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 REPLY BRIEF
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Respectfully Submitted,

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I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) should reject the unreasonable and unlawful increase in base distribution rates requested by the Dayton Power & Light Company, d/b/a AES Ohio, Inc., (AES Ohio) in its application filed on November 30, 2020 (Application). AES Ohio failed to meet its burden of proof and failed to present adequate record evidence demonstrating that it is entitled to the increase that it demands. Moreover, the explicit terms of AES Ohio's first Electric Security Plan (as modified) (ESP I) prohibit AES Ohio from implementing *any* rate increase until it first implements a new electric security plan. Therefore, the Commission should deny AES Ohio's Application for the increase in electric distribution rates proposed in its Application. But, even if some increase is warranted at a different amount, AES Ohio is prohibited from implementing that increase at this time.

Following the filing of the Application, the Commission granted intervention to the Ohio Manufacturers' Association Energy Group (OMAEG) on April 7, 2021.[1] The parties to the above-captioned cases participated in an evidentiary hearing from January 24, 2022 through February 7, 2022. Subsequently, OMAEG,[2] Commission Staff,[3] Industrial Energy Users-Ohio (IEU),[4] Walmart Inc.(Walmart),[5] One Energy Enterprises, Inc.,[6] the Ohio Hospital Association (OHA),[7] Direct Energy,[8] the Office of the Ohio Consumers' Counsel (OCC),[9] the City of Dayton,[10] Ohio Energy Group,[11] Interstate Gas Supply, Inc.(IGS),[12] The Kroger Co. (Kroger),[13] and AES Ohio[14] each filed initial post-hearing briefs in the above-captioned cases. Staff, along with all intervening parties who filed briefs (with one exception), agree that AES Ohio's Application should be denied as filed.[15]

As demonstrated in the initial briefs, AES Ohio has not met its burden of proof in this case, and in any event, legally cannot implement *any* increase to base distribution rates at this time.

[1] Entry at ¶¶ 9-10 (Apr. 7, 2021).

[2] Post-Hearing Brief Of The Ohio Manufacturers' Association Energy Group (Mar. 4, 2022) (OMAEG Brief).

[3] Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Mar. 4, 2022) (Staff Brief).

[4] Initial Brief of Industrial Energy Users-Ohio (Mar. 4, 2022) (IEU Brief).

[5] Initial Post-Hearing Brief of Walmart Inc. (Mar. 4, 2022) (Walmart Brief).

[6] Initial Post Hearing Brief on behalf of One Energy Enterprises, Inc. (Mar. 4, 2022) (One Energy Brief).

[7] Initial Post Hearing of Ohio Hospital Association (Mar. 4, 2022) (OHA Brief).

[8] Initial Post-Hearing Brief of Direct Energy Business, LLC and Direct Energy Services, LLC (Mar. 4, 2022) (Direct Brief).

[9] Consumer Protection Brief by Office of the Ohio Consumers' Counsel (Mar. 4, 2022) (OCC Brief).

[10] Initial Post-Hearing Brief of City of Dayton (Mar. 4, 2022) (Dayton Brief).

[11] Post-Hearing Brief of Ohio Energy Group (Mar. 4, 2022) (OEG Brief).

[12] Initial Post-Hearing Brief of Interstate Gas Supply, Inc. (Mar. 4, 2022) (IGS Brief).

[13] Post-Hearing Brief by The Kroger Co. (Mar. 4, 2022) (Kroger Brief).

[14] Initial Post-Hearing Brief of AES Ohio (Mar. 4, 2022) (AES Ohio Brief).

[15] OMAEG Brief at 1-3; Staff Brief at 44; OCC Brief at 75-76; Kroger Brief at 1-3; Dayton Brief at 2-3; Walmart Brief at 2-3; IEU Brief at 15; One Energy Brief at 8-13; Direct Energy Brief at 1; OHA Brief at 2; IGS Brief at 3-4.

However, to the extent the Commission believes that a rate increase is warranted at some level, the Commission should follow the recommendations set forth herein to ensure that the rates, charges, schedules, and services approved by the Commission are just and reasonable and lawful for consumers. Further, the Commission should stay the implementation of any authorized rate increase during the pendency of the stipulated rate freeze.

II. LAW AND ARGUMENT

A. AES Ohio failed to meet its burden to demonstrate that the rate increase proposed in its Application is just and reasonable.

As highlighted in the initial post-hearing briefs filed by OMAEG,[16] OCC,[17] IEU,[18] One Energy,[19] Kroger,[20] OHA,[21] Walmart,[22] and Staff,[23] the manifest weight of the record evidence shows that AES Ohio has failed to demonstrate it is entitled to the unreasonable and unjust rate increase it requests. Even in its own initial post-hearing brief, AES Ohio failed to advance any convincing arguments to the contrary.

The burden lies with AES Ohio "to show that the increased rates or charges are just and reasonable."[24] Furthermore, the Commission shall fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, or exacted where it determines that any rate, fare, charge, toll, rental, schedule, classification, or service proposed to

[16] *See* OMAEG Brief at 3-16.

[17] *See* OCC Brief at 18-34.

[18] *See* IEU Brief at 3-14.

[19] One Energy Brief at 12-13.

[20] *See* Kroger Brief at 3-11.

[21] *See* OHA Brief at 3.

[22] *See* Walmart Brief at 3-7.

[23] *See* Staff Brief at 18-20, 23-27, 28-33.

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

be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.[25]

As such, to the extent the Commission considers any increase to base distribution rates, it should adopt a return on equity, rate of return, and revenue requirement at the low end of the range recommended by Staff.[26]

1. AES Ohio's proposed rate of return is unjust and unreasonable.

AES Ohio's initial post-hearing brief fails to demonstrate that its proposed return on equity (ROE) of 10.5% and resulting rate of return (ROR) of 7.71%[27] are fair and reasonable.[28] But, the briefs filed by OMAEG,[29] IEU,[30] OCC,[31] One Energy,[32] Kroger,[33] Walmart,[34] and Commission Staff[35] all illustrate how the ROE and ROR requested by AES Ohio are unjust and unreasonable. Therefore, to protect consumers, a ROE on the low end of Staff's recommended range of 9.28% to 10.29%, and a resulting ROR on the low end of Staff's recommended range of 7.05% to 7.59% is justified and far more reasonable.[36]

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

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

[27] *See* Staff Ex. 9 (Lipthratt Testimony), Exhibit A (Revised Schedule A-1); Company Ex. 1 (Application) at 2.

[28] *See* R.C. 4909.15(A)(2) ("The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine…a fair and reasonable rate of return to the utility…").

[29] OMAEG Brief at 4-9.

[30] IEU Brief at 4-8.

[31] OCC Brief at 49-63.

[32] One Energy Brief at 12-13.

[33] Kroger Brief at 4-8.

[34] Walmart Brief at 3-6.

[35] Staff Brief at 18-20, 21-23.

[36] *See* Staff Ex. 1 (Staff Report) at 21-22; Staff Ex. 9 (Lipthratt Testimony), Exhibit A (Revised Schedule A-1).

AES Ohio makes assertions in its post-hearing brief regarding ROE that are demonstrably false, such as the argument that AES Ohio's poor credit ratings automatically entitle it to a high ROE. For example, AES Ohio states that "[OCC witness Walters'] testimony thus establishes that AES Ohio is one of the 10% riskiest utilities, and that the 10% riskiest utilities have ROEs greater than 9.7%. His testimony thus shows that AES Ohio should have an ROE greater than 9.7%."[37] This is a gross mischaracterization of what OCC witness Walters actually said.

OCC witness Walters did state that only 10% of utilities awarded ROEs in 2021 received costs of equity greater than 9.7%.[38] The witness also stated that only 10% of utilities had a credit rating from Standard & Poor's below BBB- in 2021.[39] However, the witness *did not*, at any point, state that the group of utilities with low credit ratings are the same group of utilities with the high ROE. Nothing in OCC witness Walters' testimony even indicates that the utilities with the worst credit ratings were even awarded costs of equity at all in 2021. AES Ohio's assertion that OCC witness Walters concluded that the "10% riskiest utilities" have the highest ROEs is unsupported and false.[40]

Moreover, two pages later in its own brief, AES Ohio contradicts the claim that a low credit rating automatically entitles AES Ohio to a higher ROE. As noted by AES Ohio, "Staff used utilities with a BBB+ rating or below" to develop its cost of equity proxy group.[41] Since the "10% riskiest utilities" were those utilities with an S&P rating of BBB- or lower, these "riskiest utilities" would presumably fall in the proxy group. Yet, AES Ohio complains that the proxy group contains

[37] AES Ohio Brief at 33.

[38] OCC Ex. 2 (Walters Testimony) at 7.

[39] *Id.* at 10.

[40] AES Ohio Brief at 33.

[41] AES Ohio Brief at 35, *citing* Staff Ex. 1 (Staff Report) at 21.

"distortions" because the utilities have a lower cost of equity than to which AES Ohio believes it is entitled.[42] If the 10% riskiest utilities really had higher costs of equity as AES Ohio falsely claimed, then Staff's proxy group would demonstrate as such.

However, it does not. Staff noted that the proxy group is inherently restricted because "the number of potential comparable companies had declined over the last few years and the pool of publicly traded companies that pay a dividend is down to approximately 37."[43] And, as noted by Staff and AES Ohio, Staff addressed AES Ohio's concerns with its low credit rating by using "companies with a Standard & Poor's Bond Rating of BBB+ and below" to "capture higher risked utilities."[44] Using a proxy group with higher rated utilities would be unreasonable. Staff witness Buckley testified that "Staff believes the comparable companies it used were appropriate and the process for selecting the companies was sound.[45] As AES Ohio noted, there is a significant difference in investment when moving from investment grade to below investment grade.[46]

AES Ohio's objection to this conclusion seems to be solely based on its witness's testimony that the actual "results in the Staff Report suggest just the opposite" of what AES Ohio believes those results should be.[47] AES Ohio attempts to simultaneously advance the contradictory arguments that lower credit ratings automatically entitle a utility to a higher ROE,[48] and that the proxy group used by Staff, consisting solely of utilities with lower credit ratings, is not

[42] AES Ohio Brief at 35-36, *citing* AES Ohio Ex. 38 (McKenzie Testimony) at 7-8.

[43] Staff Brief at 19, *citing* Staff Ex. 2 (Buckley Testimony) at 3-4.

[44] Staff Brief at 20, *citing* Staff Ex. 1 (Staff Report) at 21 *and* Staff Ex. 2 (Buckley Testimony) at 6-7 (quotations omitted); *see also* AES Ohio Brief at 35, *citing* Staff Ex. 1 (Staff Report) at 21.

[45] Staff Ex. 2 (Buckley Testimony) at 5.

[46] AES Ohio Brief at 34.

[47] *See* AES Ohio Brief at 35, *citing* Company Ex. 38 (McKenzie Testimony) at 7-8.

[48] *Id.* at 33.

representative.[49] Rather than revise his conclusion when Staff's reasonable, objective analysis does not support AES Ohio's requested ROE, AES Ohio witness McKenzie instead comes to the conclusion there must be some unidentified error in the analysis.[50]

Several intervening parties identified flaws in the cost of equity analysis performed by both Staff and AES Ohio which upwardly inflate results. AES Ohio witness McKenzie used various methodologies to create upward biases to intentionally inflate the findings of his cost of equity analysis, including: removing low end discounted cash flow analysis results but not high end results;[51] using forecasted bond yields rather than actual bond yields;[52] and including "flotation costs" from AES Ohio's parent, AES Corp., which are not attributable to AES Ohio specifically.[53] Staff improperly used historical yields on U.S. Treasury Bonds, going back more than fifteen years, rather than yields on *current* bonds, which results in an improperly high cost of equity.[54] In response, Staff simply states that it "believes that a larger sample of previous interest rates is more applicable."[55]

If anything, even Staff's conclusions *overstate* the ROE AES Ohio is entitled to. AES Ohio's risk is significantly lowered by the significant amounts of guaranteed cost recovery it possesses. AES Ohio faces less risk than comparable regulated companies because of its many riders and its COVID-19 deferral authority.[56] For example, the Rate Stability Charge (RSC) alone

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[49] AES Ohio Brief at 35-36.

[50] *Id.*, *citing* Company Ex. 38 (McKenzie Testimony) at 7-8.

[51] Walmart Brief at 5, *citing* Tr. Vol. II at 470-73 (McKenzie); OCC Brief at 47, *citing* OCC Ex. 2 (Walters Testimony) at 52-53.

[52] Walmart Brief at 5, *citing* Tr. Vol. III at 480-81 (McKenzie).

[53] Walmart Brief at 5, *citing* Tr. Vol. III at 477 (McKenzie); OCC Brief at 55-56, *citing* OCC Ex. 2 (Walters Testimony) at 66-67.

[54] IEU Brief at 6, *citing* Tr. Vol. V at 1026-27.

[55] Staff Brief at 21 *citing* Staff Ex. 2 (Buckley) at 7 (quotations omitted).

[56] OMAEG Brief at 5; Kroger Brief at 6-7; IEU Brief at 7.

provides AES Ohio with up to $79 million annually.[57] This rider represents an amount equivalent to more than 25% of Staff's proposed revenue requirement. While Staff claims that "the overall risk of a company is examined," it did not provide analysis as to how these riders and the significant, guaranteed cost recovery they provide impact AES Ohio's risk.[58]

Overall, the ROE proposed by AES Ohio is neither fair nor reasonable, and, in fact, it is far in excess of the norm. Even the range proposed by Staff falls on the high end of national trends. According to Walmart, "[the] national average ROE for distribution-only utilities like AES Ohio is even lower at 9.28 percent."[59] AES Ohio's unreasonable and unfair proposed ROE would be the single highest cost of equity awarded to a distribution-only utility at any time since 2018.[60] Furthermore, AES Ohio already has the highest ROE awarded to distribution-only utilities in that time frame. The highest ROE in that time frame, besides the one AES Ohio requests in its Application, is 9.9999%, which AES Ohio received in its last distribution rate case.[61] As such, the Commission should reject the unfair and unreasonable ROE and ROR proposed by AES Ohio and adopt an ROE and ROR on the lower end of that proposed by Staff.

2. AES Ohio's proposed revenue requirement is excessive, unjust, and unreasonable and should be rejected.

As demonstrated above, the ROE and ROR proposed by AES Ohio are unreasonable and unfair, and thus, result in an excessive revenue requirement. Furthermore, the revenue requirement proposed by AES Ohio is also excessive, unjust, and unreasonable due to the improper inclusion

[57] *See* OCC Brief at 17.

[58] Staff Brief at 21.

[59] Walmart Brief at 4-5, *citing* Walmart Ex. 1 (Kronauer Direct) at 9.

[60] Walmart Brief at 3, *citing* Walmart Ex. 1 (Kronauer Direct) at 7.

[61] Walmart Brief at 3, fn.8, *citing* Walmart Ex. 1 (Kronauer Testimony) at Ex. AJK-3, page 1.

of several costs in rate base which should be excluded. AES Ohio's post-hearing brief fails to present any reasonable argument for the inclusion of such improper costs.

First, AES Ohio attempts to expand its baseline vegetation management costs included in base distribution rates to $30 million annually from the current baseline of $15.7 million annually.[62] These expanded costs did not occur in the test year.[63] Several parties, including OMAEG, objected to this.[64]

Although OMAEG does not believe that AES Ohio has justified increasing the current baseline for vegetation management expense, Staff's recommended increase is a more reasonable allowance for vegetation management expenses:

> [A] vegetation management expense baseline of $17.5 million [is] prudent and reasonable. The recommended amount is higher than the current baseline of $15.7 million. Through the course of the Staff Report investigation, Staff's view is that the Company did not support its claim that $30 million was necessary.[65]

AES Ohio has not "supported its claim that $30 million was warranted."[66] AES Ohio failed to present any evidence or analysis as to the proportion of vegetation that it claims 'class jump,' or identified any specific vegetation that will 'class jump,'[67] or to any necessary increase in costs that might result from this alleged 'class jumping' if its proposal is not granted.[68] However, Staff nonetheless "recognized the need to raise the vegetation baseline" and recommended a lower, more

[62] *See* Staff Brief at 25-26.

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

[64] OMAEG Brief at 10-11; Kroger Brief at 10; OCC Brief at 26-32; Staff Brief at 25-27.

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

[66] Staff Brief at 25, *citing* Staff Ex. 9 (Lipthratt Testimony) at 5.

[67] Tr. Vol. III at 686-87 (Vest).

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

reasonable, increase.[69] The Commission should reject AES Ohio's unsupported demand for a higher increase to the baseline.

AES Ohio also seeks to include improper labor costs in rate base. AES Ohio incorrectly requests inclusion of financial bonuses in future rate base additions, and inclusion of 75% of short-term bonuses (STC) and 100% of long-term bonuses (LTC) in base rates.[70] AES Ohio alleges that because compensation is "consistent with market rates and was thus prudent," this "should be the end of the analysis."[71] AES Ohio believes that this should be the end of the analysis because it cannot provide any further analysis to support its claims. Even AES witness Buchanan agrees that salaries should not be tied to the market rate if the market rate exceeds the cost of service.[72]

As Staff aptly stated, "while incentive compensation for reliability and safety are reasonable, it is unreasonable for financial metrics in which shareholders are the primary beneficiaries."[73] Therefore, "consistent with Staff practices and Commission rulings in prior rate cases, Staff removed bonuses and incentive pay related to financial metrics."[74] Such incentive compensation primarily benefits shareholders, because if the company does not meet the applicable metrics, then AES Ohio still collects the full amount from customers, despite not paying the bonuses.[75] AES Ohio admits that "cost savings go to shareholders in the short term," but argues that "long term, sustained costs [sic] savings benefit customers."[76] However, these savings will

[69] Staff Brief at 25.

[70] AES Ohio Brief at 28, 46.

[71] AES Ohio Brief at 28.

[72] Tr. Vol. I at 176-77 (Buchanan).

[73] Staff Brief at 25.

[74] Staff Brief at 16, *citing* Staff Ex. 4 (Crocker Testimony) at 5. .

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

[76] AES Ohio Brief at 29.

only accrue to customers when AES Ohio files a new rate case—which it is unlikely to do if it is profitable, and has, in fact, only done three times over the past three decades.

AES Ohio's post-hearing brief also failed to support its attempts to include recovery of expenses related to the audit of AES Ohio's Distribution Investment Rider (DIR) in base distribution rates as proposed in its Application.[77] Staff recommended excluding DIR audit costs from base distribution rates, which OMAEG supported.[78] Staff noted that the Staff Report originally authorizing recovery of DIR audit costs "specifically states that the audit costs are to be recovered in the [DIR]."[79] The Commission did not modify that requirement.[80] If the DIR no longer exists, then the recovery mechanism authorized is no longer available, and AES, therefore, cannot recover the audit costs through base rates.[81] Although AES Ohio attempts to argue 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,"[82] the argument fails. The issue is not cost recovery for "those assets," the issue is cost recovery for audit costs. AES Ohio has not pointed to any authority permitting it to recover the audit costs in base distribution rates.

AES Ohio also seeks to improperly recover costs for an unlawful DSM program through base distribution rates, which several parties objected to.[83] AES Ohio attempts to explain why DSM program costs should be recovered absent statutory permission to recover such costs by

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

[78] OMAEG Brief at 13; Kroger Brief at 11.

[79] Staff Brief at 32.

[80] Staff Ex. 9 (Lipthratt Testimony) at 19.

[81] *See id.* ("When the Company voluntarily reverted to ESP 1, it lost its ability to recover the DIR audit costs.").

[82] AES Ohio Brief at 54, *citing* AES Ohio Ex. 49 (Teuscher Testimony) at 5.

[83] *See* OMAEG Brief at 14-16; Kroger Brief at 8-9; Staff Brief at 28; IEU Brief at 8-12.

arguing that the Commission had previously authorized "energy efficiency programs for Ohio utilities…before the HB 6 mandates were enacted."[84] However, the present statutory framework differs significantly from that time, as the Generally Assembly had not yet specifically mandated those programs to end. As noted by IEU, "Ohio law now prohibits utilities from passing on mandatory costs of energy efficiency programs to all customers."[85] A part from final reconciliation, Ohio law now prevents the Commission from authorizing cost recovery mechanisms for mandatory DSM programs.[86]

Furthermore, even if a DSM program may be lawful in some form, questions regarding such a DSM program should be addressed in a separate proceeding as "a distribution case is not the appropriate method to handle the Company's DSM program."[87] Staff witness Lipthratt explained: ". . . the distribution rate case is not the appropriate vehicle to address DSM customer program expenses."[88]

AES Ohio's post-hearing brief does not present any convincing argument regarding its attempts to include expenses associated with incentive-based compensation, DIR audits, expanded vegetation management programs, and energy efficiency programs in base distribution rates. Furthermore, AES Ohio has also failed to show that the revenue requirement proposed in its Application is lawful or just and reasonable. Therefore, the Commission should reject AES Ohio's request for an increase in base distribution rates that is not lawful, just, or reasonable pursuant to

[84] AES Ohio Brief at 48, *citing* Tr. Vol. IV at 569-73 (Tatham).

[85] IEU Brief at 10, *citing* R.C. 4928.66.

[86] *Id.*

[87] Staff Brief at 28, *citing* Staff Ex. 9 (Lipthratt Testimony) at 10.

[88] Staff Ex. 9 (Lipthratt Testimony) at 10, 31.

R.C. 4909.15 and 4909.18. Instead, only Staff's lower revenue requirement recommendation of $309,216,303, which results in a revenue increase of $64,273,390, should be considered.[89]

B. The customer class allocation proposed by AES Ohio and Staff is reasonable.

Although AES Ohio has failed to meet its burden to demonstrate that its proposed revenue requirement is fair, just, or reasonable, to the extent the Commission authorizes any increase, the Commission should adopt the proposed customer class allocation recommended by AES Ohio and Staff. OCC's proposed allocation, on the other hand, is arbitrary and unreasonable.

As noted by Staff, the "Cost of Service Study filed by the Company is a reasonable indicator of the cost responsibility of each customer class."[90] As noted by OEG, "AES Ohio was the only party to submit a cost-of-service study in this proceeding."[91] Additionally, that study demonstrated significant subsidization from primary and high voltage customers, which the allocation proposed by Staff seeks to remedy.[92]

Based on the study, AES Ohio proposed allocating approximately 66.7% of the base revenue requirement to the residential class, approximately 23.93% to the secondary class, and 7.69% to the primary class.[93] Commission Staff found this allocation to be reasonable "on an equitable and apportioned basis."[94]

OCC alone opposes the reasonable allocation proposed by AES Ohio and Staff.[95] OCC asserts that the Commission "should reject the PUCO Staff's and [AES Ohio's] allocation of base

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

[90] Staff Brief at 36.

[91] OEG Brief at 2.

[92] *Id.*, *citing* Staff Ex. 1 (Staff Report) at 26-27.

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

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

[95] OEG Brief at 2; *see also* OMAEG Brief at 17-18; OHA Brief at 2; Kroger Brief at 18-20.

distribution revenue because it is too high."[96] However, OCC did not perform its own cost-of-service study, or attempt to quantify how the non-residential customer classes would divide the non-residential revenue requirement.[97] OCC instead made its own arbitrary conclusions based on income levels in Dayton during the COVID-19 pandemic.[98]

Since OCC's proposed allocation is arbitrary and unreasonable, while AES Ohio's and Staff's proposed allocation is based on the cost-of-service study, and since the Commission considers cost-of-service studies when setting utility rates,[99] the Commission should reject the proposed revenue requirement allocation proposed by OCC and use that proposed by AES Ohio and Staff.

C. The Commission should stay the implementation of any authorized rate increase during the pendency of the stipulated rate freeze.

Although AES Ohio has not met its burden to demonstrate that it is entitled to the increase to base distribution rates that it requests in its Application, to the extent the Commission believes a lower rate increase is warranted, AES Ohio is not authorized to implement any such increase at this time. According to the express terms of ESP I that AES Ohio reverted to, AES Ohio agreed to a rate freeze, and is prohibited from raising its base distribution rates until such time as it implements a new electric security plan. Regardless of whatever rate increase AES Ohio may be entitled to, the Commission has held that the "implementation of any rate changes in the case may, subject to the remaining outstanding legal arguments of the parties, be stayed as part of [the

[96] OCC Brief at 65.

[97] OMAEG Brief at 16-17, *citing* Tr. Vol. IV at 823-24 (Fortney); IEU Brief at 2-3.

[98] OCC Ex. 4 (Fortney Testimony) at 6.

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

Commission's] determination in this case."[100] OMAEG,[101] Kroger,[102] IEU,[103] OHA,[104] OCC,[105] and Staff[106] each explained that the stipulated rate freeze was a term of ESP I, and that since the Commission extended ESP I beyond the original termination date, the stipulated rate freeze remains in effect, and bars implementation of any increase to base distribution rates.

AES Ohio, in turn, attempts to argue that the stipulated rate freeze, which it knowingly agreed to, is now somehow unlawful. In doing so, AES Ohio presents several arguments, including: that the electric security plan statute did not authorize the stipulated rate freeze, and so the stipulated rate freeze is not part of ESP I and is unlawful;[107] that the intervenors waived the right to assert the stipulated rate freeze;[108] and that the stipulated rate freeze would harm AES Ohio.[109] None of these arguments are persuasive, and each should be rejected for the reasons stated herein.

AES Ohio, ultimately, faces a simple obstacle of its own making: under the terms of ESP I, it cannot implement an increase to its base distribution rates.[110] The solution, however, is also simple: AES Ohio can either file an emergency rate case, or it can implement a new electric security plan. But instead of making one of these filings, AES unlawfully and unreasonably seeks

[100] Entry at ¶ 20 (Oct. 20, 2021).

[101] OMAEG Brief at 18-25.

[102] Kroger Brief at 11-16.

[103] IEU Brief at 1-3.

[104] OHA Brief at 2-3.

[105] OCC Brief at 12-17.

[106] Staff Brief at 3-9.

[107] AES Ohio Brief at 6-13, 21-22.

[108] AES Ohio Brief at 13-21.

[109] AES Ohio Brief at 22-27.

[110] Company Ex. 69 (ESP I Stipulation) at ¶ 18.

to retain the benefits of the ESP I Stipulation while absolving itself of any of its own obligations to comply with the stipulated rate freeze.

First, AES Ohio attempts to contort the plain language of the electric security plan statute to allege the stipulated rate freeze is unlawful.[111] AES Ohio claims that "an SSO includes '[o]nly' those terms 'authorized in accordance with' the ESP statute."[112] AES asserts that since the statute is "silent" on the subject of rate freezes, the stipulated rate freeze is not a lawful term. However, the words "those terms" do no actually appear in the statute; AES Ohio inserts them in an effort to obscure the true meaning of the statute. In reality, the statute reads: "Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section."[113] According to a plain reading of the statute, an ESP can contain terms as long as those terms do not violate any applicable statute. The statute does not require that each "term" is approved pursuant to the electric security plan statute, as AES Ohio falsely claims.

However, even if this were true, and AES Ohio agreed to a term that AES Ohio deems to be unlawful, then the ESP I Stipulation must be voided in its entirety. No rights can arise for either party from an illegal contract or a contract executed in violation of public policy.[114] Furthermore, the terms of the ESP I Stipulation are clearly intended to be inseparable and therefore non-

[111] AES Ohio Brief at 1-2.

[112] *Id.* (citations omitted).

[113] R.C. 4928.141(A).

[114] *Mid-Ohio Mech., Inc. v. Eisenmann Corp.,* Fifth Dist. Nos. 07 CA 000035, 08 CA 00012, 2009-Ohio-5804 (Nov. 2, 2009), at ¶ 72; *Snyder v. Snyder*, 170 Ohio App.3d 26, 2007-Ohio-122, at ¶ 32 (11th Dist.); *Langer v. Langer,* 123 Ohio App.3d 348, 354, 704 N.E.2d 275 (1997) ("Courts of law and courts of equity will decline to enforce obligations created by contract if the contract is illegal or the consideration given for it is illegal, immoral, or against public policy."); *Martineau v. Gresser*, 182 N.E.2d 48, 57, 88 Ohio Law Abs. 550 (1962); *see also Ohio ex rel. Laskey et al. v. Bd. of Education of Perrysburg*, 35 Ohio St. 519, 527 (1880) ("the promise being supported by two considerations, one lawful, the other unlawful, is an entirety based upon both, and can not be apportioned, and it is against public policy to enforce a promise so supported").

severable.[115] Therefore, if AES Ohio asserts the ESP I Stipulation is based on illegal or unlawful consideration, then the ESP I Stipulation as a whole is void and unenforceable, and AES Ohio retains no rights under the Stipulation, including the right to operate under its current ESP (i.e., ESP I) and receive benefits thereunder.

Moreover, the plain text of the statute authorizing utilities to implement electric security plan states that an electric security plan can address base distribution rates:

> 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.[116]

This statute makes it clear that the stipulated rate freeze is a permissible, statutorily authorized term of ESP I. Contrary to AES Ohio's assertions, the text of this statute is explanatory and permissive, rather than restrictive. The statute is clear that the electric security plan may address "provisions regarding the utility's distribution service."[117] The remaining terms—a

[115] Company Ex. 69 (ESP I Stipulation) at ¶ 34 ("This Stipulation is a consensus among the Signatory Parties of an overall approach to rates… As with such Stipulations reviewed by the Commission, the willingness of Signatory Parties to sponsor this document currently is predicated on the reasonableness of the Stipulation taken as a whole.); *id.* at ¶ 36 ("The Parties recommend that the Commission find that extending DP&L's rate plan through December 31,2012 is reasonable because the rate plan's pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate."); *id.* at ¶ 37 ("This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification.").

[116] R.C. 4928.143(B)(2)(h) (emphasis added).

[117] *Id*.

decoupling mechanism, incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility—clearly address the issues of "single issue ratemaking" denoted by the statute, which are generally prohibited by Ohio law. A distribution rate freeze, on the other hand, is plainly allowed by Ohio law, and thus authorized by the statute, as it is a provision "regarding the utility's distribution service."[118]

The Commission and the Supreme Court of Ohio have both affirmed the lawfulness of stipulated distribution rate freezes, including those entered into by AES Ohio's predecessor, the Dayton Power & Light Company (DP&L) absent specific statutory authority. For example, following the end of the market development period in Ohio and the termination of DP&L's statutorily mandated market development plan, DP&L entered into a stipulation to create a "rate stabilization plan" from 2005-2008.[119] The plan, unlike the previous market development plan and the subsequent transition plan[120] and electric security plan, was not specifically mandated or authorized by statute.[121] This stipulation included a rate freeze.[122] The Supreme Court of Ohio, at DP&L's urging, upheld the stipulation, the rate stabilization plan, and the rate freeze when challenged.[123] The Commission has also subsequently authorized base distribution rate freezes.[124]

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[118] R.C. 4928.143(B)(2)(h).

[119] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (Sept. 2, 2003); *see also* R.C. 4928.01(A)(17) and 4928.40.

[120] *See* R.C. 4928.31.

[121] *Id.*

[122] *See id.*, Stipulation and Recommendation (May 28, 2003), at ¶ IX.C ("DP&L's distribution rates and charges, as stated in tariff sheets set forth in Attachment B, will remain frozen at current levels throughout the RSP subject to the adjustments permitted in the ETP Stipulation.").

[123] Co*nstellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530 (2004).

[124] *In the Matter of the Application of Ohio Power Company for Approval of Line Extension Tariff Modifications*, 08-65-EL-ATA, Finding and Order (Apr. 16, 2008); *In the Matter of the Application of Dayton Power and Light Company for Approval of Tariff Changes Associated With a Request to Implement a Storm Cost Recovery Rider*, 05-1090-EL-ATA, Entry on Rehearing (Aug. 30, 2006).

It is clear, therefore, contrary to AES Ohio's assertions,[125] that the Commission and the stipulating parties are free to implement a distribution rate freeze.

Second, AES Ohio asserts that the stipulated rate freeze would be unlawful since AES Ohio "has a constitutional right to compensatory rates," and implementing the rate freeze would be confiscatory,[126] and would violated R.C. 4909.15.[127] However, under Ohio and federal law, the stipulated rate freeze that AES Ohio voluntarily agreed to is not confiscatory, because AES Ohio agreed to the freeze and has access to mechanisms to increase its rates, and its rates are not so unjust as to destroy the value of the property for all the purposes for which it was acquired under the existing circumstances.

A confiscatory rate is one that violates the Fifth and Fourteenth Amendments to the Constitution of the United States.[128] The Due Process Clause of the Fifth Amendment requires a mechanism through which a regulated utility may challenge the imposition of rates which may be confiscatory.[129] Where a utility possesses a mechanism to raise its rates, or where rates as a whole are not "'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 the owner of property without due process of law'" the rates are not confiscatory.[130] In turn, the Due Process Clause only "requires a mechanism through which a regulated utility may challenge the imposition of rates which may be

[125] AES Ohio Brief at 7-8.

[126] AES Ohio Brief at 2-3, 9-10, *citing Duquesne Light Co. v. Barasch,*488 U.S. 299, 307-308, 109 S.Ct. 609, *and Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm*., 262 U.S. 679, 690, 43 S.Ct. 675 (1923).

[127] *Id.* at 21-22.

[128] *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 591 (1896).

[129] *Michigan Bell Telephone Company v. Engler*, 257 F.3d 587, 593 (6th Cir. 2001).

[130] *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 906, 918 (S.D.Ohio 2004), *citing Covington & L. Turnpike Road Co. v. Sandford,* 164 U.S. 578, 597, (1896).

confiscatory."[131] Moreover, "[if] the total effect of the rate order cannot be said to be unreasonable," then rates imposed by the order are not confiscatory.[132]

Here, AES Ohio has mechanisms to increase the very rates to which it agreed. Pursuant to the stipulated rate freeze, AES Ohio can still "seek emergency rate relief pursuant to Section 4909.16, Revised Code."[133] AES Ohio also remains free to file and implement a new electric security plan to eliminate the stipulated rate freeze. Furthermore, AES Ohio willingly entered into the rate freeze when it first stipulated to it, and later each time it reverted to its current ESP I.

Additionally, due to the presence of riders and other forms of guaranteed cost recovery, AES Ohio's revenue in its entirety does not threaten its financial stability. The Commission must consider "the total effect" of the rate order, which includes guaranteed forms of cost recovery. These rates overall are not financially harmful to AES Ohio. If they were, AES Ohio would presumably not have agreed to the rates or agreed to revert back to ESP I that included those rates. AES Ohio could also file an emergency rate case, as it is entitled to under the stipulated rate freeze. AES Ohio chooses instead to attempt to remove the stipulated rate freeze from ESP I because it seeks to retain the most beneficial parts of its agreement while avoiding its own obligations under that same agreement.

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[131] *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 593 (6th Cir. 2001).

[132] *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 617 (1989); *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 920-21 (S.D.Ohio 2004), ("If the combined effect of all aspects of the Restructuring Act provides Mon Power with a rate which is not confiscatory, the rate freeze is not unconstitutional. Again, the PUCO is in a much better position to weigh and analyze all component parts of the Restructuring Act and to determine the overall effect on revenues by the Plaintiff following enactment."); *see also In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Monongahela Power Co.*, Case No. 04-880-EL-UNC, Opinion and Order (Dec. 8, 2004) (a rate freeze was not confiscatory based on the utility's overall revenue).

[133] Company Ex. 69 (ESP I Stipulation) at ¶ 18.

Third, AES Ohio dedicates a significant portion of its brief arguing that the intervenors waived the right to assert the stipulated rate freeze.[134] Once again, AES Ohio's convoluted argument falls to a simple counterpoint: the intervenors have not yet had the opportunity to assert the stipulated rate freeze.

AES Ohio has never raised its rates while operating under any version of ESP I, and therefore, the stipulated rate freeze and arguments raising such have not been applicable until now. As noted by Staff, the history of the applicable ESP and stipulated rate freeze "is long, spanning over ten years, includes three separate ESPs, and two reversions back to the provisions, terms, and conditions of AES's ESP I."[135] In order to clarify these convoluted events, Staff created a timeline, which demonstrates when AES Ohio was operating under which electric security plan, and when AES Ohio sought and obtained increases to base distribution rates.[136]

Despite AES Ohio's attempts to confuse the issue, the timeline provided by Staff makes it clear that AES Ohio never implemented an increase in base distribution rates while operating under any version of ESP I.[137] Additionally, AES Ohio is in sole control of when it files and withdraws various electric security plans, giving it the opportunity to operate under a new electric security plan until such time as it obtains an increase in base distribution rates.[138]

As such, the intervenors have not yet had the opportunity to raise the stipulated rate freeze because such provision of ESP I has not been implicated. While AES Ohio has operated under

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[134] AES Ohio Brief at 13-21.

[135] Staff Brief at 4.

[136] Staff Brief at 5.

[137] *Id.* at 6-9.

[138] *Id.* at 8 ("The history of AES Ohio's ESPs is important because AES Ohio has been in control of when it filed ESPs and has also made the decision to withdrawal from ESPs II and III and revert back to the terms and conditions of ESP I.").

ESP I during the pendency of an application for an increase in base distribution rates, it has never implemented an increase while operating under ESP I. Moreover, the Commission has ruled that ESP I "does not bar DP&L from filing a distribution rate case in order to prepare for implementing the rates at the conclusion of the rate freeze."[139] Instead, the stipulated rate freeze would bar AES Ohio from *implementing* an increase to base distribution rates at this time while continuing to operate under ESP I.[140] Since the Commission has ruled the stipulated rate freeze pertains to the implementation of rates, rather than the adjudication of a rate case, and since AES Ohio has never implemented an increase to base distribution rates while operating under any version of ESP I, the intervenors have not waived the authority to raise this issue.

Lastly, AES Ohio argues that upholding the stipulated rate freeze would impair its ability to provide reliable service. This argument is flawed for several reasons. As noted by OCC, AES Ohio is required to provide safe, reliable and adequate service.[141] AES Ohio has the capability to revise its budget to do so.[142] Regardless, "the purely legal question of whether AES Ohio is subject to a rate freeze" remains independent of factual considerations.[143] Furthermore, any financial difficulties, to the extent they do exist, are solely the responsibility of AES Ohio and are arguments that extend beyond the costs that may be included in base rates during the established test year.

Moreover, AES Ohio has several options to raise its base distribution rates. As noted by Staff, "AES Ohio has been in control of when it filed ESPs and has also made the decision to

[139] Entry at ¶ 20 (Oct. 20, 2021).

[140] *Id.* ("Accordingly, we conclude that this case is ripe for consideration in spite of the fact that implementation of any rate changes in the case may, subject to the remaining outstanding legal arguments of the parties, be stayed as part of our determination in this case.").

[141] OCC Brief at 16, *citing* R.C. 4905.22.

[142] *Id.* at 16-17, *citing* Tr. Vol. VII at 1489-1537 (Storm).

[143] Walmart Brief at 10.

withdraw from ESPs."[144] Additionally, if it is truly "necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency" then AES Ohio could simply apply for an emergency rate increase pursuant to the stipulated rate freeze.[145] Alternatively, AES Ohio could follow in the footsteps of every other Ohio distribution utility, and simply implement a new electric security plan, thus allowing it to increase its base distribution rates. AES Ohio chooses not to do so because it benefits more from retaining the most favorable parts of ESP I while not respecting its agreement to freeze its base distribution rates while receiving the benefits of ESP I. AES Ohio wants to unlawfully and improperly modify the quid pro quo of the stipulation entered into for ESP I and the bargain it negotiated. The Commission should not allow AES Ohio to hold Ohio consumers hostage with threats of unreliable and unsafe service in order to retain the beneficial aspects of a bargain it no longer desires to honor.

III. CONCLUSION

AES Ohio has not met its burden of proof in this case, and legally cannot implement *any* increase to base distribution rates at this time. The record evidence does not support AES Ohio's proposed rate of return or revenue requirement and resulting rate increase, and does not ensure that such rates are fair, just, and reasonable. As such, the Commission should, at a maximum, only consider an increase to base distribution rates at the lower end of the range proposed by Staff. Any increase should be pursuant to the reasonable allocation methodology recommended by AES Ohio and Staff.

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[144] Staff Brief at 8; *see also* OMAEG Brief at 22 *citing* Tr. Vol. III at 496-97 (McKenzie), Tr. Vol. IV at 723 (Teuscher), *and* Tr. Vol. IV at 804-05 (Forestal); OCC Brief at 17 ("DP&L controls its spending. DP&L controls when it comes in for a rate case. DP&L controls the fact that it withdrew from ESP III and reverted to ESP I. ESP I contains a rate freeze. The PUCO should not permit DP&L to cherry-pick provisions of ESP I because it does not like the rate freeze.").

[145] R.C. 4909.16; *see also* Company Ex. 69 (ESP I Stipulation) at ¶ 18.

Nonetheless, to the extent the Commission believes that a rate increase is warranted at some level, the Commission should follow the recommendations set forth herein to ensure that the rates, charges, schedules, and services approved by the Commission are just and reasonable and lawful for consumers. Further, any rate increase authorized through the rate case process should be stayed until such time as AES Ohio implements a new electric security plan pursuant to the terms of the ESP I Stipulation. The stipulated rate freeze precludes any increase in base distribution rates for the duration of ESP I, which AES Ohio is currently operating under voluntarily.

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 30, 2022 upon the parties of record.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Brief Post-Hearing Reply Brief electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group