

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**POST-HEARING REPLY BRIEF
BY
THE KROGER CO.**

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | LAW AND ARGUMENT | 3 |
| A. | The Stipulated Rate Freeze Prohibits Implementation of Any Increase to Distribution Rates As Long As AES Ohio Operates Under ESP I. | 3 |
| B. | AES Ohio Failed to Meet its Burden to Demonstrate that its Proposed Revenue Requirement is Reasonable and Lawful. | 9 |
| 1. | AES Ohio is Not Entitled to the Unfair and Unreasonable Return on Equity and Rate of Return it Requests. | 10 |
| 2. | AES Ohio Unreasonably and Unlawfully Seeks to Imbed Improper Costs into Base Rates..... | 15 |
| C. | The Commission Should Accept AES Ohio’s Proposal Regarding the Low Load Factor Provision Max Charge Provision. | 18 |
| D. | AES Ohio’s Proposed Allocation is Reasonable..... | 20 |
| III. | CONCLUSION..... | 22 |

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I. INTRODUCTION

The Dayton Power & Light Company, d/b/a AES Ohio, Inc., (AES Ohio) seeks to increase its base distribution rates by \$120,759,887, which amounts to an increase of approximately 50.9% over current base distribution revenues.¹ AES Ohio filed its application for an increase in electric distribution rates on November 30, 2020 (Application) with the Public Utilities Commission of Ohio (Commission). When the Commission considers such an application to increase base distribution rates, “the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.”² Notwithstanding its supporting testimony, evidence presented during the evidentiary hearing, and its post-hearing brief,³ AES Ohio has *failed* to meet its burden to demonstrate that its requested increased rates are just and reasonable.

¹ See Staff Ex 1 (Staff Report) at 28.

² R.C. 4909.19(C).

³ Initial Post-Hearing Brief of AES Ohio (Mar. 4, 2022) (AES Ohio Brief).

In addition to AES Ohio, The Kroger Co. (Kroger),⁴ the Ohio Manufacturers' Association Energy Group (OMAEG),⁵ Commission Staff,⁶ Industrial Energy Users-Ohio (IEU),⁷ Walmart Inc. (Walmart),⁸ One Energy Enterprises, Inc.,⁹ the Ohio Hospital Association (OHA),¹⁰ Direct Energy,¹¹ the Office of the Ohio Consumers' Counsel (OCC),¹² the City of Dayton,¹³ Ohio Energy Group (OEG),¹⁴ and Interstate Gas Supply, Inc. (IGS)¹⁵ each filed post-hearing briefs. As highlighted in those briefs, the manifest weight of the evidence does not show that the rate of return is fair and reasonable, or that AES Ohio's requested revenue increase is just and reasonable.

As such, the Commission should deny AES Ohio's Application to increase its base distribution rates by over 50%. Furthermore, even if the Commission deems that any increase in base distribution rates to AES Ohio is necessary, the Commission should bar AES Ohio from implementing that rate increase until such time as it implements a new electric security plan (ESP). The signatory parties in Case Nos. 08-1094-EL-SSO, et al., which created AES Ohio's first ESP (ESP I), agreed to a lawful stipulated rate freeze for the duration of ESP I. The Commission subsequently allowed AES Ohio to operate under ESP I beyond the agreed-upon sunset date

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

⁵ Post-Hearing Brief Of The Ohio Manufacturers' Association Energy Group (Mar. 4, 2022) (OMAEG Brief).

⁶ Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Mar. 4, 2022) (Staff Brief).

⁷ Initial Brief of Industrial Energy Users-Ohio (Mar. 4, 2022) (IEU Brief).

⁸ Initial Post-Hearing Brief of Walmart Inc. (Mar. 4, 2022) (Walmart Brief).

⁹ Initial Post Hearing Brief on behalf of One Energy Enterprises, Inc. (Mar. 4, 2022) (One Energy Brief).

¹⁰ Initial Post Hearing of Ohio Hospital Association (Mar. 4, 2022) (OHA Brief).

¹¹ Initial Post-Hearing Brief of Direct Energy Business, LLC and Direct Energy Services, LLC (Mar. 4, 2022) (Direct Brief).

¹² Consumer Protection Brief by Office of the Ohio Consumers' Counsel (Mar. 4, 2022) (OCC Brief).

¹³ Initial Post-Hearing Brief of City of Dayton (Mar. 4, 2022) (Dayton Brief).

¹⁴ Post-Hearing Brief of Ohio Energy Group (Mar. 4, 2022) (OEG Brief).

¹⁵ Initial Post-Hearing Brief of Interstate Gas Supply, Inc. (Mar. 4, 2022) (IGS Brief).

(December 31, 2012) and receive the benefits of all the terms, 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 any increase in its base distribution rates.

II. LAW AND ARGUMENT

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

As demonstrated in the initial briefs filed by Kroger,¹⁶ Commission Staff,¹⁷ and others,¹⁸ regardless of what rates the Commission ultimately deems just and reasonable in this case, AES Ohio cannot implement *any* increase to its base distribution rates at this time. As part of the ESP to which AES Ohio and other parties stipulated, AES Ohio agreed to freeze its base distribution rates for the duration of ESP I.¹⁹ AES Ohio and the Commission subsequently extended this rate freeze when the Commission allowed AES Ohio to voluntarily revert back to ESP I beyond its original termination date and reap the associated benefits of ESP I.²⁰ AES Ohio has voluntarily reverted to ESP I on two separate occasions.²¹ AES Ohio, despite dedicating an extensive portion of its own brief to the issue, fails to present any reasonable or compelling argument as to why the stipulated rate freeze of ESP I should not continue to apply.²²

¹⁶ Kroger Brief at 11-16.

¹⁷ Staff Brief at 3-9.

¹⁸ OMAEG Brief at 18-25; IEU Brief at 1-3; OHA Brief at 2-3; OCC Brief at 12-17.

¹⁹ Company Ex. 69 (ESP I Stipulation) at ¶ 18.

²⁰ See, e.g., *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); *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).

²¹ *Id.*

²² AES Ohio Brief at 1-26.

For example, AES Ohio falsely claims the stipulated rate freeze is unlawful based on an intentional misreading of the ESP statute.²³ According to AES Ohio, the statute provides that “an SSO includes ‘[o]nly’ those terms ‘authorized in accordance with’ the ESP statute.”²⁴ This is an incorrect reading of the statute based on the arbitrary insertion of the words “those terms” which do not appear in the actual statute: “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.”²⁵ Contrary to AES Ohio’s claims, the statute does not bar inclusion of “terms” in an ESP which are not expressly authorized by the statute.

In any event, the ESP statute does expressly allow parties to provide for distribution issues, such as rate freezes, in an ESP. The statute provides:

*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.*²⁶

AES Ohio argues that the remainder of the paragraph is “silent” on rate freezes,²⁷ and that since the statute does not specifically mention rate freezes, the statute prohibits them. However, AES Ohio is misunderstanding this statute. Those terms that follow the phrase “provisions

²³ AES Ohio Brief at 1-2.

²⁴ *Id.* (citations omitted).

²⁵ R.C. 4928.141(A).

²⁶ R.C. 4928.143(B)(2)(h) (emphasis added).

²⁷ *See* AES Ohio Brief at 7-8.

regarding the utility's distribution service” which are specifically named in this paragraph²⁸ are all “provisions regarding single issue ratemaking.” Since single issue ratemaking is generally disfavored, an explicit authorization is necessary. In fact, the statute specifically notes that it authorizes these terms “notwithstanding any provision of Title XLIX of the Revised Code to the contrary.”²⁹ These terms are not explicitly named in the statute because they are the only terms allowed in an ESP; they are explicitly named because they require specific authorization.

A distribution rate freeze, on the other hand, is plainly allowed by Ohio law, and thus authorized by the statute. It does not require specific authorization, as it is a provision “regarding the utility's distribution service.”³⁰ Extensive precedent from the Commission and the Supreme Court of Ohio supports the lawfulness of stipulated distribution rate freezes, even absent specific statutory authority. For example, AES Ohio’s predecessor, the Dayton Power & Light Company (DP&L) and other parties agreed to a stipulation to create a “rate stabilization plan” from 2005-2008, which included a rate freeze. The rate stabilization period followed the end of the statutorily-mandated market development plan.³¹ The subsequent transition plan³² and electric security plan³³ were also statutorily mandated. The rate stabilization plan, however, was not.

²⁸ R.C. 4928.143(B)(2)(h) (“a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility”).

²⁹ *Id.*

³⁰ *Id.*

³¹ *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); *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.”); *see also* R.C. 4928.01(A)(17) and 4928.40.

³² *See* R.C. 4928.31.

³³ *Id.*

Despite the lack of specific statutory authorization, the Supreme Court of Ohio, at AES Ohio's urging, upheld the stipulation, the rate stabilization plan, and the rate freeze.³⁴ The Commission also has permitted parties to enter into stipulated base distribution rate freezes.³⁵ Despite AES Ohio's arguments,³⁶ Ohio law and Commission precedent plainly authorize distribution rate freezes.

In addition to being lawful under Commission and Supreme Court of Ohio precedent, no laws prohibit stipulated rate freezes. AES Ohio argues that a stipulated rate freeze may violate its "constitutional right to compensatory rates," the prohibition against confiscatory rates,³⁷ or R.C. 4909.15.³⁸ However, none of these arguments are correct or persuasive, particularly given the fact that AES Ohio voluntarily entered into the stipulated rate freeze and is now claiming the very rates it agreed to in ESP I are somehow confiscatory.

Moreover, a rate freeze is not confiscatory 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.³⁹

³⁴ *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530 (2004).

³⁵ *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).

³⁶ AES Ohio Brief at 7-8.

³⁷ See 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).

³⁸ *Id.* at 21-22.

³⁹ *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); 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).

Despite the stipulated rate freeze, AES Ohio still has several mechanisms to obtain higher rates. The ESP I Stipulation still allows AES Ohio to “seek emergency rate relief pursuant to Section 4909.16, Revised Code,”⁴⁰ and to eliminate the rate freeze by terminating ESP I. Nor does AES Ohio’s revenue in its entirety threaten its financial stability, due to several forms of guaranteed cost recovery. If AES Ohio were truly in financial peril, it would have no issue filing and obtaining emergency rate relief or seeking to establish a new ESP. Instead, AES Ohio seeks an unlawful distribution rate increase to continue profiting from riders that give it guaranteed cost recovery.

Furthermore, the intervenors have not waived any right to assert that the stipulated rate freeze remains in effect.⁴¹ They have never had an opportunity to make such an argument based on the simple fact that AES Ohio has never raised its rates while operating under any version of ESP I. Commission Staff correctly explained the applicable ESP and stipulated rate freeze, stating that it “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.”⁴²

Commission Staff’s brief and timeline demonstrates that AES Ohio never implemented an increase in base distribution rates while operating under any version of ESP I.⁴³ 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

⁴⁰ Company Ex. 69 (ESP I Stipulation) at ¶ 18.

⁴¹ AES Ohio Brief at 13-21.

⁴² Staff Brief at 4-5.

⁴³ *Id.* at 6-9.

in base distribution rates.⁴⁴ Nor can AES argue that the intervenors should have raised the issue when a rate case was filed, since the Commission has ruled that AES Ohio’s current 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.”⁴⁵ The rate freeze would bar AES Ohio from *implementing* an increase to base distribution rates,⁴⁶ but not applying for one to take effect at the end of the rate freeze, and AES Ohio has never attempted to implement an increase in rates under the rate freeze. Therefore, the intervenors have not waived the authority to raise this issue.

Lastly, AES Ohio improperly argues that upholding the stipulated rate freeze would impair its ability to provide reliable service. Since the duty to provide safe, reliable and adequate service is a legal obligation, AES Ohio would still be compelled to do so⁴⁷ and would simply revise its budget to meet that obligation.⁴⁸ Moreover, forward looking financial integrity considerations are arguments are neither relevant nor appropriate to “the purely legal question of whether AES Ohio is subject to a rate freeze.”⁴⁹ At any rate, AES Ohio is solely responsible for any financial difficulties that might exist.

And again, even assuming these financial difficulties do exist, AES Ohio has several methods to raise its rates which it simply refuses to pursue. “AES Ohio has been in control of

⁴⁴ *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.”).

⁴⁵ Entry at ¶ 20 (Oct. 20, 2021).

⁴⁶ *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.”).

⁴⁷ OCC Brief at 16, *citing* R.C. 4905.22.

⁴⁸ *Id.* at 16-17, *citing* Tr. Vol. VII at 1489-1537 (Storm).

⁴⁹ Walmart Brief at 10.

when it filed ESPs and has also made the decision to withdraw from ESPs.”⁵⁰ Every other Ohio utility has simply implemented new ESPs instead of reverting to previous ESPs to retain favorable provisions while also seeking to avoid their own obligations under those ESPs.

AES Ohio may also file an emergency rate case in the event it is “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.”⁵¹ Instead, AES Ohio seeks to maintain its guaranteed cost recovery under riders while avoiding its own obligations. The Commission should reject AES Ohio’s unreasonable and unlawful efforts to do so.

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

While Kroger continues to believe, as demonstrated above, that the implementation of any increase to base distribution rates is unlawful under the stipulated rate freeze of ESP I, any increase eventually authorized must be just and reasonable. The increases requested by AES Ohio are not. As Kroger noted in its initial post-hearing brief, in “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.”⁵² The Commission must also determine that the rate of return requested by the utility is fair and reasonable.⁵³ If the Commission determines otherwise, it

⁵⁰ 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.”).

⁵¹ R.C. 4909.16; *see also* Company Ex. 69 (ESP I Stipulation) at ¶ 18.

⁵² Kroger Brief at 3, *citing* R.C. 4909.19(C).

⁵³ R.C. 4909.15(A)(2).

may instead establish just and reasonable rates, fares, charges, or services to be rendered, charged, demanded, exacted, or collected.⁵⁴

Kroger,⁵⁵ OMAEG,⁵⁶ OCC,⁵⁷ IEU,⁵⁸ OHA,⁵⁹ Walmart,⁶⁰ and Staff⁶¹ each outlined in their post-hearing briefs how AES Ohio has failed to meet this burden. AES Ohio's own post-hearing brief fails to rebut these arguments and fails to establish that AES Ohio is entitled to the rate of return it requests.

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

In its Application, AES Ohio requests an unfair and unreasonable rate of return (ROR) of 7.71%, which is based on a proposed return on equity (ROE) of 10.5%.⁶² Staff rejected this proposal, and instead recommended a ROR in the range of 7.05% to 7.59%, based on a proposed ROE in the range of 9.28% to 10.29%.⁶³ Staff's proposal is far more reasonable, but still overstates the risk faced by AES Ohio.

Evidence presented by Walmart witness Kronauer demonstrates how unfair and unreasonable AES Ohio's requested ROE is.⁶⁴ AES Ohio's current ROE is already significantly higher than the nationwide average for distribution-only utilities, and is the highest ROE awarded

⁵⁴ R.C. 4909.15(E).

⁵⁵ See Kroger Brief at 3-11.

⁵⁶ See OMAEG Brief at 3-16.

⁵⁷ See OCC Brief at 18-34.

⁵⁸ See IEU Brief at 3-14.

⁵⁹ See OHA Brief at 3.

⁶⁰ See Walmart Brief at 3-7.

⁶¹ See Staff Brief at 18-20, 23-27, 28-33.

⁶² See Staff Ex. 9 (Lipthrott Testimony), Exhibit A (Revised Schedule A-1).

⁶³ *Id.*

⁶⁴ See Walmart Brief at 3-7.

to a distribution-only utility since 2018.⁶⁵ Since then, ROEs approved for distribution-only utilities have declined in Ohio and nationwide.⁶⁶ The national average ROE for distribution-only utilities from 2018 through 2021 is 9.28%.⁶⁷ Despite this, AES Ohio seeks an ROE that is 50 basis points higher than its current ROE, and 122 basis points higher than the national average.⁶⁸ AES Ohio argues that Walmart witness Kronauer did not perform an ROE analysis for AES Ohio,⁶⁹ but that is not the purpose of the testimony. It simply is intended to provide “context of...of authorized ROEs by various state public utility and public service commissions” in Ohio and the United States.⁷⁰

The Commission should reject AES Ohio’s unpersuasive arguments in favor of such a high ROE and ROR. In its brief, AES Ohio alleges that the “Commission should conclude that Mr. McKenzie's testimony is sound, and should approve a 10.5% ROE for AES Ohio.”⁷¹ To support this position, AES Ohio makes the simple argument that “Staff witness Buckley agreed that Mr. McKenzie is a good witness.”⁷² However, as outlined by the various intervening parties, the cost of equity analysis performed by AES Ohio witness McKenzie is replete with errors which create upward biases to intentionally inflate his findings.

⁶⁵ *Id.* at 3, fn.8, *citing* Walmart Ex. 1 (Kronauer Testimony) at 9.

⁶⁶ Walmart Brief at 4.

⁶⁷ *Id.* at 4-5, *citing* Walmart Ex. 1 (Kronauer Testimony) at 9.

⁶⁸ *Id.*

⁶⁹ AES Ohio Brief at 66-67.

⁷⁰ Tr. Vol. V at 976 (Kronauer).

⁷¹ AES Brief at 34.

⁷² *Id.*, *citing* Tr. Vol. V at 987 (Buckley).

For example, AES Ohio witness McKenzie removed low-end discounted cash flow analysis results but not high end results.⁷³ He also included “flotation costs” from AES Ohio’s parent, AES Corp., “even though there is no way to attribute those costs to AES Ohio versus the parent company’s other unregulated lines of business.”⁷⁴ Additionally, AES Ohio witness McKenzie used forecasted bond yields rather than actual bond yields, resulting in higher findings.⁷⁵ As discussed above, AES Ohio does not address these errors besides making the conclusory statement “that Mr. McKenzie’s testimony is sound.”⁷⁶

AES Ohio also attempts to argue that it is entitled to a higher ROE and ROR due to its poor credit rating.⁷⁷ According to AES Ohio, the riskiest utilities, as measured by credit rating, are those with the highest ROEs.⁷⁸ In fact, the evidence shows that the ‘riskiest’ utilities are *not* those with the highest ROEs. Staff noted that the proxy group used in Staff’s ROE analysis consists of those utilities with credit ratings below investment grade,⁷⁹ which would be the ‘riskiest’ comparable utilities as determined by credit rating. However, AES Ohio objects to use of this proxy group because it results in a lower ROE than the unreasonable and unjust amount AES requests.⁸⁰ If the ‘riskiest’ utilities by credit rating really received the highest ROEs, then AES Ohio would not want

⁷³ 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.

⁷⁴ Walmart Brief at 5, *citing* Tr. Vol. III at 477 (McKenzie); *see also* OCC Brief at 55-56, *citing* OCC Ex. 2 (Walters Testimony) at 66-67.

⁷⁵ Walmart Brief at 5, *citing* Tr. Vol. III at 480-81 (McKenzie).

⁷⁶ AES Ohio Brief at 34.

⁷⁷ *See* AES Ohio Brief at 33.

⁷⁸ *Id.*

⁷⁹ Staff Brief at 19, *citing* Staff Ex. 2 (Buckley Testimony) at 5 (“Staff witness Buckley opines that 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 37.70 Mr. Buckley also states that the fact that AES Ohio has been below investment grade bond rating shrinks the pool of comparable companies. Therefore, Staff’s selection of comparable companies is appropriate for the AES Ohio rate case.”).

⁸⁰ *See* AES Ohio Brief at 35-36.

to expand the proxy group to contain utilities with lower ROEs, unless AES Ohio is arguing for a lower ROE than the one it requested.

In addition to conflicting with the objective results of Staff's analysis, AES Ohio's argument also relies on a misrepresentation of testimony submitted by OCC witness Walters.⁸¹ AES Ohio claims that the testimony shows that AES Ohio has a worse credit rating than 90% of comparable utilities, and that the 10% of utilities with the worst credit ratings all received ROEs greater than 9.7%.⁸² This is false. The testimony by OCC witness Walters stated that only 10% of comparable utilities have a worse credit rating than AES Ohio, and that 90% of comparable utilities were awarded ROEs below 9.7%.⁸³ OCC witness Walters never states, however, that the 10% of utilities with the worst credit ratings are the same utilities with the highest ROEs.⁸⁴ AES Ohio improperly attempts to conflate the two groups to confuse and mislead.

Furthermore, credit rating is not the only measure of risk faced by a utility, and AES Ohio exaggerates the overall financial risk it faces. Commission Staff noted that "the overall risk of a company is examined."⁸⁵ The overall risk of the company does not nearly rise to the level AES Ohio claims.

First, as a regulated distribution utility, AES Ohio is the only public utility within its service territory and faces no competition for provision of distribution service to ratepayers. This lack of competition results in a lower risk for AES Ohio.⁸⁶

⁸¹ *Id.*

⁸² *Id.*

⁸³ OCC Ex. 2 (Walters Testimony) at 7-10.

⁸⁴ *Id.*

⁸⁵ Staff Brief at 21.

⁸⁶ Tr. Vol. V at 1030 (Buckley).

Second, AES Ohio's ROE is not actually the determining factor as to whether AES Ohio obtains capital. As Kroger⁸⁷ noted, AES Ohio relies on its parent company, AES Corp., to issue stock.⁸⁸ Therefore "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."⁸⁹ In fact, the higher credit rating of AES Ohio's parent company exerts upwards pressure on AES Ohio's credit rating. AES Ohio Witness Illyes noted "an upgrade that [Standard & Poor's] had made [to the credit rating] at the AES Corporate level...drove an upgrade down at the DP&L/AES Ohio level."⁹⁰ While AES Ohio argues that it needs a higher ROE than that recommended by Staff, AES Ohio's own post-hearing brief does not address this issue.⁹¹

Third, AES Ohio has guaranteed cost recovery. Because of its many riders and its COVID-19 deferral authority, AES Ohio has less financial risk than many comparable utilities.⁹² For example, AES Ohio recovers up to \$79 million annually in guaranteed rates from the nonbypassable Rate Stability Charge (RSC), in addition to the amounts it recovers through base distribution rates.⁹³ While the ROR and ROE recommended by Staff are more reasonable than that recommended by AES Ohio, neither AES Ohio nor Staff provide any analysis as to how these riders and the significant, guaranteed cost recovery they provide impact AES Ohio's risk.⁹⁴

⁸⁷ Kroger Brief at 4-5; *see also* OMAEG Brief at 8.

⁸⁸ Tr. Vol. III at 431 (Illyes); Tr. Vol. III at 506 (McKenzie).

⁸⁹ Tr. Vol. III at 509 (McKenzie).

⁹⁰ Tr. Vol. III at 433 (Illyes).

⁹¹ *See* AES Brief at 33-38.

⁹² OMAEG Brief at 5, Kroger Brief at 6-7, IEU Brief at 7.

⁹³ *See* OCC Brief at 17.

⁹⁴ *See* Staff Brief at 21; *see* AES Ohio Brief at 33-38.

Since AES Ohio, and to a lesser degree, Commission Staff, both overstate the risk faced by AES Ohio, the Commission should authorize an ROR and ROE at the low end of the range proposed by Staff.

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

In addition to the unreasonable and unfair ROR and ROE proposed by AES Ohio, AES Ohio also seeks to improperly imbed certain costs in base distribution rates. AES Ohio does not present any convincing argument as to inclusion of these costs.

Several parties have noted that AES Ohio improperly seeks to include costs for energy efficiency programs in base rates.⁹⁵ Although AES Ohio previously recovered costs for statutorily-mandated energy efficiency and demand-side management (DSM) programs through the Energy Efficiency Rider, rather than through base distribution rates, these programs no longer exist.⁹⁶ The Commission ordered a wind-down of those statutorily-mandated energy efficiency programs beginning September 30, 2020,⁹⁷ with the Energy Efficiency Rider to be set to zero effective January 1, 2021.⁹⁸

AES Ohio argues that the Commission had previously authorized voluntary DSM programs, and that the programs would comply with the policy of the state of Ohio.⁹⁹ However, the Commission has not given AES Ohio permission to restart these programs on a voluntary basis.¹⁰⁰ Furthermore, and importantly, “Ohio law now *prohibits* utilities from passing on

⁹⁵ See Kroger Brief at 8-9; OMAEG Brief at 14-16; Staff Brief at 28; IEU Brief at 8-12; Walmart Brief at 9.

⁹⁶ Tr. Vol. III at 565 (Tatham).

⁹⁷ Tr. Vol. III at 565-66 (Tatham); Tr. Vol. IV at 709-10 (Teuscher); Tr. Vol. VI at 1420 (Lipthrott).

⁹⁸ *Id.*

⁹⁹ AES Ohio Brief at 47-48.

¹⁰⁰ Tr. Vol. IV at 710 (Teuscher).

mandatory costs of energy efficiency programs to all customers.”¹⁰¹ As such, the Commission should not authorize AES Ohio to continue these programs and costs associated with such programs should not be passed on to customers.

AES Ohio also seeks to include unnecessarily high labor costs in base distribution rates, including both long-term compensation (LTC) and short-term compensation (STC) incentive pay, and financial bonuses from future base rate additions.¹⁰² The Commission typically does not allow EDUs to recover LTC or STC through rate base.¹⁰³ However, AES Ohio argues that since incentive pay is consistent with market rates, it is prudent and should be included in rate base.¹⁰⁴

Staff recommended removing 100% of LTC and 75% of STC from rate base,¹⁰⁵ as AES Ohio’s shareholders, rather than ratepayers, are the direct beneficiary of incentive-based compensation.¹⁰⁶ Just because the bonuses are ‘consistent with market rates’ does not mean they should be recovered from customers. The question is not whether AES Ohio can pay these bonuses, it is whether or not it can charge customers for them. As noted by Staff, “while incentive compensation for reliability and safety are reasonable, it is unreasonable to include in rate base incentive compensation for financial metrics in which shareholders are the primary beneficiaries.”¹⁰⁷

¹⁰¹ IEU Brief at 10, *citing* R.C. 4928.66 (emphasis added).

¹⁰² AES Ohio Brief at 28; Tr. Vol. I at 173 (Buchanan); *see also* Staff Ex. 1 (Staff Report) at 15-16.

¹⁰³ Tr. Vol. I at 174 (Buchanan).

¹⁰⁴ *See* AES Ohio Brief at 28 (“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.”).

¹⁰⁵ *Id.*

¹⁰⁶ Staff Ex. 4 (Crocker Testimony) at 5; *see also* Tr. Vol. I at 175 (Buchanan).

¹⁰⁷ Staff Brief at 25.

Furthermore, AES Ohio seeks to recover \$30 million in expanded vegetation management expenses from customers through base distribution rates.¹⁰⁸ Several parties objected to these unnecessary costs, including Commission Staff, who recommended a lower amount.¹⁰⁹ Commission Staff found that a baseline of \$17.5 million was more prudent and reasonable, and that AES Ohio had not “supported its claim that \$30 million was warranted.”¹¹⁰ In its post-hearing brief, AES Ohio did not present any additional analysis as to the proportion of vegetation that it claims will increase costs if its proposal is not granted.¹¹¹ As such, AES Ohio has failed to present sufficient evidence to demonstrate that these costs should be included in base distribution rates.

Similarly, AES Ohio seeks to recover costs for its DIR Compliance Audit.¹¹² Kroger, Commission Staff, and OMAEG each argued against including DIR audit costs in base distribution rates.¹¹³ AES Ohio Witness Teuscher claims that “these costs were incurred as a direct result of AES Ohio's compliance with the Stipulation” and should be recovered in rate base.¹¹⁴ AES Ohio further claims 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.”¹¹⁵

However, AES Ohio never had authority to recover DIR Compliance Audit costs absent the DIR Rider, and the DIR Rider no longer exists. The prior staff report which originally

¹⁰⁸ See Company Ex. 50 at 8 (Vest).

¹⁰⁹ Kroger Brief at 10; OCC Brief at 26-32; OMAEG Brief at 10-11; Staff Brief at 25-27.

¹¹⁰ Staff Brief at 25, *citing* Staff Ex. 9 (Lipthrott Testimony) at 5-6.

¹¹¹ See Tr. Vol. III at 687 (Vest).

¹¹² See Company Ex. 49 (Teuscher Supplemental Testimony) at 5.

¹¹³ OMAEG Brief at 13; Kroger Brief at 11.

¹¹⁴ See Company Ex. 49 (Teuscher Supplemental Testimony) at 5.

¹¹⁵ AES Ohio Brief at 54, *citing* AES Ohio Ex. 49 (Teuscher Testimony) at 5.

authorized recovery of DIR audit costs “specifically states that the audit costs are to be recovered in the [DIR].”¹¹⁶ By voluntarily reverting to ESP I, AES Ohio eliminated the DIR.¹¹⁷ AES has not identified any authority that would allow it to instead recover these costs through base distribution rates.

The post-hearing brief filed by AES Ohio failed to demonstrate that various expenses and costs it proposes to be included in base rates are just and reasonable. As such, the Commission should instead authorize a more just and reasonable revenue requirement.¹¹⁸

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 increase to base distribution rates, or even believe AES Ohio can implement any increase at this time, Kroger does support AES Ohio’s proposed Low Load Factor Provision. AES Ohio seeks to raise the maximum rate charge provision associated with the Low Load Factor Provision.¹¹⁹

By raising the maximum charge rates, fewer customers would pay their rates under the maximum rate provision.¹²⁰ AES Ohio seeks “to reduce the number of customers and the number of bills that take advantage of” the Low Load Factor Provision.¹²¹ As several parties noted, this will decrease subsidization of other customers.¹²²

¹¹⁶ Staff Brief at 32.

¹¹⁷ Tr. Vol. IV at 723 (Teuscher); Tr. Vol. IV at 804-05 (Forestal).

¹¹⁸ See Staff Ex. 9 (Lipthrott Testimony), Exhibit A (Revised Schedule A-1).

¹¹⁹ Tr. Vol. IV at 776 (Teuscher).

¹²⁰ *Id.*

¹²¹ Tr. Vol. IV at 773 (Teuscher).

¹²² Kroger Brief at 18-20; OEG Brief at 3-4; Walmart Brief at 7-8; AES Ohio Brief at 58-59.

While recognizing subsidization concerns, Staff recommends a smaller decrease, and argues that “Staff’s proposal follows a long-standing principle in rate-making – gradualism.”¹²³ Under Staff’s proposal, “the secondary and primary demand rates are going to be higher under the Staff proposal than the Company’s proposal.”¹²⁴

While Kroger has always supported the principle of gradualism, in this case, Staff is not truly implementing gradualism, it is simply implementing a smaller increase.¹²⁵ Staff has not made any recommendations to decrease the Low Load Factor Provision in the future or to phase-in new rates—important components of gradualism.¹²⁶ Staff has not even performed any analysis to determine if Staff would support future increases.¹²⁷

Furthermore, Staff’s proposal does not go far enough. Under AES’s proposal, the number of customers taking service under the Low Load Factor Provision will decrease from 21,000 to approximately 12,000.¹²⁸ This is still a substantial increase over the 4,000 customers who took such service several years ago.¹²⁹ This represented a 500% increase in the short time following AES Ohio’s previous rate case, since the parties inadvertently failed to update the provision.¹³⁰

AES Ohio’s proposal will not lower the customer count to pre-2015 levels, but would lower the total subsidization within rate classes, and more closely align rates with cost of service principles, which the Commission should consider when designing rates for a utility.¹³¹ In turn,

¹²³ Staff Brief at 34-35.

¹²⁴ *Id.*

¹²⁵ Tr. Vol. VI at 1202-03 (Bremer).

¹²⁶ *Id.*

¹²⁷ Tr. Vol. VI at 1204 (Bremer).

¹²⁸ AES Ohio Brief at 58.

¹²⁹ *Id.*

¹³⁰ OEG Brief at 3.

¹³¹ Tr. Vol. II at 321 (Chapman).

AES Ohio's proposal will favor the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service in accordance with R.C. 4928.02. As such, the Commission should adopt AES Ohio's proposal regarding the Low Load Factor Provision.

D. AES Ohio's Proposed Allocation is Reasonable.

Any increase in base distribution rates should be allocated fairly and reasonably among customer classes. To the extent the Commission authorizes any such increase at this time, the Commission should use the rate class allocation proposed by Commission Staff and AES Ohio. This allocation complies with cost causation principles and relies on record evidence. The allocation proposed by OCC does not.

Only OCC opposes the reasonable allocation proposed by Commission Staff and AES Ohio.¹³² According to OCC, the Commission "should reject the PUCO Staff's and DP&L's allocation of base distribution revenue because it is too high."¹³³

However, "AES Ohio was the only party to submit a cost-of-service study in this proceeding,"¹³⁴ as OCC did not perform its own cost-of-service study.¹³⁵ Nor did OCC attempt to quantify how the non-residential customer classes would divide the non-residential revenue requirement.¹³⁶

The Commission generally considers cost-of-service studies when designing or approving rates for a utility.¹³⁷ According to Commission Staff:

¹³² OEG Brief at 2; *see also* OMAEG Brief at 17-18; OHA Brief at 2; Kroger Brief at 18-20.

¹³³ OCC Brief at 65.

¹³⁴ OEG Brief at 2.

¹³⁵ OMAEG Brief at 16-17, *citing* Tr. Vol. IV at 823-24 (Fortney); IEU Brief at 2-3.

¹³⁶ *Id.*

¹³⁷ Tr. Vol. II at 321 (Chapman).

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.¹³⁸

The only cost of service study performed in this case demonstrated that the largest share of rate base and operating expenses comes from the residential rate class.¹³⁹ According to Commission Staff, this is “a reasonable indicator of costs and cost responsibility of each customer class.”¹⁴⁰

OCC avers that this allocation is too high for the residential class.¹⁴¹ OCC instead recommends “allocating no more than 40% of the increase to the residential class.”¹⁴² This request does not align with the cost of service study or basic rate design principles. Instead, it appears to be based primarily on a witness’ opinion regarding income levels in Dayton during the COVID-19 pandemic.¹⁴³

OCC’s proposal simply does not 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.”¹⁴⁴ As such, the Commission should reject OCC’s proposal, and adopt the allocation supported by AES Ohio and Commission Staff.

¹³⁸ Staff Ex. 1 (Staff Report) at 26.

¹³⁹ Tr. Vol. II at 324-25 (Chapman).

¹⁴⁰ Staff Ex. 1 (Staff Report) at 26.

¹⁴¹ OCC Ex. 4 (Fortney Testimony) at 4.

¹⁴² *Id.* at 6.

¹⁴³ *Id.*

¹⁴⁴ Tr. Vol. IV at 829 (Fortney).

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 and maximum charge provision for the Low Load Factor Provision.

Respectfully submitted,

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Summary: Brief Post-Hearing Reply Brief by The Kroger Co. electronically filed by
Mrs. Angela Whitfield on behalf of The Kroger Co.