notice of withdrawal of its application in Case No. 16-395-EL-SSO be approved").

<sup>12</sup> *E.g.*, *ESP I Case*, Application for Rehearing by Office of the Ohio Consumers' Counsel (Sept. 26, 2016).

Rehearing (Dec. 14, 2016). The intervenors thus forfeited the right to argue that the rate freeze should have been incorporated into AES Ohio's SSO, particularly since AES Ohio had a pending distribution rate case at the time.<sup>13</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 identified above.

### **3. The Intervenors Did Not Seek to Dismiss the 2015 Distribution Rate Case**

---

In its Fifth Entry on Rehearing in the *ESP I Case*, the Commission correctly rejected OCC's argument that it should 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 *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]

---

<sup>13</sup> The Application in the 2015 Distribution Rate Case was filed on November 30, 2015.

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, ¶ 19 (June 16, 2021).

Nor did any of the other intervenors raise the rate freeze issue in the 2015 rate case. By failing to ask the Commission to enforce the rate freeze in the 2015 Distribution Rate Case during the 14 months during which AES Ohio operated under ESP I rates, the intervenors waived this argument. *Id.*

As the Commission found, *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. "

*Id.* at ¶ 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. The intervenors are not entitled to an end-run around those principles by raising those arguments here.

#### **4. The Stipulation From the 2015 Rate Case Authorized AES Ohio to File This Case**

---

The Commission 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*, Case No. 15-1830-EL-AIR, *et al.*, Stipulation and Recommendation, 7 (June 18, 2018).

That Stipulation was signed by many of the intervenors in this case (including OCC, OEG, Kroger, Wal-Mart, OHA, OEC, OPAE, IEU, OMA, and One Energy) (*id.* at 17-18) and approved by the Commission. *2015 Distribution Rate Case*, Opinion and Order (Sept. 26, 2018). Since that decision was issued after the 2009 rate freeze was approved in the *ESP I Case*, it establishes that AES Ohio has the right to file this distribution rate case.

Indeed, as the Commission recently acknowledged, parties knew when they signed the ESP I Stipulation that AES Ohio may have a statutory right to revert to ESP I in the future. *ESP I Case*, Fifth Entry on Rehearing, ¶ 61 (June 16, 2021) ("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, those intervenors signed the 2015 rate case Stipulation two years after AES Ohio had reverted to ESP I the first time, so they were on notice as to this issue when they signed the 2015 rate case Stipulation. The intervenors thus waived any right they may have had to enforce the rate freeze when they signed the 2015 rate case Stipulation, which authorized AES Ohio to file this rate case.

In addition, no party sought rehearing as to the Commission's order approving that Stipulation. All the intervenors are thus banned from raising that issue now. R.C. 4903.10.

**5. The Intervenors 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**

Assuming that the rate freeze issue survived the waivers identified above, the intervenors should have raised the rate freeze issue when AES Ohio terminated ESP III. Upon the termination of ESP III, the Commission solicited parties to submit comments regarding AES Ohio's proposed tariffs to reinstate ESP I rates. *ESP I Case*, Entry (Nov. 27, 2019). Numerous parties filed comments or other memoranda, none of which asked the Commission to reinstate the 2009 rate freeze.<sup>14</sup>

Although the Commission has questioned whether a party's failure to raise the rate freeze issue in its comments constituted a waiver,<sup>15</sup> controlling authority by the Supreme

---

<sup>14</sup> *E.g.*, *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>15</sup> *ESP I Case*, Fifth Entry on Rehearing, ¶ 19 (June 16, 2021).



Court of Ohio establishes that a party'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).

The intervenors' failure to raise this argument before filing applications for rehearing constitutes a forfeiture of it. *Id.*

**E. A RATE FREEZE WOULD VIOLATE R.C. 4909.15(E)**

A rate freeze would violate R.C. 4909.15(E), which states in relevant part:

"When the Commission is of the opinion, after a hearing . . . that any rate . . . is, or will be, unjust . . . , that the service is, or will be, inadequate, or that the maximum rates . . . are insufficient to yield reasonable compensation . . . , the Commission shall:

[Implement rates consistent with the rate making formula]"

In *Elyria Tel. Co. v. Public Util. Com.*, 158 Ohio St. 441, 445-446, 110 N.E.2d 59 (1953), the issue was whether the Commission could decline to increase rates when a utility was otherwise entitled to a rate increase. The Court held that it was the "duty of the Commission to set just and reasonable rates" once the Commission found that "current rates were inadequate":

"In its original order, the commission, basing its conclusion on a valuation determined by its own staff, found that the current rates were inadequate, and that the requested rates were reasonable,

having regard for the value of the existent company property. It must be remembered that we are not here faced with a question of valuation since all parties agreed to accept the commission's valuation; the question is whether when it is found that existing rates are inadequate an increase can be conditioned on an improvement of services and facilities.

From an examination of the record it is apparent that the commission was justified in its determination that the current rates were inadequate to provide a fair return on the company's property. After determining this, it became the duty of the commission to set just and reasonable rates under the provisions of Section 614-23, General Code. Nowhere in the statutes can we find authority on the part of the commission to condition an increase in rates, under such circumstances, on an improvement of service."

*Id.*

R.C. 4909.15(E) thus establishes that the Commission "shall" implement rates consistent with the rate-making formula, and *Elyria* establishes that the Commission has a "duty" to do so once it finds that current rates are "inadequate." There is no dispute in this case that AES Ohio's current rates are inadequate. Staff Ex. 1; AES Ohio Ex. 6. Nor will AES Ohio be able to provide reliable service without a rate increase. AES Ohio Ex. 95.

The Commission would thus violate R.C. 4909.15(E) if it were to implement a rate freeze.

**F. A RATE FREEZE WOULD SEVERELY CHALLENGE AES OHIO'S ABILITY TO PROVIDE RELIABLE SERVICE**

**1. AES Ohio Currently is Struggling to Provide Reliable Service**

As the Commission knows, AES Ohio has long been in a "fragile" financial condition. *In re AES Ohio's Application to Modernize Its Distribution Grid*, Case No. 18-1875-EL-GRD, et al. ("*Consolidated Cases*"), Opinion and Order, ¶ 58 (June 16, 2021). *Accord*: Tr.

1401 (Lipthrott) (AES Ohio is in financial "distress"); Tr. 239 (Lund) (AES Ohio has been in a "fragile financial condition for a long time"). AES Ohio has had the lowest rates in the state for years, and would continue to have the lowest rates if AES Ohio's request in this case was granted in full. AES Ohio Ex. 19, pp. 6-7 and Ex. RJ-1 (Adams); Tr. 114-17 (Adams). That rate comparison is on a total bill basis, and includes *all* rates and riders collected by AES Ohio and other Ohio utilities. Tr. 117 (Adams).

AES Ohio's current distribution rates were established based on a 2015 test year, and since then, the costs that AES Ohio incurs to provide reliable service have increased dramatically. AES Ohio Ex. 95, p. 8 (Storm). For example, "on average, it costs AES Ohio \$5,148 to clear a mile of distribution line of vegetation in 2015; in 2019, that cost averaged \$13,968, a 170% increase." *Id.* Other costs have also increased dramatically. *Id.*

Due to AES Ohio's fragile financial condition, low rates and rising costs, AES Ohio has not been able to implement its five-year vegetation management plan or make needed investments in its distribution system. *Id.* at pp. 5-9. As a result, AES Ohio's reliability metrics have been getting worse (lower numbers reflect better reliability):

| Year | CAIDI Standard | CAIDI  | SAIFI Standard | SAIFI |
|------|----------------|--------|----------------|-------|
| 2020 | 125.04         | 132.17 | 0.88           | 0.84  |
| 2019 | 125.04         | 133.29 | 0.88           | 0.88  |
| 2018 | 125.04         | 118.41 | 0.88           | 0.83  |
| 2017 | 125.04         | 133.07 | 0.88           | 0.68  |
| 2016 | 125.04         | 119.08 | 0.88           | 0.69  |

*Id.* at p. 8.

AES Ohio failed its Commission-approved reliability metrics for 2017, 2019 and 2020. *Id.* at p. 7.

OCC witness Williams was critical of AES Ohio's inability to provide reliable service. OCC Ex. 1, pp. 15-31. He specifically criticized AES Ohio for failing to implement its Commission-approved vegetation management plan and for the fact that the largest contributor to outages was equipment failures. *Id.* at pp. 15-23, 28. Mr. Williams agreed that it was "very important" that AES Ohio provide reliable service. Tr. 896.

## **2. A Rate Freeze Would Make It Difficult, if Not Impossible, for AES Ohio to Provide Reliable Service**

OCC witness Willis asserted that AES Ohio's rates should be frozen at current levels. OCC Ex. 3, pp. 4-5. However, OCC witnesses Willis and Williams both admitted that they have done no analysis to determine whether AES Ohio could provide reliable service with its rates frozen at current levels. Tr. 866, 896.

Although the rate freeze is not an ESP I term for the reasons identified above, AES Ohio has developed a plan in the event that there is no rate increase in this case. AES Ohio Ex. 95, pp. 9-19. Before outlining AES Ohio's plan, it is important that the Commission understand two points.

First, AES Ohio has been operating under the assumption that a rate increase would be approved in this case, and has been spending more money than it has been recovering in rates. *Id.* at p. 10. If no rate increase is approved, "AES Ohio would be forced to cut its expenses and investments to a level that could be supported by its current rates." *Id.* As the

Commission knows, AES Ohio is already struggling to provide reliable service, and further cuts will exacerbate that problem. *Id.*

Second, due to AES Ohio's poor financial condition, "AES Ohio has been carefully managing its business to find savings in areas not directly connected to reliability for years." *Id.* at p. 6. "The savings efforts over the years in areas not directly connected to reliability have been all but exhausted." *Id.*

If a rate freeze were to be implemented by the Commission, AES Ohio "will continue to endeavor to provide the most reliable service as possible to customers." *Id.* at p. 9. However, AES Ohio would be forced to make significant cuts to its reliability expenditures, as follows:

1. Storm Restoration: AES Ohio uses contractors to maintain and clear its transmission and distribution lines. *Id.* at pp. 10-11. When a major storm strikes, AES Ohio redirects those contractors from line work to storm restoration. *Id.*

If a rate freeze were to be implemented, AES Ohio would need to reduce its line contractors from 179 persons to 54, and its line clearance contractors from 185 persons to 140 persons. *Id.* at p. 11. That would be a 47% cut to contractors. Those cuts would be a "significant setback" to AES Ohio's ability to respond to major storms. *Id.*

It is also significant that many of those contractors have worked on AES Ohio's distribution system for many years. *Id.* That experience allows for faster restoration, and would be lost if rates were frozen. *Id.*

AES Ohio has experienced a number of very large storms in recent years, including the 2019 tornadoes, the 2018 ice storm, the 2017 thunderstorms with severe wind, the 2012 derecho, and 2008 Hurricane Ike. *Id.* at p. 12. A rate freeze would significantly hamper AES Ohio's ability to respond to all storms, particularly very large ones. *Id.*

2. Vegetation Management: If a rate freeze were to be enforced, AES Ohio would be forced to cut its vegetation management expenses from \$20.3 million to \$15.7 million. *Id.* OCC witness Williams was critical of AES Ohio's expenditures on vegetation management and the resulting declines in reliability. OCC Ex. 1, pp. 15-23. That problem would grow significantly worse under a rate freeze. AES Ohio Ex. 95, pp. 12-13.

3. Maintenance Expenses: Under a rate freeze, AES Ohio would be forced to cut its inspection and maintenance expenses for substations, relays, capacity and regulator banks, and poles. *Id.* at pp. 13-14. Cutting those expenses will undermine AES Ohio's ability to provide reliable service. *Id.*

4. Capital: AES Ohio would also have to make significant cuts to its capital investments. *Id.* at pp. 14-16. Those cuts to capital investments will make it significantly more difficult for AES Ohio to provide reliable service. *Id.*

5. Long Term Effects: The cuts described above would have significant long-term effects on AES Ohio's ability to provide reliable service. *Id.* at pp. 17-18. For example, reducing line clearance will result in "overgrown rights of way" which will make it more difficult to clear them in the future. *Id.* at p. 18. Further, eliminating equipment maintenance will result in equipment "degrad[ing] until failure, placing the system in an overall higher risk posture." *Id.*

### **III. AES OHIO'S OBJECTIONS TO THE STAFF REPORT**

This section addresses AES Ohio's objections to the Staff Report.

#### **A. Revenue Requirement**

##### **AES Ohio Objection 1. Amount of Staff's Proposed Revenue Requirement**

AES Ohio Objection No. 1 addresses the fact that many of AES Ohio's other objections would have flow-through effects to the revenue requirement if the Commission were to agree with them. AES Ohio Ex. 49, p. 3.

#### **B. Rate Base**

##### **AES Ohio Objection 2. Working Capital**

AES Ohio Objection No. 2 addresses Staff's recommendation (Staff Report, p. 11) that the Commission disallow a working capital allowance because AES Ohio did not submit a lead-lag study. AES Ohio Ex. 32, pp. 4-5 (Forestal).

The Commission should reject the Staff's recommendation because there is no requirement in the Commission's rules that AES Ohio perform a lead-lag study for miscellaneous working capital items. The Commission's rules do require a lead-lag study for working capital, but not for miscellaneous working capital. Ohio Adm.Code 4901-7-01, Sec. B(E)(1) and (2) (p. 37). In addition, AES Ohio witness Forestal explained that "a lead-lag study will not determine the amount of miscellaneous working capital. There is no connection between analyzing a lead-lag study (which evaluates the timing of when the Company pays for services and is paid for the services it provides) and miscellaneous working capital requirements (prepayments, materials and supplies inventory, and accruals)." AES Ohio Ex. 32, p. 5.

### **AES Ohio Objection 3. Capitalization of Earnings - Based Incentive Compensation**

AES Ohio Objection No. 3 addresses the Staff's recommendation (Staff Report, p. 10) regarding exclusion of financial bonuses from future base rate additions. AES Ohio is aware that the Commission has ruled in the past that financial bonuses should not be recoverable, since they benefit shareholders, not customers. AES Ohio asks the Commission to reconsider that ruling and allow recovery of financial bonuses for the following reasons.

First, it is undisputed that AES Ohio needs to compensate its employees at market rates. AES Ohio Ex. 25, p. 3 (Buchanan); Tr. 868 (Willis); Tr. 1321 (Lipthrott). If AES Ohio does not do so, then the employees would not show up for work. Tr. 868-69 (Willis). AES Ohio needs to compete with utility and private-sector employers to hire employees. Tr. 1063 (Crocker).

It is also undisputed that the total compensation -- including the financial bonuses -- that AES Ohio pays its employees is consistent with market rates. AES Ohio Ex. 24, pp. 4-11; AES Ohio Ex. 25, p. 3 (Buchanan); Tr. 1065 (Crocker) (Staff did not analyze the issue); Tr. 1322 (Lipthrott) (same); Tr. 868-70 (Willis).

That should be the end of the analysis. The financial bonuses were paid to compensate AES Ohio's employees for providing service to customers. The total compensation paid to employees -- including the financial bonuses -- was consistent with market rates and was thus prudent. The financial bonuses should thus be recoverable.

Second, the Commission's rule is inconsistent with the rate-making statute. Specifically, the statute provides that the Commission "shall" determine "[t]he cost to the utility



of rendering the public utility service for the test period." R.C. 4909.15(A)(4). There is no dispute that the financial bonuses are a cost to AES Ohio of rendering service during the test period. They must therefore be recoverable.<sup>16</sup>

Third, providing financial bonuses to employees gives those employees an incentive to reduce costs. AES Ohio Ex. 24, pp. 12-13 (Buchanan); Tr. 1324 (Lipthrott). Those cost savings go to shareholders in the short term. However, long term, sustained costs savings benefit customers. AES Ohio Ex. 24, pp. 12-13 (Buchanan); AES Ohio Ex. 25, pp. 4-5 (Buchanan); Tr. 178 (Buchanan); Tr. 871 (Willis). It is thus a good thing that a utility's employees are looking for ways to lower costs. *Id.*

The financial bonuses thus benefit customers, and should be recoverable.

Fourth, evaluating whether particular expenditures benefit customers or shareholders is an impractical test. Take for example employees who are paid just a salary (*i.e.*, no bonus at all). Staff witness Lipthrott explained that employees who are paid just a salary still have an incentive "to find operational savings." Tr. 1326. And again, operational savings would benefit shareholders in the short term, and customers in the long term.

Does that mean that a base salary should not be recoverable in rates? The point is that there is no reason that financial bonuses should be treated any differently than other labor expenses. Financial bonuses are a cost that AES Ohio incurs to provide service to customers.

---

<sup>16</sup> R.C. 4909.15(A)(4) addresses expenses, not rate base. But that section does establish that financial bases must be recovered as an expense, and if the financial bases are a recoverable expense, they should be included in the rate base as well.

Employee compensation -- including the bonuses -- is reasonable in amount. Financial bonuses should thus be recoverable (in rate base and expenses).

#### **AES Ohio Objection 4. Account 362 Subaccounts**

AES Ohio Objection No. 4 addresses the Staff's recommendation (Staff Report, pp. 58-71) regarding depreciation for account 362. As demonstrated below, Staff misapplies the whole-life application technique.

The Commission has described depreciation as follows:

*"When a piece of property (other than land) is placed into service, the investment in that property is charged to the appropriate plant account and eventually becomes a part of the rate base. Customers are charged a depreciation expense each month on that property so that the investment in the property will eventually be returned to investors over the useful life of the property."*

*In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Pub. Util. Comm. No. 84-188-EL-AIR, 1985 Ohio PUC LEXIS 46, at \*39-40 (Mar. 7, 1985) (emphasis added). *Accord: In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify and Increase its Rate for Electric Service to All Jurisdictional Customers*, Pub. Util. Comm. No. 82-517-EL-AIR, 1983 Ohio PUC LEXIS 70, at \*18-19 (Apr. 27, 1983) ("Thus, the *investor is entitled to recovery of his investment* and a return on that portion not recovered.") (emphasis added).

There are two application techniques used to determine depreciation rates -- whole-life and remaining life. AES Ohio Ex. 89, p. 63 (excerpts from NARUC manual). *Accord: Tr. 1038-39 (Mumma)* (NARUC is well respected).

Under the remaining life method, an asset is depreciated over its expected remaining life and full life cycle, regardless of whether the asset actually lasts a shorter or longer period. AES Ohio Ex. 89, p. 63. An investor is thus assured that he will receive a "recovery of his investment."

The Commission has a longstanding preference for the whole-life method. *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges to Increase the Rates and Charges for Electric Services and Related Matters*, Pub. Util. Comm. No. 94-9960-EL-AIR, 1995 Ohio PUC LEXIS 236, at \*75 (Mar. 23, 1995) ("The staff developed accrual rates after independently analyzing the company's depreciation study and applying *the straight line, whole life methodology long favored by the Commission.*") (emphasis added).

Under the whole-life method, depreciation expense is recovered for as long as the asset is on the utility's books. AES Ohio Ex. 89, p. 63. So the utility will stop recovering depreciation expense if the asset is retired prematurely; but the utility will continue to recover depreciation expense if the asset lasts beyond its expected average life. *Id.* The depreciation expense recovered by the utility will on average equal its investment, but actual recovery may be less than the actual investment (if assets are retired prematurely) or greater than the actual investment (if assets last longer than their expected average life).

The Staff witness testified (correctly) that under the whole-life method, if an asset is expected to last ten years but is retired after five years, then the depreciation expense would stop after five years. Tr. 1040. However, the Staff witness further testified (mistakenly) that if

that asset lasts longer than ten years, then the utility should stop recovering depreciation expense after ten years. *Id.*

The Staff witness conceded that under Staff's method, a utility "would never fully recover" its investments. *Id.* The Commission should conclude for two reasons that Staff is misapplying the whole-life method.

First, Commission precedent establishes that the purpose of depreciation expense is to ensure that "the investment in the property will eventually be returned to investors." *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Pub. Util. Comm. No. 84-188-EL-AIR, 1985 Ohio PUC LEXIS 46, at \*39-40 (Mar. 7, 1985). The Staff witness conceded that would "never" happen under the Staff's method. Tr. 1040.

Second, the Staff's method is inconsistent with the NARUC manual. Specifically, the manual says that using the whole-life method may result in an "over-accrual or under-accrual." AES Ohio Ex. 89, p. 63. NARUC thus expressly acknowledges that an "over-accrual" could occur using the whole-life method, which the Staff witness admits would "never" occur under Staff's method. Tr. 1040.

The Commission should thus conclude that Staff is mistaken in its conclusion that a utility should stop recovering depreciation expenses under the whole-life method when an asset lasts longer than its expected useful life. Ongoing recovery of depreciation expense is required in that situation to offset the fact that some assets will be retired before their expected average life, and depreciation expense for those assets will terminate then.

### **AES Ohio Objection 5. Accounts 362.20 and 396**

AES Ohio Objection No. 5 addresses the recommendation in the Staff Report for Accounts 362.20 and 396, regarding the use of L3 curves instead of square cones. The Staff stated that it "is not opposed to the Company using L3 curves." Staff Ex. 3, p. 5.

#### **C. Rate of Return**

AES Ohio requested a return on equity ("ROE") of 10.5%. AES Ohio Ex. 91, p. 4 (McKenzie). Staff recommended an ROE range of 9.28% to 10.29% (midpoint 9.785%). Staff Report, pp. 21-22, 117 (Schedule D-1).

Before turning to AES Ohio's objections to the Staff Report, it is important to note that the testimony of OCC witness Walters shows that AES Ohio's ROE should be greater than 9.7%. Specifically, Mr. Walters conceded at the hearing that higher risk utilities should have a higher ROE, and that credit ratings are a good measure of how risky a utility is. Tr. 928.

His filed testimony showed that in 2021, 10% of utilities had a credit rating from S&P below BBB-, i.e., below investment grade. OCC Ex. 2, p. 10. He agreed that AES Ohio was one of those utilities. Tr. 930.

His filed testimony also shows that in 2021, 10% of utilities were awarded ROEs greater than 9.7%. OCC Ex. 2, p. 7; Tr. 932 (the fact that 90% of utilities had ROEs less than or equal to 9.7% shows that 10% had ROEs greater than 9.7%).

Mr. Walters' testimony thus establishes that AES Ohio is one of the 10% riskiest utilities (OCC Ex. 2, p. 10), and that the 10% riskiest utilities have ROEs greater than 9.7%. *Id.* at p. 7. His testimony thus shows that AES Ohio should have an ROE greater than 9.7%.

**AES Ohio Objection 6. Return on Equity – Failure to Address Company's Recommendation**

AES Ohio Objection No. 6 addresses the fact that the Staff Report does not address the recommendations made in the testimony of AES Ohio's ROE witness, McKenzie. Mr. McKenzie's testimony explains in great detail why a 10.5% ROE was reasonable. AES Ohio Ex. 91.

Staff witness Buckley agreed that Mr. McKenzie is a good witness and that his methods were sound. Tr. 987. However, Staff did not address Mr. McKenzie's specific recommendations in the Staff Report.

In his testimony, Mr. McKenzie explained that credit ratings are a useful measure of how risky a utility is, and that AES Ohio has credit ratings at "the very bottom" from all three major credit bureaus. AES Ohio Ex. 91, pp. 9-10.

AES Ohio's rating given by S&P is below investment grade, and "[t]here is a precarious increase in risk associated with moving from investment grade to below investment grade securities." *Id.* at p. 10. *Accord:* Tr. 929 (Walters). Mr. McKenzie explained that utilities with below investment grade credit ratings have a yield spread of 1.94% on bonds as compared to utilities with a BBB rating (just above investment grade). AES Ohio Ex. 91, pp. 11-12.

Mr. McKenzie conducted a detailed analysis of the ROE required by AES Ohio, and evaluated eleven different ways to determine that ROE. *Id.* at pp. 20-66 and Ex. AMM-2. He ultimately concluded that a 10.5% ROE is reasonable. *Id.* at Ex. AMM-2.

The Commission should conclude that Mr. McKenzie's testimony is sound, and should approve a 10.5% ROE for AES Ohio.

### **AES Ohio Objection 7. Return on Equity – Unreasonable Proxy Group**

AES Ohio Objection No. 7 addresses the Staff's use (Staff Report, p. 21) of five utilities in its proxy group. AES Ohio Ex. 38, pp. 5-9. For a proxy group, Staff used utilities with a BBB+ rating or below, and eliminated one of them due to a lack of available data. Staff Ex. 1, p. 21.

AES Ohio witness McKenzie explained that using such a small proxy group could lead to distortions:

"Consider the Staff Report's reference to credit ratings, for example. While corporate credit ratings provide one widely accepted, objective risk benchmark, the results of the DCF and CAPM approaches do not always conform to the accepted notion that expected returns are a function of risk. In a perfect world, bond ratings and cost of equity estimates would always be correlated, so that companies with lower ratings would also have higher cost of equity results. However, credit ratings are an imperfect measure of equity risks, and the true cost of equity is unobservable. Because our estimating tools (e.g., applications of the CAPM and DCF models based on observable data) provide imperfect readings, the results of the financial models may deviate from the accepted risk-return tradeoff. A proxy group of five companies is too small to address the potential for such distortions."

AES Ohio Ex. 38, p. 6.

Mr. McKenzie's testimony further demonstrates that there are actual distortions in the Staff's proxy group:

"FirstEnergy's credit ratings of BB and Ba1 fall below the minimum threshold for an investment grade rating. As discussed at length in my direct testimony, there is a precipitous increase in risk associated with moving from investment grade to below investment grade securities. As a result, investors demand a significant premium in their required return to compensate for bearing the much greater risks associated with speculative, or 'junk' bond ratings. Meanwhile, the DCF results in the Staff Report suggest just the opposite—that investors would accept a *lower*

return to own common stock in a *higher* risk utility. These results are not consistent with accepted financial principles and illustrate the limitations of relying on a constrained proxy group of only five companies, which is simply too small to provide a reliable guide to investors' cost of equity."

*Id.* at pp. 7-8 (footnotes omitted).

### **AES Ohio Objection 8. Return on Equity – CAPM**

AES Ohio Objection No. 8 addresses the application by the Staff (Staff Report, pp. 21-22) of the Capital Asset Pricing Model ("CAPM"). AES Ohio Ex. 38, pp. 10-18. There are two principal defects in the Staff's application of CAPM.

First, to determine the market risk premium, Staff used an obscure internet resource called "Fairness Finance," which is published by a French consulting firm. *Id.* at p. 10. Market risk premium is a forward-looking measure of the return required by investors, and Fairness Finance is not a service that is relied upon by investors. *Id.* at p. 11.

AES Ohio witness McKenzie used Value Line, which is the most highly respected and widely used service. *Id.* at pp. 11-12. The difference is important, because use of Value Line results in a market risk premium of 10.69%, compared to 6.57% using Fairness Finance. *Id.* at p. 12.

Second, the Staff Report did not include a size adjustment in applying CAPM. *Id.* at p. 14. Mr. McKenzie's testimony explained that smaller utilities like AES Ohio are riskier, and thus requires a higher ROE. *Id.* at pp. 14-15. FERC agrees a "size adjustment is a generally accepted approach to CAPM analyses." *Id.* at p. 15 (*quoting Coakley v. Bangor-Hydro-Electric Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165 at p. 117 (2015)).



**AES Ohio Objection 9. Return on Equity – Consideration of a Comparable Earnings Approach**

AES Ohio Objection No. 9 addresses the fact that the Staff (Staff Report, pp. 21-22) did not consider a comparable/expected earnings approach. AES Ohio Ex. 38, pp. 18-20.

The testimony of AES Ohio witness McKenzie demonstrates that the comparable earnings approach is both sound and has been used by Staff before. *Id.* at p. 19; AES Ohio Ex. 91, pp. 64-66.

**AES Ohio Objection 10. Return on Equity – Consideration of a Risk Premium Approach**

AES Ohio Objection No. 10 addresses the fact that Staff (Staff Report, pp. 21-22) did not consider the utility risk premium method. The utility risk premium method is a widely accepted method for estimating the cost of equity. AES Ohio Ex. 91, pp. 60-63; AES Ohio Ex. 38, p. 20.

**AES Ohio Objection 11. Return on Equity – Consideration of Implications of the Company's Bond Rating**

AES Objection No. 11 addresses the fact that Staff (Staff Report, pp. 21-22) does not address the fact that AES Ohio is considerably riskier than the utilities in the Staff's proxy group. AES Ohio Ex. 38, pp. 21-23.

Mr. McKenzie explained that AES Ohio is a risky utility that requires a higher ROE:

"Q. WHAT IS THE DISTINCTION BETWEEN AES OHIO'S RISK PROFILE AND THAT OF OTHER FIRMS IN THE ELECTRIC UTILITY INDUSTRY?

A. The BB+ credit rating currently assigned to AES Ohio by S&P falls below investment grade. As noted earlier and

discussed at length in my direct testimony, a speculative or 'junk' bond rating is indicative of significantly greater risks relative to the vast majority of other electric utilities. As a result, investors require a significant premium to assume the much greater uncertainties associated with credit ratings that fall below investment grade.

In addition, as discussed in my direct testimony, investors would also consider the implications of potential uncertainties attributable to the propensity for legal challenges to the Commission's decisions, which undermine regulatory certainty for the state's utilities, including AES Ohio.

\* \* \*

Q. DOES THE STAFF REPORT DIRECTLY ADDRESS THE IMPACT OF AES OHIO'S GREATER RISK IN ARRIVING AT A RECOMMENDED ROE?

A. No. The Staff Report does not make any explicit adjustment to the results of its analysis to recognize AES Ohio's greater risk or otherwise address the implications of the Company's BB+ credit rating from S&P. While one of the firm's included in the proxy group used in the Staff Report is also rated below investment grade (FirstEnergy), the remaining four firms have S&P credit ratings higher than AES Ohio and within the investment grade scale. Moreover, the importance of considering direct evidence of investors' speculative grade risk premiums, such as the yield spreads presented above, is heightened due to the imprecision associated with the financial models used to estimate the cost of equity."

*Id.* at pp. 21-23 (footnotes omitted).

Therefore, to the extent that the Commission uses the Staff's recommended ROE range of 9.28% to 10.29%, the Commission should select an ROE that is at the high end of that range to account for the fact that AES Ohio is riskier than the other utilities in Staff's proxy group.

**D. Operating Income**

**AES Ohio Objection 12. Vegetation Management Expense**

AES Ohio Objection No. 12 addresses the Staff's recommendation (Staff Report, pp. 15, 92) regarding vegetation management. As described above, AES Ohio has not been able to trim vegetation on its distribution lines in accordance with its Commission-approved plan, and AES Ohio's reliability metrics have been growing worse. AES Ohio Ex. 95, pp. 6-8 (Storm).

AES Ohio has developed a plan to address vegetation in its service territory. AES Ohio Ex. 50, pp. 5-6 (Vest). To estimate the costs needed, AES Ohio "solicited bids" from "medium sized regional contractors and large national contractors to ensure that it has access to labor and equipment resources and continuously monitors market conditions for opportunities and risks." *Id.* at p. 7. Those bids show that AES Ohio needs \$30 million per year to adequately maintain its distribution lines. *Id.* at pp. 7-8.

Staff recommends that AES Ohio have a \$17,500,000 per year baseline for vegetation management, and a deferral for vegetation management of up to \$5,000,000 per year, which is up to \$22,500,000 total. Staff Ex. 1, p. 15.

The testimony of AES Ohio witness Vest explains that Staff's recommendation "is inadequate to mitigate vegetation risk safely and effectively." AES Ohio Ex. 92, p. 3.

For example, in AES Ohio's 2015 rate case, the Commission approved a vegetation management baseline of \$15.7 million with a deferral capped at \$4.6 million, which is up to \$20,300,000 total. AES Ohio Ex. 59, p. 12. Staff's recommendation in this case amounts to an 11% total increase in vegetation management cost recovery as compared to that 2015 rate case.

In 2015, it cost AES Ohio \$5,148 on average to clear vegetation on a mile of distribution lines; in 2019, the cost averaged \$13,968, a 170% increase. AES Ohio Ex. 95, p. 8 (Storm). An 11% increase is insufficient when costs have increased by 170%.

The Commission should thus approve AES Ohio's request for \$30 million in vegetation management expenses.

**AES Ohio Objection 13. Deferred Vegetation Management Expense**

AES Ohio Objection No. 13 addresses Staff's recommendation (Staff Report, p. 15) regarding a vegetation management deferral. For the reasons identified above, if the Commission were to establish a \$17,500,000 baseline, then the Commission should set the deferral cap at \$12,500,000. AES Ohio Ex. 92, p. 5 (Vest).

**AES Ohio Objection 14. Amortization of Regulatory Asset Relating to Deferred Vegetation Management Expense**

AES Ohio Objection No. 14 addresses Staff's recommendation (Staff Report, p. 15) that AES Ohio's regulatory asset associated with vegetation management be amortized over five years. AES Ohio Ex. 49, p. 6 (Teuscher). The Commission should conclude that a three-year amortization period is more reasonable for three reasons.

First, the rates from AES Ohio's last rate case went into effect on October 1, 2018, and the application in this case was filed on November 30, 2020, just over two years later. *Id.*

Second, to continue to recover the Infrastructure Investment Rider, AES Ohio must file a new distribution rate case by January 1, 2025, which is less than three years from now. AES Ohio Ex. 75, p. 6.

Third, AES Ohio must implement a new CIS by June 16, 2024, three years after the Commission approved the Smart Grid Stipulation. *Id.* at pp. 20-23. Those CIS investments cannot be recovered through the IIR, and thus must be recovered through distribution rates. *Id.* at p. 21.

The Commission should thus conclude that AES Ohio will likely file a new distribution case within three years of when rates in this case are implemented, and should thus approve a three-year amortization period.

#### **AES Ohio Objection 15. Property Tax Expense**

AES Ohio Objection No. 15 addresses Staff's recommendation (Staff Report, p. 15) that the Commission reject a 1.5% inflation factor for property taxes. AES Ohio Ex. 45, p. 2 (Salatto). The Commission should include a 1.5% inflation factor for AES Ohio because "[t]here is a very consistent pattern of increasing property taxes over the last five years, and it is reasonable to include an inflation adjustment to account for that pattern." *Id.*

#### **AES Ohio Objection 16. Income Tax Expense**

AES Ohio Objection No. 16 addresses the fact that many of AES Ohio's other objections will have flow-through tax effects. AES Ohio Ex. 45, pp. 2-3 (Salatto). *See also* Staff Ex. 9, p. 8 (Lipthratt) (addressing flow-through tax effects of Staff corrections to the Staff Report).

#### **AES Ohio Objection 17. Deferred Municipal Income Tax Deficiency Expense**

AES Ohio Objection No. 17 addresses the Staff's recommendation (Staff Report, p. 13) that AES Ohio amortize its regulatory asset associated with municipal income tax expense

over five years. The amortization period should be three years for the reasons identified above associated with AES Ohio Objection No. 14.

**AES Ohio Objection 18. Energy Efficiency Rider Revenue and Expense**

AES Ohio Objection No. 18 addresses the fact that Staff (Staff Report, pp. 14, 88) included \$773,286 in duplicative labor and related expense deductions. AES Ohio Ex. 33, pp. 6-8 (Forestal). In testimony, Staff agreed with this objection. Staff Ex. 9, pp. 9-10 (Lipthrott).

**AES Ohio Objection 19. Annualized Payroll Tax Expense**

AES Ohio Objection No. 19 addresses the method that Staff (Staff Report, pp. 14, 95) used to calculate Federal Insurance Contribution Act ("FICA") tax expense. AES Ohio Ex. 33, pp. 8-13. In calculating FICA tax expense, Staff excluded March and May from the test year, and thus used a 10-month average of FICA expenses to get Staff's recommended FICA expense. *Id.* at 8-9. Staff explains that it excluded March because "FICA tax was abnormally high due to short term bonus payments during the month." Staff Ex. 1, p. 15.

As an initial matter, as demonstrated in AES Ohio Objection No. 3, the Commission should reject Staff's recommendation that financial bonus payments should not be recovered in rates. If the Commission agrees with AES Ohio on that part, then March and May should thus be included in the calculation.

Assuming for the sake of argument that financial bonuses are not recoverable, it was still unreasonable for Staff to exclude March and May for two reasons:

First, once an employer's FICA wages reach an annual limit, employers are no longer required to pay the Social Security component of FICA taxes. AES Ohio Ex. 33, p. 9.

FICA taxes are thus front loaded during the year, and excluding March and May in their entirety from the average will lower the FICA tax expense. *Id.*

Second, "non-union pay raises are made effective on January 1st of each year by paying the employees a true-up each March. These true ups are FICA taxable and an ongoing operating expense." *Id.* at p. 11. March will thus have higher FICA expense for this reason as well.

Therefore, if the Staff wanted to exclude financial bonuses from FICA expense, it should have excluded only the FICA taxes that were associated with those bonuses. *Id.* By excluding all of March and May FICA expenses from the average, Staff has understated AES Ohio's FICA tax expense. *Id.* at p. 13. Correcting that error results in a \$232,312 increase to AES Ohio's FICA tax expenses. *Id.*

#### **AES Ohio Objection 20. AES Ohio Employees' Salaries and Wages Expense**

AES Ohio Objection No. 20 addresses the recommendation by Staff (Staff Report, pp. 14, 96) regarding the exclusion of non-jurisdictional and non-O&M expenses. The method used by Staff erroneously removes those items twice. AES Ohio Ex. 33, pp. 13-19, pdf pp. 42-48 (Forestal).

Specifically, to calculate AES Ohio's distribution labor expense, Staff started with AES Ohio's total labor expenditures and excluded two items: non-jurisdictional expenditures (*e.g.*, transmission expenses) and non-O&M expenditures (*e.g.*, capitalized labor). Staff Ex. 1, p. 96; Tr. 1054-56 (Crocker).

Page 96 of the Staff Report shows that Staff started with \$32,999,159 in straight time full time labor expenses (line 5) and removed capitalized labor by applying an O&M allocation (line 6) and removed transmission and other non-jurisdictional expenditures by applying a jurisdictional allocation (line 7). Tr. 1054-56 (Crocker) (explaining calculation on page 96). The error made by Staff is that the \$32,999,159 figure that it started with already excluded the non-O&M and non-jurisdictional amounts. AES Ohio Ex. 33, pp. 13-19, and pdf pp. 42-48.

Specifically, AES Ohio Ex. 33, pdf pp. 42-50 was provided by AES Ohio to Staff and it includes AES Ohio's labor expenditures. The blue box at the top of page 42 shows that the user can make selections to make the spreadsheet display particular data. Tr. 1057 (Crocker). That blue box shows that the labor amounts selected to be displayed are O&M, and not capitalized labor. AES Ohio Ex. 33, pdf p. 42. That same box shows that transmission and other non-jurisdictional expenditures were excluded because the Profit Center selected was "DPLDistrib." *Id.* The testimony of AES Ohio witness Forestal explains that having selected "O&M" and "DPLDistrib" in that exhibit, Staff excluded non-O&M and non-jurisdictional expenditures. AES Ohio Ex. 33, p. 15.

At the hearing, Staff witness Crocker agreed that selecting O&M had the effect of labor expenditures that were capitalized. Tr. 1057. She also testified that the selection of "DPLDistrib" would have the effect of excluding non-jurisdictional expenditures (with the exception of certain FERC accounts). Tr. 1058.

Significantly, pdf page 48 shows that the labor expenses *after* those items were removed was \$32,999,159. AES Ohio Ex. 33, pdf p. 48. That is the same figure that Staff starts



with on Staff Report, p. 96, line 5. It was thus an error for Staff to again remove non-O&M and non-jurisdictional expenditures from that amount on Staff Report p. 96, lines 6 and 7, because those items have already been removed.

**AES Ohio Objection 21. AES Ohio Union Employee Pay Increase**

AES Ohio Objection No. 21 addresses the fact that Staff did not annualize a 2.75% union employee pay increase. AES Ohio Ex. 33, pp. 17-18. AES Ohio witness Forestal explained this objection as follows:

"AES Ohio entered into a contract with its union employees that increased their pay by 2.75% effective November 1, 2020. This fixed, known and measurable increase to operating expenses happened during the Test Year. Because overtime pay is calculated based upon based pay, the 2.75% increase in base pay is also a 2.75% increase in overtime pay. The Staff Report incorporates an overtime pay amount that is simply the actual AES Ohio expense for the year ended April 2021. This amount (i) fails to annualize the 2.75% union pay increase; and (ii) is short by the amount the raise impacted the actual Test Year month of May 2021. Because Staff used the year ended April 2021, instead of the Test Year that is the year ended May 2021, the Staff used May 2020 expense (which does not include the 2.75% raise), instead of May 2021 expense (which did include the 2.75% raise)."

*Id.* at 17-18.

**AES Ohio Objection 22. AES Services Employees' Salaries and Wages Expense**

AES Ohio Objection No. 22 addresses the fact that Staff did not annualize a 1.8% pay increase that became effective January 1, 2021. AES Ohio Ex. 33, pp. 18-19 (Forestal). In testimony, Staff agreed that "including the pay increase is reasonable." Staff Ex. 4, p. 4 (Crocker).

**AES Ohio Objection 23. Short-Term Compensation and Long-Term Compensation Expense**

AES Ohio Objection No. 23 addresses Staff's recommendation (Staff Report, pp. 15-16, 96) that 75% of short-term bonuses ("STC") and 100% of long-term bonuses ("LTC") be eliminated from base rates. The Commission should reject that recommendation because, as demonstrated in Objection No. 3 above, the total amount of compensation that AES Ohio pays to its employees is consistent with market rates, the costs were incurred to provide service to customers and the bonuses provide incentives to AES Ohio's employees to provide excellent service at a low cost, which benefits customers. Accordingly, the Commission should reject the Staff recommendation here.

If the Commission disagrees with AES Ohio and concludes that financial bonuses should not be recovered, then the Commission should find that Staff erred in concluding that 75% of short-term bonuses were financial in nature. Staff calculated that 75% figure by summing the 45% figure and the 30% figure on AES Ohio's Confidential Ex. 88. Tr. 1073 (Crocker). The Staff erred because the 30% figure in that exhibit was not based on AES Ohio's financial metrics, and thus was not a financial bonus. AES Ohio Confidential Ex. 88; AES Ohio Ex. 25, p. 5 (Buchanan).

**AES Ohio Objection 24. Annualize Pay Increases into STC and LTC**

AES Ohio Objection No. 24 addresses the manner in which the Staff (Staff Report, pp. 16, 97) annualizes expenses for short term and long term compensation. As demonstrated in Objection No. 3, financial bonuses should be recoverable in rates. Those bonuses will need to be adjusted to reflect the effect of pay increases. AES Ohio Ex. 33, pp. 20-22 (Forestal).

### **AES Ohio Objection 25. Annualize Employee Pensions and Benefits Expense**

AES Ohio Objection No. 25 addresses the fact that Staff did not update pension and other post-employment expenses to reflect updated data. AES Ohio Ex. 43, pp. 2-3 (Roach); AES Ohio Ex. 33, p. 22 (Forestal). In testimony, Staff stated that it "agrees that the updated calculation increasing pension and other post[-]employment benefits expense by \$932,478 provided within supplemental testimony is reasonable." Staff Ex. 4, p. 6 (Crocker) (footnote omitted).

### **AES Ohio Objection 26. Customer Programs Expense**

AES Ohio Objection No. 26 addresses the Staff's recommendation (Staff Report, pp. 17-18, 108 (Schedule C-3.25)) to exclude Demand Side Management ("DSM") customer program expenses. The Commission should reject Staff's recommendation because the DSM programs provide an overall net benefit to customers and having those programs is consistent with Ohio's energy policy. AES Ohio Ex. 23, pp. 4-5 (Tatham); Ex. 26, pp. 2-9 (Campbell).

AES Ohio's DSM programs should be implemented because they benefit customers and community. The DSM programs benefit customers and the community because they (1) reduce overall energy consumption, (2) reduce peak usage, (3) reduce greenhouse gases and other pollutants, (4) create additional jobs, and (5) stimulate economic growth. AES Ohio Ex. 23, pp. 3-4 (Tatham); Ex. 26, pp. 4-6 (Campbell).

Moreover, AES Ohio's DSM programs promote Ohio's energy policy. Pursuant to R.C. 4905.70, the "commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption." Further, R.C. 4928.02(D) states that it is the policy of Ohio to "[e]ncourage 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, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure."

The Commission has approved numerous energy efficiency programs for Ohio utilities in furtherance of this mission before the HB 6 mandates were enacted. Tr. 569-573 (Tatham); AES Ohio Ex. 23, pp. 4-5 (Tatham); *In the Matter of the Commission's Investigation into the Impacts of Demand-Side Management Programs and Power Purchase on the Profitability of Electric Utilities*, Pub. Util. Comm. No. 90-723-EL-COI, 1992 Ohio PUC LEXIS 873, at \*8-9 (Oct. 1, 1992); *In re Cleveland Electric Illuminating Company*, Pub. Util. Comm. No. 92-391-EL-AAM, et al., 1992 Ohio PUC LEXIS 959, at \*9 (Oct. 29, 1992); *In re The Dayton Power and Light Company*, Pub. Util. Comm. No. 93-1738-EL-AAM, et al., 1994 Ohio PUC LEXIS 140, at \*7-11 (Feb. 24, 1994); *In re Columbus Southern Power Company*, Pub. Util. Comm. No. 94-1812-EL-AAM, et al., 1995 Ohio PUC LEXIS 294, at \*6-12 (Apr. 13, 1995); *In re Ohio Power Company*, Pub. Util. Comm. No. 92-777-EL-AAM, 1992 Ohio PUC LEXIS 1135, at \*3-5 (Dec. 17, 1992); *In re Columbus Southern Power Company*, No. 93-2110-ELAAM et al., 1994 Ohio PUC LEXIS 358, at \*6-9, 13 (May 11, 1994).

Accordingly, consistent with the Commission's precedent and R.C. 4905.70 and 4928.02, the Commission should reject Staff's recommendation here.

#### **AES Ohio Objection 27. Customer Programs Expense Deferral**

AES Ohio Objection No. 27 addresses the Staff's recommendation (Staff Report, pp. 17-18, 108 (Schedule C-3.25)) to reject a deferral for DSM customer program expenses. The Commission should reject Staff's recommendation because the Staff Report did not consider

setting a cap on program expenditures and establishing a regulatory liability if annual expenditures fall below that cap. AES Ohio Ex. 23, pp. 4-5 (Tatham). Using a capped deferral mechanism would protect customers from any risk that AES Ohio spends less than the cap. *Id.* Accordingly, the Commission should reject Staff's recommendation here.

#### **AES Ohio Objection 28. Duplicative Expenses**

AES Ohio Objection No. 28 addresses the fact that Staff recommended (Staff Report, pp. 6, 17, 22, 23, 104, 110) certain duplicative expense adjustments. AES Ohio Ex. 30, pp. 2-3 (Donlon). In testimony, Staff stated that it agreed with this objection. Staff Ex. 9, p. 11 (Lipthrott).

#### **AES Ohio Objection 29. Out-of-Test-Year Services Expense**

AES Ohio Objection No. 29 addresses the Staff's recommendation (Staff Report, pp. 19, 110 (Schedule C-3.27)) that the Commission disallow \$1,384,139 of expenses for services that were performed before the test year. AES Ohio Ex. 30, pp. 6-12 (Donlon). The Staff explained the basis for its recommendation as follows:

"During its investigation, Staff found numerous transactions for expenses incurred prior to the test year. The Company informed Staff that its accounting policy dictates that no accrual entries are made for transactions with an expected cost that are less than The AES Corporation's established materiality threshold of \$10,000. Staff finds these expenses fundamentally represent costs incurred prior to the test year, irrespective of the Company's accounting policy; therefore, an adjustment is necessary to remove such expenses from the test year. In total, Staff found \$1,384,139 in expenses incurred prior to the test year, and recommends a corresponding adjustment."

Staff Ex. 1, p. 19 (footnote omitted). The Commission should reject that recommendation for two reasons.

First, \$916,283.55 of those expenses were for amounts over \$10,000 that were properly accrued. AES Ohio Ex. 30, pp. 6-7 (Donlon). The Staff Report thus incorrectly included those amounts in the \$1,384,139 figure. *Id.* The Staff audited AES Ohio's accrual policy, and none of the invoices that the Staff audited are included in that \$916,283.55. *Id.*

Second, under AES Ohio's accounting policies, invoices over \$10,000 must be accrued (*i.e.*, recorded as an expense in the month the service is rendered). *Id.* at p. 9. Invoices under \$10,000 are not required to be accrued (*i.e.*, they may be recorded as an expense when the invoice is paid). *Id.* It is common for utilities to have a threshold for which invoices they will accrue, and doing so is consistent with Generally Accepted Accounting Principles ("GAAP"). Tr. 1342 (Lipthrott).

The \$1,384,139 figure includes \$467,855.29 in expenses for services below the \$10,000 threshold that were performed before the test year and that were recorded as an expense during the test year. AES Ohio Ex. 30, p. 9. The Commission should include the \$467,855.29 are recoverable expenses for the following reasons.

First, the rate-making statute provides that a utility is entitled to recover the "*cost* to the utility of rendering the public utility service for the *test period*." R.C. 4909.15(A)(4) (emphasis added). There is no dispute that the costs at issue were recorded and paid during the test period, and GAAP allows for those costs to be recorded during the test period. They are thus "costs" that were incurred during the "test period" and are recoverable under R.C. 4909.15(A)(4).

Second, just as there are costs for invoices below the \$10,000 threshold for services that were performed before the test year and that were recorded during the test year, there are costs below that threshold for services that were performed during the test year and that

were recorded after the test year. AES Ohio Ex. 30, p. 9. The latter costs are not included in AES Ohio's request here. *Id.*

There should be a "de minimis" difference between the cost of services performed before the test period but recorded during the test period, and the costs for services performed during the test period but recorded after it. *Id.* It is thus reasonable that those costs be recovered through rates.

Third, if AES Ohio were to be required to accrue expenses under \$10,000 for them to be recoverable in a rate case, then AES Ohio will need to engage additional staff. *Id.* at p. 10. The costs of hiring that additional staff would be recoverable from customers, and tracking those "de minimis" differences in costs would not be worth the additional expenses. *Id.*

#### **AES Ohio Objection 30. Miscellaneous Expense**

AES Ohio Objection No. 30 addresses Staff recommendation (Staff Report, pp. 6, 17, 22, 23, 104, 110) regarding the rate case expense, ice, and cable and satellite expense. AES Ohio Ex. 30, pp. 4-6 (Donlon).

Staff agreed with AES Ohio regarding rate case expense and ice. Staff Ex. 9, p. 17 (Lipthrott). Staff did not agree with AES Ohio regarding cable and satellite expense. *Id.* The Commission should conclude that those expenses are appropriate to include because "cable TV is used for monitoring weather, traffic, and other items that may affect our ability to serve our customers." AES Ohio Ex. 30, p. 5 (Donlon).

### **AES Ohio Objection 31. Deferred Uncollectible Expense**

AES Ohio's Objection No. 31 addresses Staff's recommendation (Staff Report, p. 16) that AES Ohio be required to eliminate its \$8.6 million uncollectible deferral. AES Ohio Ex. 14, Workpaper C-3.18. Staff asserted that AES Ohio "had no authorization from the Commission to defer those costs." Staff Ex. 1, p. 16. The Commission should reject that recommendation because the Commission did authorize AES Ohio to defer those amounts.

Specifically, AES Ohio's application in its 2015 rate case (Case No. 15-1830-EL-AIR) asked the Commission to "grant the deferrals requested by [AES Ohio]." AES Ohio Ex. 49, pp. 3-4 (Teuscher).

In that case, AES Ohio removed all of its uncollectible expenses from its operating expenses and proposed to recover those expenses through an uncollectible rider. *Id.*; AES Ohio Ex. 58, p. 15. AES Ohio proposed to defer any uncollectible expenses that it did not recover. AES Ohio Ex. 49, p. 4 (Teuscher).

Although AES Ohio intended at that time to recover its uncollectible expenses through a to-be-approved uncollectible rider, the request for deferral authority was not dependent upon a rider being approved. Specifically, AES Ohio witness Parke explained in that case that "The actual expenses in those riders will vary from the amounts collected. Therefore, the Company *needs authority to defer these variances* and create a regulatory asset or liability to recognize the amounts due to or from customers." *Id.* (emphasis added).

Thus, AES Ohio proposed to defer the difference between (the actual amount of uncollectible expense) and (the amount of the uncollectible expense collected through a to-be-approved rider). If the uncollectible rider was approved, the difference between those amounts



would be expected to be small. However, if the uncollectible rider was not approved, the deferral would be larger, because the amount of uncollectible expense collected would be zero.

Significantly, the rate case was filed in 2015 while the ESP III case that implemented the uncollectible rider was filed in 2016. In 2015, it was thus reasonable to expect that the 2015 rate case would be approved before the 2016 ESP III case. During that expected gap in time, AES Ohio would have been recovering no uncollectible expense in base rates and would have needed to defer the entire uncollectible expense to be made whole. While the 2016 ESP III case ended up being decided before the 2015 rate case, the fact is that AES Ohio's plan in the 2015 case was to defer all of its uncollectible expense if there was no recovery in a rider.

The Staff Report in the 2015 rate case confirmed that AES Ohio's uncollectible expenses were removed from operating expenses, and did not recommend against AES Ohio's deferral request. AES Ohio Ex. 58, p. 15.

The Stipulation in that case stated that: "Except as modified by this Stipulation or the Staff Report, [AES Ohio's] Application in this proceeding is approved." AES Ohio Ex. 59, p. 15. Nothing in the Staff Report or the Stipulation modified AES Ohio's request for a deferral of uncollectible expenses, and therefore, the Commission's Order approving the Stipulation approved AES Ohio's request for a deferral. *2015 Distribution Rate Case*, Opinion & Order, ¶ 104 (Sept. 26, 2018).

Critically, the fact that ESP III was terminated means that the uncollectible rider was terminated, but that does not terminate the deferral authority that was approved in the 2015 rate case. As discussed above, AES Ohio asked in its application for accounting authority to defer the difference between its actual uncollectible expenses and the uncollectible expenses that

it recovered through a rider. That request for deferral authority was approved. The fact that the amount of uncollectible expenses recovered through a rider is equal to zero simply means that AES Ohio has authority to defer its actual uncollectible expenses.

It is important that the Commission understand that a Commission order that AES Ohio cease deferral of that \$8.6 million regulatory asset would require an immediate write off of that entire amount. That would do significant harm to AES Ohio's already fragile financial condition.

#### **AES Ohio Objection 32. Deferred DIR Audit Expense**

AES Ohio Objection No. 32 addresses the Staff's recommendation (Staff Report, pp. 17, 106) to eliminate the regulatory asset associated with auditing the Distribution Investment Rider. AES Ohio witness Teuscher explained that "the assets that were audited are still in service today and included in AES Ohio's rate base in this case, therefore, costs associated with the audit of those assets should be recovered during the utility's based rate case as a practical matter." AES Ohio Ex. 49, p. 5. For those reasons, the Commission should allow AES Ohio to recover those deferred expenses.

#### **AES Ohio Objection 33. Customer Deposit Interest Expense Adjustment**

AES Ohio Objection No. 33 addresses the Staff's recommendation (Staff Report, p. 16) to reduce certain deposit interest expense by \$128,774. The testimony of AES Ohio witness Whitehead explains that only \$77,857 should have been excluded. AES Ohio Ex. 94, pp. 2-3.

**AES Ohio Objection 34. Customer Deposit Interest Expense Adjustment Regarding FERC 235 Balances**

AES Ohio Objection No. 34 addresses the fact that Staff (Staff Report, p. 16) did not carry forward certain updated deposit balances to calculate interest expense. AES Ohio Ex. 94, p. 3 (Whitehead). Staff agreed with this objection. Staff Ex. 6, pp. 5-6 (Snider).

**E. Rates And Tariffs**

**AES Ohio Objection 35. Small Constant Unmetered Service**

AES Ohio Objection No. 35 addresses the Staff's recommendation (Staff Report, p. 24) to disallow AES Ohio's proposed tariff for Small Constant Unmetered Service. The Commission should reject Staff's recommendation because this service aligns with customer needs where metered service is not readily available, and the customer's equipment draws less power than can be practically or economically metered at each individual service location. AES Ohio Ex. 92, pp. 5-6 (Vest).

Small Constant Unmetered Service is designed to create efficiencies for small constant loads limited to 25 Watts in three ways. *Id.* at p. 5. First, the Small Constant Unmetered Service would alleviate the need for installation of unnecessary and excessive meter infrastructure such as meter bases, meter sockets, etc. *Id.* at pp. 5-6. These types of infrastructure would be impractical and uneconomical in light of the small amount of power drawn from the small constant loads and would not benefit AES Ohio or customers. *Id.* Second, adding these uneconomical and impractical metering infrastructures would create additional unnecessary operational and safety risks. *Id.* at p. 6. Third, Staff's recommendation would create barriers to cities and counties that desire to install innovative smart technologies and networks such as "Shot Spotter" technology. *Id.*

Further, Staff's recommendation of using other methods, like pole attachments, is less economical for customers. Pole attachments would involve a fee charged to customers to attach to one of AES Ohio's poles. Tr. 1224 (Smith). That fee would be in addition to amounts charged for energy used through the attachment. *Id.* Staff has not taken any steps to analyze whether its recommendation that other methods used would, in fact, be more economical for customers. *Id.*

### **AES Ohio Objection 36. Customer Deposits**

AES Ohio Objection No. 36 addresses the Staff's recommendation (Staff Report, pp. 28-29) that the Commission require AES Ohio to offer customers the ability to pay deposits in three installments instead of just one payment. The Commission should reject Staff's recommendation for three reasons.

First, Ohio Adm.Code 4901:1-17-05 requires only that the utility not assess "a cash deposit to establish or reestablish credit in an amount in excess of one-twelfth of the estimated charge for regulated service(s) provided by that utility company for the ensuing twelve months, plus thirty per cent of the monthly estimated charge." No rule or code provision in Ohio requires that a utility permit an installment plan for deposits. Tr. 1225 (Smith). In fact, no rule or code provision in Ohio prescribes a specific timeframe for which a utility should collect the deposit. AES Ohio Ex. 20, pp. 3-4 (Adams).

Second, AES Ohio already goes above and beyond the prescribed deposit requirements. AES Ohio permits customers to pay their full deposit amount with their first bill instead of requiring that the deposit be paid before initiation of electrical service, despite the fact that no such payment plan is required by the Ohio Administrative Code. *Id.*

Third, no other electric distribution utility in Ohio has the installment plan for deposits that Staff has recommended here. Tr. 1225-26 (Smith). If the Commission believes that an installment plan for deposits should be required, it should do so consistently across the state and introduce this change as part of a rule review proceeding. *Id.*

**F. Rate Design**

**AES Ohio Objection 37. Residential Customer Charge**

AES Ohio Objection No. 37 addresses the Staff's recommendation (Staff Report, pp. 28-29) that the residential customer charge be lower than the charge proposed by AES Ohio. AES Ohio Ex. 49, pp. 7-9 (Teuscher).

As an initial matter, AES Ohio and Staff agree that AES Ohio's costs are largely fixed (*i.e.*, they do not vary based upon usage), and that it thus costs AES Ohio the same amount to serve customers with identical peaks but different loads. Tr. 1168 (Bremer).

AES Ohio's current customer charge is \$7.00 (AES Ohio Ex. 59, p. 14), and AES Ohio requested increasing that charge to \$15.66. AES Ohio Ex. 10, Schedule E-4.1, pp. 1-2. That increase is requested because it better aligns with AES Ohio's costs to serve customers. AES Ohio Ex. 49, pp. 7-8 (Teuscher).

Staff recommends using a "minimum compensatory method" which is "designed to recover costs that vary directly with the number of customers, such as the cost of the meter, service drop, line transformer and customer billing." Staff Ex. 7, p. 7 (Bremer). AES Ohio witness Teuscher explained that the Staff's recommendation is not consistent with principles of cost causation:

"Q. Does Staff's proposal better align costs with cost-causers?

- A. No. For example, Residential heating customers will pay more for the same distribution service as Residential non-heating customers, just because they use more kWh, not because they cause more costs. AES Ohio's proposal better aligns rates to cost causation so that customers can make better economic decisions. Additionally, AES Ohio's rate design proposal utilizes the COSS and aligns with Staff's conclusion that the COSS in this case properly assigns costs to the appropriate cost causers."

AES Ohio Ex. 49, p. 8.

**AES Ohio Objection 38. Low Load Factor Provision**

AES Ohio Objection No. 38 addresses the Staff's recommendation (Staff Report, pp. 31-32) that AES Ohio's low-load factor proposal be rejected, and that an alternate low-load factor proposal be implemented. AES Ohio Ex. 49, pp. 9-10 (Teuscher).

The low-load factor provision (previously called the "Max Charge" provision) puts a cap on the bills of customers with low load factors. *Id.* at p. 9. As discussed above, AES Ohio and Staff agree that AES Ohio's distribution costs are largely fixed and that it costs AES Ohio the same amount to serve customers who have identical peaks but different loads. Tr. 1168 (Bremer).

The low-load factor provision thus is not cost based, and reflects a policy decision to cap the rates of low-load factor customers. The low-load factor rate was not updated in AES Ohio's last rate case, Case No. 15-1830-EL-AIR. AES Ohio Ex. 49, p. 9 (Teuscher). In the last 36 months before AES Ohio filed its objections to the Staff Report, the number of customers triggering the low-load provision went from 4,000 per month to 21,000 per month. *Id.* at p. 10. Under AES Ohio's proposal, approximately 12,000 bills per month will trigger the provision. *Id.*

Staff suggests increasing the low-load factor rates and thereby lowering the eligibility threshold. Staff Ex. 7, p. 4 (Bremer). However, Staff's recommendation would only "slightly" reduce the number of customers triggering the low-load factor provision. AES Ohio Ex. 49, p. 10 (Teuscher). The Commission should thus approve AES Ohio's proposal.

**IV. THE COMMISSION SHOULD REJECT RECOMMENDATIONS MADE BY THE INTERVENOR WITNESSES**

**A. OCC Witness Willis**

**1. Rate Freeze**

OCC witness Willis testified that the Commission should implement a distribution rate freeze. OCC Ex. 3, pp. 4-5. As demonstrated above, doing so would be unlawful and would make it difficult, if not impossible, for AES Ohio to provide reliable service.

**2. Capitalized Bonuses**

Mr. Willis testified that the Commission should require AES Ohio to remove from its existing rate base any labor amounts that are associated with financial bonuses. OCC Ex. 3, pp. 6-9. As an initial matter, as demonstrated in connection with AES Ohio Objection No. 3, those bonuses are reasonable and should be recovered in rates.

If the Commission were to reject that argument, Staff witness Lipthratt explained why Staff rejected Mr. Willis's proposal. Staff Ex. 9, pp. 20-21; Tr. 1364-69. Mr. Lipthratt explained that there was no recommendation or requirement in AES Ohio's 2015 Rate Case that AES Ohio cease capitalizing those financial bonuses, that there is no Commission precedent that a utility not capitalize financial bonuses, that there was not readily available data to determine the amounts of those bonuses that have been capitalized, and that it was thus "fair" to allow those

amounts to remain in rate base. Staff Ex. 9, p. 21; Tr. 1364-69 (Lipthratt). The Commission should thus reject Mr. Willis's recommendation.

### **3. Capitalized Storm Costs**

Mr. Willis recommends excluding "administrative and general overheads, operation and maintenance expenses, cash bonuses, meals, picnics and parties, travel, and office supplies" from capitalized storm costs. OCC Ex. 3, p. 9. The Commission should reject that recommendation for the following reasons.

First, Staff witness Lipthratt testified that Staff did not identify any capitalized storm expenditures that should not have been capitalized. Staff Ex. 9, p. 21.

Second, Staff witness Lipthratt explained why it is appropriate to capitalize labor expenditures associated with storm restoration. Tr. 1378-79. *Accord*: Tr. 875 (Willis) (it is common to capitalize administrative and general overhead).

Third, Staff witness Lipthratt explained that it is appropriate to capitalize meals associated with storm response. *Id.* at pp. 1381-82.

Fourth, Staff witness Lipthratt explained that AES Ohio's account titled "picnics and parties" was a poorly named account and the items included in the account were legitimate, recoverable expenditures. *Id.* at pp. 1383-84.

### **4. Depreciation Reserve and Expense**

Mr. Willis opines that depreciation reserve and expense should be adjusted. OCC Ex. 3, p. 10. He conceded at the hearing that those items would need to be adjusted only if the Commission agreed with him regarding capitalized bonuses and storm capital. Tr. 877.



**5. Trade Association Dues**

Mr. Willis recommended that dues associated with the Edison Electric Institute ("EEI") should be excluded from operating expenses. OCC Ex. 3, pp. 11-12. He testified that those expenses should be excluded because EEI engages in lobbying, and from EEI's invoice "you can't tell what's lobbying." Tr. 878. However, EEI's invoice shows that 13% of its dues are related to lobbying. AES Ohio Ex. 63.

**6. Operating Income**

Mr. Willis opined that a Staff adjustment to operating income was unreasonable because it was made "without substantive explanation." OCC Ex. 3, p. 12. Staff explained the reason for the adjustment. Staff Ex. 6, pp. 3-4 (Snider).

**7. Travel and Entertainment**

Mr. Willis also opined that travel and entertainment expenses associated with COVID-19 should be removed from operating expense. OCC Ex. 3, p. 12. Staff testified that they were. Staff Ex. 9, pp. 23-24 (Lipthrott).

**8. Rebuttal Testimony**

Mr. Willis also submitted rebuttal testimony regarding Staff adjustments to Storm Cost Recovery Rider ("Storm Rider") revenue and expenses. OCC Ex. 7. The Commission should reject the recommendations made in Mr. Walters' rebuttal testimony for two reasons.

First, OCC did not raise the issue in its objections. The materials that Mr. Walters relied upon all existed at the time those objections were filed. OCC Ex. 7, Attachments 1-2. OCC is thus barred from raising the issue in rebuttal testimony. R.C. 4909.19(C); OAC 4901-1-28(B) and (C).

Second, Mr. Willis testified that Staff erred in the method that it used to remove Storm Rider revenues and expenses. OCC Ex. 7, p. 3. Assuming for the sake of argument that Staff did err, Mr. Willis erred in calculating the effect of that alleged error on AES Ohio's revenue requirement.

Specifically, AES Ohio Schedule C-2 starts with AES Ohio unadjusted jurisdictional revenue and expenses, and adjusted those amounts to remove items that are not jurisdictional (including Storm Rider recovery and expenses). AES Ohio Ex. 8; Tr. 1597 (Willis).

All else equal, removing expenses from Schedule C-2 will lower the revenue requirement, because those expenses will no longer need to be recovered through base rates. *Id.* at p. 1600.

However, removing revenue from Schedule C-2 (AES Ohio Ex. 8) actually has no effect on the revenue requirement. The reason is that the \$237,349,443 in adjusted distribution revenues shown on Schedule C-2, p. 1, L.2 is adjusted on C-3.24 so that the revenues equal the amount calculated on Schedule E-4 (AES Ohio Ex. 10). In other words, the adjustments to revenue shown on Schedule C-2 are irrelevant, since the adjusted revenue amount calculated on Schedule C-2 will be adjusted on Schedule C-3.24 to equal the revenue amount from Schedule E-4.

Mr. Willis claimed that a Staff adjustment on Schedule C-3.4 that removed less Storm Rider revenue than AES Ohio had removed had the effect of increasing AES Ohio's revenue requirement. OCC Ex. 7, Att. 2, pp. 1-2. The defect in his testimony is that the C-3.4

adjustments are included in Schedule C-3, which are then used to make the Schedule C-2 adjustments that were discussed above.

And discussed above, the Schedule C-2 jurisdictional revenue amount is adjusted in Schedule C-3.24 to equal the Schedule E-4 recovery amounts. The Staff's adjustment to Schedule C-4 for Storm Rider revenue thus has no effect on the revenue requirement in this case.

**B. OCC Witness Williams**

**1. Residential Bill Impacts**

OCC witness Williams testified regarding the bill impacts that a rate increase would have on residential customers. OCC Ex. 1, pp. 5-15. Significantly, he conceded at the hearing that AES Ohio has had the lowest rates in the state, and he did not dispute the testimony of AES Ohio witness Adams that AES Ohio would continue to have the lowest rates in the state if its application was approved. Tr. 897-98 (Williams). *Accord*: AES Ohio Ex. 19, pp. 6-7 and RJA-1.

Mr. Williams also agreed that there are state and federal programs that assist low-income customers. Tr. 898-99. He was also aware that AES Ohio had a "Gift of Power" program to help low-income customers. Tr. 899. He agreed that the Gift of Power program was "very helpful" and he was not aware of any requirement that AES Ohio have such a program. Tr. 900.

**2. Reliable Service**

Mr. Williams was critical of the fact that AES Ohio has not trimmed its trees in accordance with its Commission-approved plan and the fact that AES Ohio has failed Commission reliability metrics. OCC Ex. 1, pp. 15-31. However, he admitted that he did not

know whether AES Ohio has sufficient revenues to trim trees in accordance with its Commission-approved plan. Tr. 895. He also agreed that he has not done any analysis regarding whether AES Ohio could provide reliable service if its rates were frozen. Tr. 896.

**C. OCC Witness Fortney**

**1. Cost Allocation**

OCC witness Fortney recommended that no more than 63.1% of any rate increase should be assigned to residential customers. OCC Ex. 4, p. 7. However, he admitted that his recommendation was "not based on a cost-of-service study" and that "the Staff recommendations and the Company's proposal in terms of the allocation percentage are reasonable in terms of cost-of-service." Tr. 823, 829. OCC did not object to the Staff recommendation (Staff Report, p. 26) that AES Ohio's cost-of-service study was reasonable. The Commission should thus reject Mr. Fortney's recommendation.

**2. Customer Charge**

Mr. Fortney also testified that when calculating a customer charge, Account 368, Line Transformers should not have been included. OCC Ex. 4, p. 9. To support that assertion, he cites to the NARUC manual for the proposition that Line Transformers are demand related (not customer related), and that "Staff has not generally included Line Transformers when calculating a customer charge." *Id.* However, at the hearing, he admitted that the NARUC manual states that Line Transformers can be either demand or customer related, and that Staff had in fact included Line Transformers in prior calculations of a customer charge. Tr. 831-33.

**D. OCC Witness Walters**

**1. ROE Greater Than 9.7%**

As demonstrated above, Mr. Walters' testimony demonstrates that AES Ohio's ROE should be greater than 9.7%. *See Supra* § III. C.

**2. Mr. Walters' Testimony in Other Proceedings Shows That the Commission Should Consider AES Ohio's Credit Ratings**

In a Michigan proceeding, Mr. Walters testified that the utility had a credit rating two notches above the average bond rating of the proxy group, and that the Michigan "Commission should continue to reflect the Company's low risk" in setting its ROE. AES Ohio Ex. 66, pp. 11, 13-14. *Accord*: AES Ohio Ex. 67, pdf pp. 49-50; Tr. 937-40. Here, AES Ohio has a very low bond rating, but Mr. Walters failed to recommend that the Commission consider that in setting AES Ohio's ROE. OCC Ex. 2, p. 10.

As discussed above, Mr. McKenzie's testimony shows that AES Ohio has a bond rating lower than the proxy group, and that the Commission should consider that rating in setting an ROE. AES Ohio Ex. 38, pp. 20-23.

**3. The Federal Reserve Has Increased the Federal Funds Rate**

On January 26, 2022, the Federal Reserve announced plans to raise the Federal Funds Rate. AES Ohio Ex. 93. Mr. Walters' testimony was filed before that action by the Federal Reserve, but he anticipated the possibility and explained that an increase to the Federal Funds Rate "does not necessarily indicate that there will be a corresponding increase in long-term rates or the cost of utility equity." OCC Ex. 2, p. 20. He claimed that a chart in his testimony on page 20 showed that the Federal Funds Rate "did not have corresponding changes" with treasury and utility bond yields. *Id.* at pp. 20-21.

The problem for Mr. Walters is that his chart on page 20 in fact shows a high correlation between those items. Specifically:

- To mid-2016: The Federal Funds Rate (green line) is very low through mid-2016, and the treasury yield (blue line) and bond yield (red line) are falling over that period.
- Late 2016 to late 2018: The Federal Funds Rate increases to its peak. The utility and treasury yields also hit their peaks.
- Late 2018 to Early 2020: The Federal Funds Rate falls significantly, as do the utility and treasury yields.

OCC Ex. 2, p. 20; Tr. 944-46.

The Commission should thus conclude that the Federal Funds Rate and yields for utility and treasury bonds are highly correlated. The Commission should further conclude that the Federal Reserve's recent announcement that it would increase the Federal Funds Rate shows that yields will be increasing and the required ROE for AES Ohio will similarly be increasing.

#### **4. Projected Bond Yields are Rising**

Mr. Walters provided a chart that shows projected yields. OCC Ex. 2, p. 22. That chart also shows that AES Ohio needs an ROE on the high end of any range.

Specifically, that chart shows that forecasts issued in July of 2021 expected the treasury bond yield to increase from 2.3% in Q2 2021 to 2.7% in Q3 2022. *Id.*; Tr. 948 (Walters). Those projected increases in yields also shows the need for an ROE at the high end of the range.

#### **E. Walmart Witness Kronauer**

Walmart witness Kronauer states that the Commission should find that the ROE requested by AES Ohio is "unreasonably high." Walmart Ex. 1, p. 4.

The Commission should reject his testimony because he agreed that he is not an ROE expert. Tr. 977. Specifically, he has taken two utility-related seminars since he started at Walmart in 2019. Tr. 973. Both seminars were introductory level; one covered general utility principles; he could not recall the subject of the other seminar. Tr. 974-75. He has testified in other proceedings but has not conducted an ROE analysis in them. Tr. 975-76. He is thus woefully unqualified to sponsor ROE testimony.

He also admitted that he did not perform an ROE analysis for AES Ohio, and he did not assess AES Ohio's risks. Tr. 976-77. The Commission should thus reject his testimony.

**F. IGS Witness White**

**1. Uncollectible Expenses**

IGS witness White opines that uncollectible expenses from SSO customers should be allocated to the SSO and recovered on a bypassable basis. IGS Ex. 1c, pp. 5-9. Staff disagreed with Mr. White, stating: "As a provider of last resort for default service, the Company's inclusion of SSO generation uncollectible expense is consistent with established practices. These costs are distribution costs and thus recoverable in distribution rates." Staff Ex. 8, p. 8 (Smith).

In addition, Mr. White testified that principles of cost causation show that uncollectible expense from delinquent SSO customers should be recovered from the remaining SSO customers. Tr. 1296. However, he agreed at the hearing that the individual SSO customers that did not pay their bills were the "direct cause" of the cost. Tr. 1297. He opined that customers of a CRES did not do anything to cause those SSO customers not to pay their bills. *Id.* He admitted at his deposition that other SSO customers similarly did not do anything to

cause those SSO customers not to pay their bills, but changed that answer at the hearing. Tr. 1297-99. In any event, SSO customers did not cause other SSO customers not to pay their bill, the SSO customers did not cause that uncollectible expense to be incurred.

## **2. PUCO and OCC Assessments**

Mr. White also testified that PUCO and OCC assessments should be allocated to the SSO and recovered on a bypassable basis. IGS Ex. 1c, pp. 10-11. Staff explained that the Commission should reject that proposal: "The Company as the provider of last resort for default service should include the PUCO/OCC assessment expense for SSO generation in distribution rates. These costs are distribution costs and thus recoverable in distribution rates." Staff Ex. 8, pp. 8-9.

## **3. Switching Fees**

Mr. White also testified that the \$5 switching fee should be either eliminated or charged to customers that switch from CRES service to the SSO. IGS Ex. 1c, pp. 12-14. Staff did not agree with that recommendation, explaining that the \$5 fee was "typical amongst Ohio utilities" and was not discriminatory. Staff Ex. 8, p. 9. Regarding the non-discriminatory point, Staff explained that customers frequently return to SSO service because they were dropped by CRES providers, the utility usually does not know why the customer was dropped, and it is not reasonable to charge customers a fee to return to SSO service. *Id. Accord:* Tr. 1306-08.



Respectfully submitted,

/s/ Christopher C. Hollon

---

Christopher C. Hollon (0086480)  
THE DAYTON POWER AND  
LIGHT COMPANY d/b/a AES OHIO  
1065 Woodman Drive  
Dayton, OH 45432  
Telephone: (937) 259-7358  
Telecopier: (937) 259-7178  
Email: christopher.hollon@aes.com

/s/ Jeffrey S. Sharkey

---

Jeffrey S. Sharkey (0067892)  
(Counsel of Record)  
D. Jeffrey Ireland (0010443)  
Melissa L. Watt (0092305)  
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  
mwatt@ficlaw.com

Counsel for The Dayton Power and Light  
Company d/b/a AES Ohio

*(willing to accept electronic mail)*

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Initial Post-Hearing Brief of AES Ohio has been served via electronic mail upon the following counsel of record, this 4th day of March,

2022:

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

Counsel for Staff of the Commission

Kimberly W. Bojko  
Thomas V. Donadio  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, OH 43215  
bojko@carpenterlipps.com  
donadio@carpenterlipps.com

Counsel for The Ohio Manufacturers'  
Association Energy Group

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

Counsel for The Kroger Company

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

Maureen R. Willis  
Ambrosia E. Wilson  
John Finnigan  
The Office of the Ohio Consumers'  
Counsel  
65 East State Street, 7th Floor  
Columbus, OH 43215  
Maureen.willis@occ.ohio.gov  
ambrosia.wilson@occ.ohio.gov  
john.finnigan@occ.ohio.gov

Counsel for The Office of the Ohio  
Consumers' Counsel

Brian M. Zets  
Isaac Wiles & Burkholder, LLC  
Two Miranova Place, Suite 700  
Columbus, OH 43215  
bzets@isaacwiles.com

Special Counsel for The Office of the  
Ohio Consumers' Counsel

Matthew R. Pritchard  
Bryce A. McKenney  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17th Floor  
Columbus, OH 43215  
mpritchard@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.

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

Counsel for Nationwide Energy Partners,  
LLC

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

Counsel for IGS Energy

Janean Weber  
Environmental Law & Policy Center  
21 West Broad Street  
Columbus, OH 43215  
jweber@elpc.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

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

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.

N. Trevor Alexander  
Kari D. Hehmeyer  
Sarah G. Siewe  
BENESCH FRIEDLANDER COPLAN &  
ARONOFF  
41 South High Street, Suite 2600  
Columbus, OH 43215  
talexander@beneschlaw.com  
khehmeyer@beneschlaw.com  
ssiewe@beneschlaw.com

Counsel for The City of Dayton

Chris Tavenor  
1145 Chesapeake Avenue, Suite I  
Columbus, OH 43212-3449  
ctavenor@theOEC.org

Counsel for Ohio Environmental Council

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

Counsel for One Energy Enterprises, LLC

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

/s/ Jeffrey S. Sharkey  
Jeffrey S. Sharkey

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**3/4/2022 3:49:05 PM**

**in**

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

Summary: Brief Initial Post-Hearing Brief of AES Ohio electronically filed by Mr.  
Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company