BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for an Increase in Electric Distribution Rates.	))))	Case No. 20-1651-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority.	))))	Case No. 20-1652-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 20-1653-EL-ATA

POST-HEARING BRIEF
BY
THE KROGER CO.

Respectfully Submitted,

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I. INTRODUCTION

The Dayton Power & Light Company, d/b/a AES Ohio, Inc. (AES Ohio or the Company) filed a notice of intent to file an application for an increase in its electric distribution rates with the Public Utilities Commission of Ohio (Commission) on October 30, 2020. The Kroger Co. (Kroger) intervened in these proceedings on November 25, 2020. Although AES Ohio had agreed to freeze its base rates as part of its first Electric Security Plan (ESP I),[1] to which AES Ohio unilaterally reverted in August, 2016,[2] AES Ohio nonetheless filed its application for an increase

[1] Company Ex. 69 (ESP I Stipulation) at 10; *See also In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case Nos. 08-1094-EL-SSO, et al., Opinion & Order at 5, 9 (June 24, 2009) (ESP I 2009 Opinion).

[2] *See In re Application of the Dayton Power & Light Co. for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Motion of the Dayton Power & Light Co. to Withdraw its Applications in this Matter (July 27, 2016); Opinion and Order (August 26, 2016).

in its electric distribution rates on November 30, 2020 (Application). AES Ohio seeks a substantial increase in distribution base revenues of approximately 50%, or nearly $121 million.[3]

On July 26, 2021, the Staff of the Commission filed its Staff Report of Investigation (Staff Report) in the above-captioned proceeding.[4] In response, pursuant to R.C. 4909.19, Ohio Adm.Code 4901-1-28, and a July 20, 2021 Commission Entry, Kroger and other parties submitted Objections to the Staff Report on August 25, 2021. The parties participated in an evidentiary hearing in these proceedings which began on January 24, 2022, and concluded on February 7, 2022. The Attorney Examiner directed the parties to file post-hearing briefs on March 4, 2022.[5]

The record evidence presented by the parties over the course of this proceeding demonstrates that AES Ohio has not met its burden to demonstrate that it is entitled to the requested base distribution rate increase. AES Ohio has failed to demonstrate that its requested rate of return is fair and reasonable, or that its requested revenue increase is just and reasonable. As such, the Commission should deny AES Ohio's Application to prevent AES Ohio from recovering unreasonably and unlawfully high distribution rates from customers to which it is not entitled.

Furthermore, to the extent the Commission allows AES Ohio to raise its rates, the Commission should not allow AES Ohio to implement that rate increase at this time. As originally stipulated to by the signatory parties in Case Nos. 08-1094-EL-SSO, et al., ESP I, including its terms and conditions and other provisions, such as riders, was intended to remain in place through December 31, 2012. In exchange, AES Ohio agreed to freeze its rates for the duration of ESP I. The Commission modified the ESP I Stipulation and Recommendation, allowing AES Ohio to operate under ESP I beyond the agreed-upon sunset date and receive the benefits of all the terms,

[3] *See* Staff Ex. 1 (Staff Report) at 28.

[4] *See* Staff Ex. 1 (Staff Report).

[5] Tr. Vol. VII at 1624.

conditions, and provisions of ESP I. As such, the stipulated rate freeze remains in effect, and bars present implementation of AES Ohio's request for an increase in its base distribution rates.

II. LAW AND ARGUMENT

A. AES Ohio Failed to Meet its Burden to Demonstrate that its Proposed Revenue Requirement is Reasonable and Lawful.

AES Ohio bears the burden to demonstrate that the rates proposed in its Application are just and reasonable. Ohio law states that for "any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility."[6] Furthermore when fixing and determining just and reasonable rates, the Commission must determine a fair and reasonable rate of return to the utility.[7] If the Commission finds that any rate, fare, charge, schedule, classification, or service proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, the may instead establish just and reasonable rates, fares, charges, or services to be rendered, charged, demanded, exacted, or collected.[8]

As such, the Commission should deny the Application based on the evidentiary record in these proceedings. AES Ohio requests a total base distribution revenue requirement of $365,180,240, which represents an increase of nearly $121 million.[9] The proposed increase would result in an estimated increase for a nonresidential customer on secondary service single-phase as high as 9.71 percent; and for a nonresidential customer on secondary three-phase as high as 17.56

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[6] R.C. 4909.19(C).

[7] R.C. 4909.15(A)(2).

[8] R.C. 4909.15(E).

[9] Tr. Vol. I at 113 (Adams).

percent.[10] AES Ohio has failed to meet its burden to demonstrate that it is entitled to these increases for several reasons.

AES Ohio has failed to show that the rate of return that it requests is just and reasonable. AES Ohio does not face significant risks compared to other Ohio EDUs or EDUs in other states. Furthermore, AES Ohio receives capital through its parent corporation, AES Corp., and AES Ohio's poor financial position results from that merger. Additionally, Distribution Investment Rider (DIR) audit costs, over-exaggerated labor costs, expanded vegetation management program costs, and energy efficiency costs should not be included in base distribution rates.

1. AES Ohio is Not Entitled to the Unfair and Unreasonable Cost of Equity and Rate of Return It Requests.

AES Ohio requests an unfair and unreasonable rate of return of 7.71%.[11] Staff's recommended return in the range of 7.05% to 7.59%,[12] while also high, is far more reasonable. AES Ohio exaggerates the financial risk it faces when requesting an unreasonably high rate of return. First, it is important to note that AES Ohio is the only public utility within its service territory. This results in a lower risk for AES Ohio.[13]

At the time AES Ohio had filed testimony in this case, Standard & Poor's had upgraded AES Ohio's credit rating to BB+, but AES Ohio's requested cost of equity, and therefore its rate of return in this case does not reflect the improved credit rating.[14] Furthermore, AES Ohio no

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[10] Tr. Vol. I at 110-11 (Adams).

[11] *See* Staff Ex. 9 (Lipthratt Testimony), Exhibit A (Revised Schedule A-1).

[12] *Id.*

[13] Tr. Vol. V at 1030 (Buckley).

[14] Tr. Vol III at 432 (Illyes).

longer issues common stock, and has no preferred stock outstanding.[15] Instead, AES Ohio relies on common stock issued by its parent company, AES Corp.[16]

As such, while a higher cost of equity and, therefore, rate of return, will lead to higher charges for AES Ohio customers, it will not necessarily make it easier for AES Ohio to attract capital, as it is AES Corp. that ultimately needs to attract investors. AES Ohio Witness McKenzie noted that "investors in AES Corp. make decisions on whether they are going to buy or sell the stock of AES Corp. based on their expectations for returns for that corporation as a whole, not based on the return to AES Ohio."[17] AES Ohio Witness Illyes noted that the Standard & Poor's upgrade to AES Ohio's credit rating "was predicated upon an upgrade that S&P had made at the AES Corporate level that…drove an upgrade down at the DP&L/AES Ohio level."[18] Accordingly, it is the performance of AES Ohio's parent company, AES Corp., which determines whether or not AES Corp. can attract capital.

Additionally, the risk faced by AES Ohio is not significantly higher than that faced by other EDUs in Ohio or elsewhere. AES Ohio Witness McKenzie alleges that several factors, such as the removal of the DMR, Supreme Court of Ohio appeals, potential refunds for significantly excessive earnings, and COVID-19, make AES Ohio more financially risky.[19] In reality, none of these risks apply uniquely to AES Ohio.

The risk of potential refunds for significantly excessive earnings would apply equally to all EDUs in Ohio.[20] At any rate, AES Ohio has never issued a refund for significantly excessive

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[15] Tr. Vol. III at 430-31 (Illyes); Tr. Vol. III at 506 (McKenzie).

[16] Tr. Vol. III at 431 (Illyes); Tr. Vol. III at 506 (McKenzie).

[17] Tr. Vol. III at 509 (McKenzie).

[18] Tr. Vol. III at 433 (Illyes).

[19] Company Ex. 91 (Corrected McKenzie Testimony) at 15-17, 21-22.

[20] *Id.*

earnings.[21] The Commission uses a safe harbor for its review under R.C. 4928.143(F),[22] which makes refunds unlikely to occur. Furthermore, the witness did not attempt to quantify the actual risk faced by DP&L in regards to potential refunds under R.C. 4928.143(F).[23]

Nor does DP&L face increased risk from the Supreme Court of Ohio or removal of the unlawful distribution modernization rider (DMR). Appeals to the Supreme Court of Ohio apply equally to all EDUs.[24] Similarly, removal of the DMR resulted from a Supreme Court of Ohio decision as applicable to another EDU—demonstrating that this risk applies equally to all EDUs in Ohio. Additionally, AES Ohio Witness McKenzie did not perform any analysis to see if the appeal process in Ohio are longer than appeals to reviewing courts in other states[25]

AES Ohio also benefits from several forms of potential cost recovery that give it increased financial stability. AES Ohio has guaranteed cost recovery through various nonbypassable riders.[26] These nonbypassable riders enable AES Ohio to fully and quickly recover many of its costs.[27] AES Ohio has guaranteed cost recovery of up to $259 million for grid modernization through AES Ohio's Infrastructure and Investment Rider.[28] AES Ohio has guaranteed cost recovery of these investments regardless of the outcome of the rate case.[29] Furthermore, AES Ohio continues to collect the RSC.[30]

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[21] Tr. Vol. III at 499-500 (McKenzie); *see also* Tr. Vol. I at 178 (Lund).

[22] Tr. Vol. III at 500-01 (McKenzie)

[23] *Id.*

[24] Tr. Vol. III at 499 (McKenzie).

[25] *Id.*

[26] Tr. Vol. V at 1030-31 (Buckley).

[27] *Id.*

[28] Tr. Vol. II at 235 (Lund).

[29] Tr. Vol. II at 240-41 (Lund); Tr. Vol. III at 511 (McKenzie) ("I understand that there have been riders approved for the Smart Grid investment, for example.").

[30] Tr. Vol. III at 498 (McKenzie).

Additionally, through its deferral authority,[31] AES Ohio is likely to recover any costs associated with the COVID-19 pandemic. AES Ohio is currently tracking savings, foregone revenues, and expenses associated with COVID-19, although it is no longer recording them.[32] AES Ohio seeks to adjust test year revenue so that the revenue requirement reflects the revenue that would be necessary absent COVID-19, because the costs, savings, expenses, and foregone revenue are reflected in the regulatory asset.[33] According to Staff Witness Lipthratt, "an audit of those costs will be performed if the Company seeks to recover" the regulatory asset.[34] The audit would only occur if AES Ohio seeks to recover those costs.[35]

Essentially, this puts AES Ohio in a win-win scenario regarding COVID-19 cost recovery. In the event that savings outweigh the costs, AES Ohio is unlikely to seek recovery, and no audit would occur.[36] According to Staff Witness Lipthratt, "in that situation, there would not be…an accounting for any savings associated with COVID."[37] But, to the extent that COVID-19 costs outweigh savings, AES Ohio is likely to recover these costs in the future. To the extent that savings outweigh costs, customers will see no benefit and the savings will be enjoyed by AES Ohio. This, again, results in significantly lowered financial risk for AES Ohio.

Overall, AES Ohio requests a cost of equity and rate of return that is unfair, unreasonable, and significantly higher than it is entitled to. Although AES Ohio attempts to argue that it faces

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[31] *See In The Matter Of The Application Of The Dayton Power And Light Company For Approval Of Its Temporary Plan For Addressing The Covid-19 State Of Emergency*, Case Nos. 20-651-EL-UNC, et al., Finding and Order (May 20, 2020) (granting AES Ohio deferral authority for COVID-19 related costs, savings, and foregone revenue).

[32] Tr. Vol. II at 367 (Donlon)

[33] Tr. Vol. II at 374-75 (Donlon).

[34] Tr. Vol. VI at 1412 (Lipthratt).

[35] Tr. Vol. IV at 1417 (Lipthratt).

[36] *Id.*

[37] Tr. Vol. VI at 1417 (Lipthratt).

increased financial risk, thus justifying an increased rate of return, AES Ohio fails to present evidence sufficient to meet its burden to justify this requested return.

2. AES Ohio Unreasonably and Unlawfully Seeks to Imbed Improper Costs into Base Rates.

Additionally, AES Ohio has failed to meet its burden to demonstrate that various expenses are just and reasonable and should be included in base rates. Since AES Ohio has failed to meet its burden, the Commission should exclude these costs from consideration when establishing base distribution rates.

First, AES Ohio unjustly and unreasonably seeks to include costs for energy efficiency programs in base rates. AES Ohio's previous statutorily-mandated energy efficiency and demand-side management programs no longer exist.[38] And the Company recovered costs for these programs through the Energy Efficiency Rider, not through base distribution rates.[39] On February 26, 2020, the Commission ordered that the Energy Efficiency Rider be set to zero effective January 1st, 2021.[40] The Commission also ordered a wind-down of those statutorily-mandated energy efficiency programs beginning September 30th, 2020.[41] This was in response to legislation that eliminated energy efficiency programs for compliance purposes beginning January 1, 2021.[42]

Given that the Commission has not given AES Ohio permission to restart these programs on a voluntary basis,[43] the Commission has not authorized AES Ohio to recover the previous

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[38] Tr. Vol. III at 565 (Tatham).

[39] *Id.*

[40] Tr. Vol. III at 565-66 (Tatham); Tr. Vol. IV at 709-10 (Teuscher); Tr. Vol. VI at 1420 (Lipthratt).

[41] *Id.*

[42] *Id.*

[43] Tr. Vol. IV at 710 (Teuscher).

statutorily-mandated program costs through base rates. As such, these programs should not be continued and costs associated with such programs should not be passed on to customers.

Furthermore, AES Ohio's deferral request for these programs should be denied. Staff used the six part test for determining whether deferrals are appropriate in their Report, and concluded that AES Ohio's deferral proposal failed to satisfy the Commission's six-part test for deferral authority.[44]

Second, AES Ohio seeks to include unnecessarily high labor costs in base distribution rates. For example, AES Ohio proposed including both long-term compensation (LTC) and short-term compensation (STC) incentive pay in base distribution rates.[45] The Commission typically does not allow EDUs to recover LTC or STC through rate base.[46]

Staff recommended removing 100% of LTC and 75% of STC from rate base,[47] as AES Ohio's shareholders are the direct beneficiary of incentive-based compensation.[48] If AES Ohio recovers its proposed cost of short-term and long-term compensation from base rates, and AES does not meet the performance metrics that trigger those bonuses, then AES Ohio will not pay out the entirety of those bonuses to employees. Instead, AES would keep the full amount imbedded in base rates.[49]

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[44] Tr. Vol. IV at 716 (Teuscher), *citing* Staff Ex. 1 at 17-18 (Staff Report).

[45] Tr. Vol. I at 173 (Buchanan); *see also* Staff Ex. 1 (Staff Report) at 15-16.

[46] Tr. Vol. I at 174 (Buchanan).

[47] *Id.*

[48] Staff Ex. 4 (Crocker Testimony) at 5; *see also* Tr. Vol. I at 175 (Buchanan).

[49] Tr. Vol. I at 183 (Buchanan).

If an EDU lowers expenses below the level allowed in base rates, the EDU still collects the same amount of money from customers through base rates.[50] The EDU does not lower its base rates every year to adjust for actual expenses.[51] Therefore, if expenses are lowered, AES gets to keep the amount saved.[52]

AES Ohio also recommends including $30 million in expanded vegetation management expenses in base distribution rates.[53] Staff recommended a lower amount. Staff found that a baseline of $17.5 million was more prudent and reasonable and supported by the record.[54]

AES Ohio argues that without these expanded costs, it will be forced to defer tree trimming and costs will increase. [55]

However, AES Ohio did not perform any analysis as to the proportion of vegetation that AES Ohio believes will increase in any given year.[56] AES Ohio Witness Vest merely states "we know it's out there."[57] Furthermore, AES Ohio has not made any effort to calculate whether increased costs of vegetation management would result under Staff's proposal.[58] As such, as explained by Staff, AES Ohio has failed to present sufficient evidence demonstrating that these costs should be included in base distribution rates.

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[50] Tr. Vol. I at 178 (Buchanan).

[51] *Id.*

[52] *Id.*

[53] *See* Company Ex. 50 at 8 (Vest).

[54] Staff Ex. 9 (Lipthratt Testimony) at 6.

[55] Company Ex. 50 at 7-8 (Vest), *see also* Tr. Vol. III at 686 (Vest).

[56] Tr. Vol. III at 686 (Vest).

[57] *Id.*

[58] Tr. Vol. III at 687 (Vest).

Similarly, AES Ohio seeks to recover costs for its DIR Compliance Audit.[59] Staff recommended that these expenses be excluded and the associated regulatory asset eliminated.[60] AES Ohio Witness Teuscher claims that "these costs were incurred as a direct result of AES Ohio's compliance with the Stipulation in Case No. 16-395-EL-SSO," and therefore, should be recovered in rate base.[61] However, AES Ohio never had authority to recover DIR Compliance Audit costs outside of the DIR Rider.

Given that the DIR Rider no longer exists, there is no mechanism for AES Ohio to recover the costs of the DIR Rider Compliance Audit. The DIR was eliminated when AES Ohio voluntarily reverted to ESP I.[62] As such, AES Ohio willingly forfeited the authority to recover these costs. Allowing AES Ohio to imbed these costs into base rates would be unjust and unreasonable.

In addition to failing to demonstrate that its proposed return is fair and reasonable, AES Ohio failed to demonstrate that various expenses and costs it proposes to be included in base rates are just and reasonable. The Commission should instead authorize a more just and reasonable revenue requirement.[63]

B. The Stipulated Rate Freeze Prohibits Implementation of Any Increase to Distribution Rates As Long As AES Ohio Operates Under ESP I.

Although the AES Ohio has failed to demonstrate that the base distribution rates proposed in its Application are just and reasonable, if the Commission considers approving an increase in AES Ohio's rates, implementation of that increase should be stayed as long as AES Ohio continues

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[59] *See* Company Ex. 49 (Teuscher Supplemental Testimony) at 5.

[60] *Id.*; *see also* Staff Ex. 1 (Staff Report) at 17.

[61] *See* Company Ex. 49 (Teuscher Supplemental Testimony) at 5.

[62] Tr. Vol. IV at 723 (Teuscher); Tr. Vol. IV at 804-05 (Forestal).

[63] *See* Staff Ex. 9 (Lipthratt Testimony), Exhibit A (Revised Schedule A-1).

to operate under ESP I. Under the terms of ESP I, as originally stipulated to by the parties in Case Nos. 08-1094-EL-SSO, et al. on February 24, 2009,[64] and as modified by the Commission on December 19, 2019,[65] the stipulated rate freeze remains effective and bars implementation of AES Ohio's Application for an increase in base distribution rates as a legal matter. While the Commission held that the stipulated rate freeze did not preclude AES Ohio from *applying* for a rate increase, the Commission noted that the stipulated rate freeze, as a matter of law, may preclude the Commission from implementing any approved increase until AES Ohio implements a new ESP.[66]

The signatory parties in Case Nos. 08-1094-EL-SSO, et al., including AES Ohio (then known as The Dayton Power & Light Co.), Kroger, and Commission Staff entered into the ESP I Stipulation "for the purposes of resolving all issues raised in" those proceedings.[67] The ESP I Stipulation was intended to remain in effect until December 31, 2012, with a number of provisions set to terminate on that date.[68] For example, the parties agreed "to extend DP&L's current rate plan through December 31, 2012."[69] AES Ohio agreed to file new ESP and/or market rate offer (MRO) by March 30, 2012, "to set [standard service offer] rates to apply for period beginning January 1, 2013," the next day following termination of ESP I.[70] The parties also agreed that the rate

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[64] Company Ex. 69 (ESP I Stipulation).

[65] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding & Order (Dec. 18, 2019).

[66] *See* Entry at ¶¶ 20, 22 (Oct. 20, 2021) (The Commission found that "implementation of any rate changes in the case may, subject to the remaining outstanding legal arguments of the parties, be stayed," that "DP&L may not be able to implement the rates established in this proceeding during ESP I," and that the issue is properly determined after an evidentiary hearing rather than on a motion to dismiss.).

[67] Company Ex. 69 (ESP I Stipulation) at 2.

[68] *Id.* at 3 ("It is in the best interest of DP&L and its customers to enter into an agreement that will provide stable rates through 2012."); *Id.* at ¶ 30 (contributions to the Ohio Partners for Affordable Energy are "effective February 1, 2009, and continuing through December 31, 2012");

[69] Company Ex. 69 (ESP I Stipulation) at ¶ 1.

[70] Company Ex. 69 (ESP I Stipulation) at ¶ 9.

stabilization charge would "continue as a nonbypassable charge through December 31, 2012."[71] In exchange for extending these provisions through December 31, 2012, and in order to maintain "stable rates," AES Ohio also agreed to freeze its base distribution rates for the duration of ESP I.[72] The Commission initially approved the ESP I Stipulation as a package without modification.[73] However, the Commission has subsequently modified the ESP I Stipulation by allowing DP&L to extend the duration of a modified version of ESP I beyond the stipulated sunset date.

The first incidence of this modification came in 2012. Although AES Ohio had filed an application for an MRO before the March 30, 2012 deadline, AES Ohio subsequently withdrew its Application in September 2012, and filed a new application for ESP II on October 5, 2012, less than three months before ESP I was set to end.[74] Although several parties, including Kroger, requested that the Commission nevertheless terminate the rate stabilization charge on the stipulated sunset date,[75] the Commission rejected the request, and modified ESP I by allowing AES Ohio to continue operating under the terms of the ESP I Stipulation beyond the stipulated sunset date.[76]

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[71] Company Ex. 69 (ESP I Stipulation) at ¶ 3.

[72] *Id.* at ¶ 18 ("DP&L's distribution base rates will be frozen through December 31, 2012.").

[73] ESP I 2009 Opinion.

[74] *See In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case Nos. 12-426-EL-SSO, et al., Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan (Oct. 5, 2012).

[75] *Id.*, Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders (Sept. 26, 2012).

[76] *Id.*, Entry (Dec. 19, 2012).

The Commission noted that "the effective date of DP&L's current ESP, as well as the RSC, was to end on December 31, 2012."[77] However, the Commission found that since ESP I was continuing beyond the sunset date, the terms of ESP I must continue beyond that date as well.[78]

The Commission again modified ESP I when it allowed AES Ohio to revert back to ESP I in 2019. Prior to that reversion, AES Ohio had been operating under its ESP III.[79] However, the Commission modified ESP III by directing AES Ohio to remove its Distribution Modernization Rider (DMR).[80] The Commission did so following a Supreme Court of Ohio decision, which found that a substantially similar rider for another EDU was not authorized by R.C. 4928.143, the ESP statute.[81] Responding to this decision, the Commission removed the DMR from AES Ohio's ESP III.[82] Based on the Commission's order, AES Ohio made the unilateral decision to again withdraw its ESP and revert to a version of ESP I.

The Commission did not direct AES Ohio to revert back to ESP I.[83] Instead, AES Ohio made the decision to revert to ESP I in order to increase "the utility's cash flow" following the removal of the DMR.[84] Again, despite the opposition of several parties, including Kroger, the Commission allowed AES Ohio to re-implement a version of ESP I far beyond the original sunset

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[77] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case Nos. 12-426-EL-SSO, et al., Entry at ¶ 5 (Dec. 19, 2012).

[78] *Id.* ("The Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.").

[79] *See In The Matter Of The Application Of The Dayton Power And Light Company To Establish A Standard Service Offer In The Form Of An Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al., Opinion & Order (Oct. 20, 2017).

[80] Tr. Vol. III at 493 (McKenzie)

[81] *See In re Application of Ohio Edison Co*., 157 Ohio St.3d 73, 2019-Ohio-2401.

[82] *In re Application of the Dayton Power & Light Co. to Establish a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order (Nov. 21, 2019).

[83] Tr. Vol. III at 496-97 (McKenzie); Tr. Vol. IV at 723 (Teuscher); Tr. Vol. IV at 804-05 (Forestal)

[84] Tr. Vol. III at 497 (McKenzie) ("I think that decision was forced on the Company by the loss of the DMR under ESP 3, so it was a very significant portion of the utility's cash flow, and the utility had to take steps to address that.").

date contemplated to and stipulated to by the signatory parties.[85] Now, by seeking an increase in its base distribution rates while continuing to operate under the terms of a modified version of ESP I, AES Ohio is essentially seeking to retain the beneficial aspects of ESP I, while absolving itself of its own obligations to customers under the ESP I Stipulation.

Doing so would violate the Commission's previous decisions authorizing extensions of ESP I. Pursuant to Ohio statutory law, when an EDU withdraws from an ESP, it reverts to its most recent, authorized ESP: "The Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer…until a subsequent offer is authorized."[86] Previously, the Commission has interpreted this statutory mandate to mean that withdrawing an ESP and reverting to a previous ESP reinstates *all* of the terms of that ESP.[87] The Commission has also ruled that if this extends provisions of the ESP beyond a sunset date, other provisions are continued as well.[88] Thus, by operation of law, when the Commission extended ESP I past the original stipulated sunset date, it also extended the stipulated rate freeze beyond the original stipulated sunset date. Since ESP I remains in effect, so too does the stipulated rate freeze. AES Ohio, as a matter of law, cannot implement any increase its distribution base rates until it implements a new ESP.

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[85] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding & Order (Dec. 18, 2019).

[86] R.C. 4928.143(C)(2)(b).

[87] *See In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case Nos. 12-426-EL-SSO, et al., Entry at ¶ 5 (Dec. 19, 2012) ("Although the General Assembly has not provided specific guidance in the event that an electric distribution utility were to terminate an MRO and file a new ESP, as is the case here, the Commission finds that it would be consistent with both Section 4928.141 and Section 4928.143(C)(2)(b), Revised Code, to order that the terms and conditions of the current ESP should continue until a subsequent offer is authorized.").

[88] *Id.* (finding that when the Commission extended the ESP past December 31, 2012, it also extended the RSC past that date).

The Commission has authorized AES Ohio to continue collecting the RSC until the Commission approves AES Ohio's next ESP.[89] By raising its rates, AES Ohio would be benefiting from the terms of a previous agreement while not abiding by the agreement itself. Allowing one party to unilaterally modify a settlement to its own advantage will dissuade parties from entering future settlement agreements to resolve proceedings. As such, to the extent the Commission considers approving any increase in base distribution rates, the Commission should stay implementation of any increase in AES Ohio's base distribution rates until AES Ohio implements a new ESP.

C. The Commission Should Accept AES Ohio's Proposal Regarding the Low Load Factor Provision Max Charge Provision.

While Kroger does not support AES Ohio's proposed return or revenue requirement, Kroger does support its proposed Low Load Factor Provision. AES Ohio is proposing to raise the maximum rate charge provision associated with the Low Load Factor Provision.[90] As Staff explained, the maximum charge provision is "a capped $/kwh rate (Energy Rate)" which replaces "the demand charges low load factor customers are otherwise charged under the Secondary and Primary rate schedules."[91] A change in in the maximum charge provision will "alter the usage data needed to calculate the demand rate and reactive demand rates" for Primary and Secondary customers.[92] Under the Low Load Factor Provision, when low-load factor customers pay less than they otherwise would due to the cap, other customers are forced to pay more. Other high-load factor customers are forced to unfairly and unreasonably subsidize the low-load factor customers.

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[89] Tr. Vol. III at 498 (McKenzie); *In The Matter Of The Application Of The Dayton Power And Light Company For Approval Of Its Plan To Modernize Its Distribution Grid*, Case Nos. 18-1875-EL-GRD, et al., Opinion and Order (June 16, 2021)

[90] Tr. Vol. IV at 776 (Teuscher).

[91] Staff Ex. 1 (Staff Report) at 31.

[92] *Id.*

AES Ohio is "trying to reduce the number of customers and the number of bills that take advantage of" the Low Load Factor Provision.[93] By raising the maximum charge rates, AES Ohio's proposal would lead to fewer customers paying their rates under the maximum rate provision.[94] When this occurs, "fewer customers will [pay] max charge rates as you increase the max charge rates."[95] This will lower the amount of foregone revenue that must be recovered from high-load factor customers, and in turn "will lead to less cost shifting between customers within the same rate classes."[96]

Staff Witness Bremer noted that "where you have a class revenue requirement that you need to design rates to recover, then lowering the max charge rates will result in less revenues recovered through max charge customers paying those bills and so you are going to have a larger revenue requirement that you are building the demand rate from."[97]

Staff did not recommend raising the maximum rate charge provision to the reasonable extent AES Ohio requested. As such, "the secondary and primary demand rates are going to be higher under the Staff proposal than the Company's proposal."[98] Staff Witness Bremer states that "Staff recommends increasing the max charge rates gradually," and that "Staff's proposal takes into account the principle of gradualism."[99]

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[93] Tr. Vol. IV at 773 (Teuscher).

[94] *Id.*

[95] Tr. Vol. VI at 1195 (Bremer)

[96] Tr. Vol. IV at 776-77 (Teuscher).

[97] Tr. Vol. VI at 1191 (Bremer).

[98] *Id.*

[99] Staff Ex. 7 at 4-5 (Bremer).

However, Staff has not recommended gradual increases to the max charge rates, or any future increases.[100] Staff has not made any similar recommendations in any other proceedings.[101] Nor has Staff performed any analysis as to how high the maximum charge rate should eventually be set, or to determine if Staff would support future increases.[102] Future increases would therefore be addressed in future base distribution rate cases.[103] However, due to the infrequency of base distribution rate cases, this would not occur for some time.

As such, Staff's proposal does not truly account for gradualism—it is simply a smaller, single increase. However, AES Ohio's proposal would eliminate some of the subsidization within rate classes, more closely aligning rates with cost of service principles, which the Commission should consider when designing rates for a utility.[104] Furthermore, this will ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service in accordance with R.C. 4928.02. On the other hand, Staff's proposal will not truly serve the interests of gradualism. As such, the Commission should adopt AES Ohio's proposal regarding the Low Load Factor Provision.

D. AES Ohio's Proposed Allocation is Reasonable.

Additionally, the rate class allocation proposed by Commission Staff complies with cost causation principles. The allocation proposed by OCC does not. Therefore, to the extent the Commission approves any rate increase, it should apply Staff's proposed reasonable allocation rather than the unreasonable and unsupported allocation proposed by OCC.

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[100] Tr. Vol. VI at 1202-03 (Bremer).

[101] *Id.*

[102] Tr. Vol. VI at 1204 (Bremer).

[103] Tr. Vol. VI at 1203 (Bremer).

[104] Tr. Vol. II at 321 (Chapman).

The Commission generally considers cost-of-service studies when designing or approving rates for a utility.[105] According to Commission Staff:

> The assignment of classified costs to each customer class on an equitable and apportioned basis. This is determined by a combination of the number of customers, class demands, and energy usage.[106]

The cost of service study performed by AES Ohio showed that the residential rate class is responsible for the largest share of rate base and operating expenses.[107] Commission Staff found the cost of service study performed by AES Ohio to be "a reasonable indicator of costs and cost responsibility of each customer class."[108]

In its Application, AES Ohio proposed allocating approximately 66.7% of base revenue requirement to the residential class, approximately 23.93% to the secondary class, and 7.69% to the primary class.[109] Staff agreed with this allocation.

OCC avers that this allocation is too high for the residential class.[110] OCC instead recommends "allocating no more than 40% of the increase to the residential class."[111] This provision is extremely out of line with cost causation principles. In fact, OCC's recommendation about the amount that it believes should be allocated to the residential class is not based on a cost-of-service study at all.[112] Instead, it appears to be based primarily on a witness' opinion regarding income levels in Dayton during the COVID-19 pandemic.[113]

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[105] Tr. Vol. II at 321 (Chapman)

[106] Staff Ex. 1 (Staff Report) at 26.

[107] Tr. Vol. II at 324-25 (Chapman)

[108] Staff Ex. 1 (Staff Report) at 26.

[109] Tr. Vol. IV at 719 (Teuscher), *citing* Company Ex. 10 (Schedule E-3.2).

[110] OCC Ex. 4 (Fortney Testimony) at 4.

[111] *Id.* at 6.

[112] Tr. Vol. IV at 823-24 (Fortney).

[113] *Id.*

OCC's proposal simply doesn't align with cost-of-service or statutory ratemaking principles. OCC Witness Fortney even agreed that "from a pure cost-of-service standpoint the Staff recommendations and the Company's proposal in terms of the allocation percentage are reasonable in terms of cost-of-service."[114] As such, the Commission should reject OCC's proposal, and adopt the allocation supported by AES Ohio and Staff.

E. The Commission Should Adopt the Corrected Customer Charges.

Lastly, the Commission should adopt the revised customer charges which correct errors in AES Ohio's calculations which were identified by Kroger. Staff Witness Bremer sponsors updated Staff Report Tables 6 and 7.[115] These updates were made because AES originally calculated the secondary rate class in error. Kroger identified the error when reviewing the workpapers AES Ohio provided during discovery, and subsequently raised this issue to Staff and AES Ohio. Commission Staff and AES Ohio acknowledged and corrected this error. According to Witness Bremer:

> There was an error in the calculation and I think some of the links in the calculation that we did not identify in the course of our review so we make those corrections now as part of my testimony.[116]

The original secondary rate class customer charge in the Staff Report had initially carried this error forwards.[117] Staff Witness Bremer's testimony, and the revised Staff Report Tables 6 and 7, correct this error.[118]

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[114] Tr. Vol. IV at 829 (Fortney).

[115] Staff Ex. 7 at 6 (Bremer); Tr. Vol. VI at 1206 (Bremer).

[116] Tr. Vol. VI at 1206 (Bremer).

[117] Tr. Vol. VI at 1207 (Bremer).

[118] *Id.*

Accordingly, to the extent the Commission authorizes any increase to AES Ohio's distribution base rates, the Commission should adopt the revised Tables 6 and 7 to ensure that the previously-corrected error is not carried forward into future rates.

III. CONCLUSION

At this time, the stipulated rate freeze from ESP I precludes AES Ohio from implementing any increase to its base distribution rates. As such, the Commission should stay implementation of any rate increase until AES Ohio files a new ESP. However, to the extent the Commission does authorize a rate increase, the Commission should do so pursuant to the recommendations raised herein by Kroger. The Commission should reject AES Ohio's unreasonably high proposed rate of return and revenue requirement, and adopt a more just, fair, and reasonable rate of return and revenue requirement on the lower end of the range proposed by Commission Staff. However, the Commission should adopt AES Ohio's proposed allocation, maximum charge provision for the Low Load Factor Provision, and corrected customer charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utility Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on March 4, 2022 upon the parties of record.

/s/ *Angela Paul Whitfield*________
Angela Paul Whitfield