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

JOINT MEMORANDUM CONTRA THE DAYTON POWER AND LIGHT COMPANY's MOTION TO FILE A SURREPLY
BY
THE KROGER CO.
AND
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4124
Bojko@carpenterlipps.com
(willing to accept service by email)
Counsel for the Ohio Manufacturers' Association Energy Group

Angela Paul Whitfield (0068774)
Jonathan B. Wygonski (0100060)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
Paul@carpenterlipps.com
Wygonski@carpenterlipps.com
(willing to accept service by email)
Counsel for The Kroger Co.

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I. INTRODUCTION

On May 6, 2022, The Dayton Power and Light Company d/b/a AES Ohio (AES) filed a Motion to File a Surreply (Motion) and a Surreply to The Kroger Co.'s (Kroger) and the Ohio Manufacturers' Association Energy Group's (OMAEG) briefs.[1] AES claims that a surreply is necessary because "Kroger and OMAEG asserted for the first time in their reply briefs that R.C. 4928.143(B)(2)(h) authorizes the Commission to implement a distribution rate freeze."[2] What AES fails to disclose in its Motion, however, is that it was AES that opened the door to Kroger's and OMAEG's arguments by asserting, in its own initial brief, that the stipulated rate freeze was not authorized by the ESP statute.[3] Kroger and OMAEG had a right, and were entitled, to respond to AES's incorrect arguments in their respective reply briefs. And, that is precisely what Kroger and OMAEG did. Responding to an argument asserted in an initial brief by an applicant cannot be a reasonable and justifiable basis for a surreply. Otherwise, surreply briefs would become the norm among all parties and proceedings before the Public Utilities Commission of Ohio (Commission). Simply put, AES is not entitled to a second bite at the apple by way of a surreply, and thus, its Motion and Surreply are procedurally improper and should be denied and the Surreply should be stricken.

Moreover, AES's Motion is untimely and unduly prejudicial. By way of background, AES submitted an Application in the above-captioned cases requesting Commission approval to increase its base distribution rates. However, by choice, AES currently is operating under its first electric security plan (ESP I), which contains a stipulated rate freeze. As a matter of law, the

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[1] Motion of The Dayton Power and Light Company D/B/A AES Ohio to File a Surreply (May 6, 2022) (Motion).

[2] *Id*. at 1.

[3] Initial Post-Hearing Brief of AES Ohio at 6-11 (Mar. 4, 2022) (AES Brief).

stipulated rate freeze of ESP I precludes AES from implementing a base distribution rate increase until such time as it implements a new ESP. Nonetheless, these cases proceeded to an evidentiary hearing on February 7, 2022.[4] Twenty-five days later, on March 4, 2022, the parties filed their initial post-hearing briefs. In its initial brief, Commission Staff demonstrated that the stipulated rate freeze remains in effect:

> Staff's position on this issue is that the distribution rate freeze was a term and condition of ESP I. Since AES Ohio filed its application to increase distribution rates for this proceeding while operating under the terms of and conditions of ESP I, the Commission should not implement new distribution rates until such time that AES Ohio is no longer operating under ESP I. ESP I was resolved through a Stipulation. The Stipulation was approved by the Commission. As a Stipulation represents a package and is a compromise between the signatory parties, it would be unfair to determine only *some* of the terms and conditions of ESP I are applicable, while others are not.
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> * * * *
>
> 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 [sic] from ESPs II and III and revert back to the terms and conditions of ESP I. The Commission had the authority – and the obligation – to implement the provisions, terms, and conditions of AES's most recently approved ESP (i.e., ESP I) upon AES's withdrawal from ESP III. R.C. 4928.143(C)(2)(b). The distribution rate freeze is a term and condition of AES's ESP I. The Commission should not continue certain terms and conditions of ESP I (such as the Rate Stability Charge AES Ohio is currently charging customers) but exclude other terms (such as the distribution rate freeze). If AES Ohio is operating under the terms and conditions of ESP I, the distribution rate freeze provision should apply.[5]

[4] *See* Tr. Vol. VII.

[5] Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 3-9 (Mar. 4, 2022).

Nearly every intervening party, including OMAEG,[6] Kroger,[7] Industrial Energy Users-Ohio,[8] the Ohio Hospital Association,[9] and the Office of the Ohio Consumers' Counsel,[10] agreed with Staff and argued that the stipulated rate freeze is a term and condition of ESP I, and thus, is in effect.

In its own initial brief, AES argued that the stipulated rate freeze was not authorized by the ESP statute.[11] On March 14, 2022, after seeing the consensus in favor of the stipulated rate freeze, AES requested oral argument on the issue. Thereafter, on March 30, 2022, the parties submitted their respective reply briefs. In their reply briefs, both Kroger[12] and OMAEG[13] responded to AES's incorrect assertion that the stipulated rate freeze was not authorized pursuant to R.C. 4928.143(B)(2)(h).[14] The next day, the Attorney Examiner issued an Entry scheduling oral arguments for May 18, 2022.[15]

More than a month *after* reply briefs were filed and a mere seven business days *before* the scheduled oral arguments in these cases, AES filed its Motion. AES could have sought leave to file a surreply at any time in the intervening month-plus, but effectively waited until just before the oral argument to prejudice and distract Kroger and OMAEG from their preparation for that oral argument. That is unfair and prejudicial and such gamesmanship should not be rewarded by the Commission. Moreover, without waiting for the Commission to rule on its Motion, AES

[6] Post-Hearing Brief Of The Ohio Manufacturers' Association Energy Group at 18-25 (Mar. 4, 2022).

[7] Post-Hearing Brief by The Kroger Co. at 11-16 (Mar. 4, 2022).

[8] Initial Brief of Industrial Energy Users-Ohio at 1-3 (Mar. 4, 2022).

[9] Initial Post Hearing of Ohio Hospital Association at 2-3 (Mar. 4, 2022).

[10] Consumer Protection Brief by Office of the Ohio Consumers' Counsel at 12-17 (Mar. 4, 2022).

[11] Initial Post-Hearing Brief of AES Ohio at 6-11 (Mar. 4, 2022) (AES Ohio Brief).

[12] Post-Hearing Reply Brief by The Kroger Co. at 4-6 (Mar. 30, 2022).

[13] Post-Hearing Reply Brief Of The Ohio Manufacturers' Association Energy Group at 15-19 (Mar. 30, 2022).

[14] *See* AES Brief at 6-8.

[15] Entry (Mar. 30, 2022).

proceeded to file its Surreply contemporaneously with its Motion in order to raise its additional arguments. AES also included those additional arguments from its Surreply at the oral arguments that the Commission held in this case. Providing such extra-record information at the oral arguments was improper and prejudicial as AES' Motion to file a Surreply had not been ruled upon yet.

Accordingly, for the reasons set forth herein, AES's Motion is a procedurally improper, factually incorrect, and unduly prejudicial attempt to incorrectly circumvent procedural requirements and to get a second bite at the apple. As such, pursuant to Ohio Adm.Code 4901-1-12(B)(1), Kroger and OMAEG respectfully submit their joint memorandum contra and request that the Motion be denied in its entirety and that the filed Surreply attached as Exhibit 1 to the Motion be stricken from the docket. Kroger and OMAEG also request that any arguments raised at the oral argument regarding these issues also be stricken as they go beyond the scope of the record before the Commission at the time of the oral arguments.

Alternatively, if the Commission does not deny the Motion and strike the Surreply and oral argument testimony regarding the issues contained in the Surreply, Kroger and OMAEG request an opportunity to file a reply to the Surreply.

II. LAW AND ARGUMENT

Commission precedent does not support AES's request for a surreply. The Commission has occasionally allowed parties to file surreplies where the opposing party presents new information and positions to which the parties should have an opportunity to respond. However, the Commission will deny a request to file a surreply where the surreply is simply an attempted

end-run on the procedural schedule to gain an additional chance to respond.[16] For example, the Commission has previously denied a request by AES to file a surreply where AES simply sought an additional opportunity to respond to another party's reply in support, which "did not raise anything new, but responded to DP&L's memorandum in opposition."[17]

In this case, Kroger and OMAEG "did not raise anything new, but responded to [AES]'s memorandum in opposition."[18] AES incorrectly asserts that "arguments relating to R.C. 4928.143(B)(2)(h) . . . were raised by intervenors Kroger and the [OMAEG] for the first time in their reply briefs."[19] This is demonstrably false. Kroger and OMAEG were merely responding to arguments AES made in its initial brief. Specifically, AES claimed (incorrectly) that "no party has claimed that *any* specific provision in the ESP statute would authorize the Commission to implement a distribution rate freeze."[20] AES further claimed that "nothing in that division [R.C. 4928.143(B)(2)(h)] authorizes an actual rate freeze." In response to AES's incorrect claims in its initial brief, Kroger and OMAEG properly pointed out that the statute *does* authorize a rate freeze.

Interestingly, this is not the first time this argument has been raised or briefed by AES or other parties. In fact, in the briefing on OCC's Motion to Dismiss, OCC raised similar arguments, asserting that the Commission has "treated the terms of ESP settlements, whether explicitly

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[16] *See, e.g., In the Matter of the Complaint of Westside Cellular Inc. dba Cellnet*, Case No. 93-1758-RC-CSS, Entry at ¶ 9 (Nov. 19, 1998) ("The Commission notes that, relative to interlocutory appeals, Rule 4901-1-15, O.A.C., only provides for the filing of an application for review and a memoranda contra. Therefore, Cellnet's motion for leave to file surreply comments is denied.")

[17] *In the Matter of the Complaint of AT&T Ohio v. the Dayton Power and Light Company*, Case No. 06-1509-EL-CSS, Entry at ¶¶ 9-13 (Mar. 28, 2007).

[18] *See* Case No. 06-1509-EL-CSS, Entry at ¶¶ 9-13 (Mar. 28, 2007).

[19] Motion at 1.

[20] AES Brief at 7.

provided for in the ESP statute or not, as part of the ESP."[21] OCC noted that pursuant to R.C. 4928.143, even those terms of the ESP I stipulation that were not specifically compelled by the ESP statute were considered part of ESP I.[22] AES responded to OCC's Motion with a memo contra, offering counter arguments to OCC's claims. Kroger and OMAEG did not address the argument in its brief as they believed it was baseless, but they could not have known that AES would pursue the baseless argument that the rate freeze is not a term in ESP I until AES raised it in its own initial brief. After AES raised it in its initial brief, Kroger and OMAEG were entitled to respond and counter the argument in their reply briefs, which is what they did. Given that the argument was raised and discussed in the motion to dismiss briefing and that AES raised it in its initial brief, the issue is certainly not new or novel and Kroger's and OMAEG's contrary arguments could not of come to a surprise to, or unfairly prejudice, AES.

The only alleged "new information and positions" that Kroger and OMAEG raised in their reply briefs were their correct readings of R.C. 4928.143(B)(2)(h), something that AES omitted from its own initial brief. There is nothing new or novel about parties interpreting statutory provisions in different ways or about parties responding in reply briefs to interpretations that they disagree with in other parties' merit briefs. The fact that AES failed to correctly interpret the statute, and failed to elaborate on its arguments in its reply brief, does not entitle it to an additional opportunity to respond through a surreply.

The Commission properly afforded parties the opportunity to file post-hearing initial briefs, and reply briefs to respond to those initial briefs. Kroger's and OMAEG's reply briefs properly

[21] Reply in Support of Motion to Dismiss DP&L's Application for a Rate Increase by Office of The Ohio Consumers' Counsel at 10 (Aug. 27, 2021).

[22] Reply in Support of Motion to Dismiss DP&L's Application for a Rate Increase by Office of The Ohio Consumers' Counsel at 9-10 (Aug. 27, 2021).

responded to an incorrect argument raised by AES in its initial brief. AES's Motion is simply an attempt to gain an additional opportunity to respond and to set forth its meritless argument.[23] The Commission should reject that attempt here.

Moreover, in addition to being procedurally improper, AES's Motion is unduly prejudicial to Kroger and OMAEG, given that AES waited more than a month after reply briefs were filed and a mere seven business days before the scheduled oral argument to file its Motion. It appears AES unreasonably delayed filing its Motion until shortly before oral arguments, forcing Kroger and OMAEG to respond to this pleading at the same time they prepared their oral arguments. This unreasonable and improper filing is unduly prejudicial to Kroger and OMAEG, and unfairly rewards AES for its own delay.

III. THE SURREPLY IS WITHOUT MERIT.

As explained above, the Motion and Surreply are improper and unnecessary and should be stricken. Nonetheless, if the Commission considers the Surreply, it should also find that the Surreply is without merit and reject the arguments contained therein.

The central argument of AES's Surreply is that R.C. 4928.143(B)(2)(h) does not expressly authorize the Commission to implement a rate freeze.[24] AES argues, that pursuant to *In re Columbus Southern Power Co*.,[25] this precludes the inclusion of ESP terms not specifically enumerated.[26] This argument fails because the cases that AES relies upon, *In re Columbus*

[23] Moreover, the Commission has *already* granted AES another opportunity to raise its incorrect arguments by granting its request for oral arguments.

[24] Motion, Exhibit 1 at 2.

[25] 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.

[26] Motion, Exhibit 1 at 3, *citing* 2011-Ohio-1788, ¶ 33.

Southern Power Co. and *Burger Brewing Co. v. Thomas*,[27] do not apply to R.C. 4928.143(B)(2)(h) or the stipulated rate freeze.

The decision in *In re Columbus Southern Power Co*. turned on specific, operative language in R.C. 4928.143(B)(2). This operative language is entirely absent from R.C. 4928.143(B)(2)(h). Specifically, the Supreme Court of Ohio stated as follows:

> By its terms, R.C. 4928.143(B)(2) allows plans to include only "any of the following" provisions. It does not allow plans to include "any provision." So if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute.[28]

R.C. 4928.143(B)(2)(h), to the contrary, does *not* contain the phrase "any of the following." Instead, it reads as follows:

> 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.[29]

Notably, the operative language, "any of the following," is also entirely absent from AES's Surreply. AES ignores the operative, limiting language found only in R.C. 49228.143(B)(2), and

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[27] *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 383, 329 N.E.2d 693 (1975)

[28] *In Re Columbus Southern Power Co.*, 2011-Ohio-1788, ¶ 32.

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

instead misrepresents the Court's holding as turning on the similar *enabling* language found in both R.C. 4928.143(B)(2)(h) and R.C. 49228.143(B)(2).[30] AES attempts to argue that "the 'including, without limitation' phrase in [R.C. 4928.143(B)(2)(h)] is substantially similar to the 'may . . . include, without limitation' phrase in R.C. 4928.143(B)(2)."[31]

However, the Court held that the "without limitation" language was insufficient to overcome the "any of the following" language in R.C. 4928.143(B)(2)(h). The Court did not hold that the "without limitation" language *itself* served to limit the scope of authorized provisions. Such a holding would have been nonsensical. Instead, a plain reading of *In Re Columbus Southern Power Co.* demonstrates that the limiting language, which is entirely absent from R.C. 4928.143(B)(2)(h), controlled the Court's decision. As the Court noted, "[t]he plain language of the statute controls."[32]

Nonetheless, R.C. 4928.143(B)(2)(h) *does* specifically authorize a distribution rate freeze, as it allows inclusion of "[p]rovisions regarding the utility's distribution service."[33] A provision regarding the authorized rates for a utility's distribution service is very plainly a provision regarding the utility's distribution service. Thus, even if *In re Columbus Southern Power Co.* did apply, since the Court's holding allowed for inclusion of terms which "fit within one of the categories listed 'following' (B)(2),"[34] a provision from (B)(2)(h) would be allowed.

Similarly, AES asserts that *Burger Brewing Co. v. Thomas* stands for the proposition that the Commission does not have authority to enforce the stipulated rate freeze. According to AES,

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[30] Motion, Exhibit 1 at 3.

[31] *In Re Columbus Southern Power Co.*, 2011-Ohio-1788, ¶¶ 32-33.

[32] *Id.* at ¶ 34.

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

[34] *In Re Columbus Southern Power Co.*, 2011-Ohio-1788, ¶ 32.

since "[i]n construing [a] grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear," the Commission lacks the authority to freeze rates.[35]

In *Burger Brewing*, the Court looked at the entire statutory framework concerning liquor regulation in Ohio and found that *no* statute authorized the Ohio Liquor Control Commission (Liquor Commission) to pass regulations granting itself the authority to set prices in the liquor industry:

> Appellants assert that a number of statutes in the two chapters, singularly or in combination, authorize the commission to adopt the regulation. The first is R.C. 4301.03 which provides with respect to the rule making authority of the commission…
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> ***
>
> The statute then enumerates nine specific areas of regulation, none of which, however, confers any express or specific authority in the area of pricing, at any level, of any segment of the liquor industry.
>
> ***
>
> From the above, it is evident that the General Assembly has not specifically expressed an intention that the commission have authority in the area of pricing in the liquor industry generally or in the malt beverage industry specifically.[36]

Clearly, *Burger Brewing* is distinguishable from the case at hand and it does not apply to the facts of this case.[37] In *Burger Brewing*, the Court could not identify a single provision in the entire Revised Code which granted authority to control liquor prices to the Liquor Commission. On the other hand, numerous Revised Code provisions, including the entirety of Chapter 4909, are expressly dedicated to the Commission's authority to establish rates. Moreover, R.C.

[35] *Burger Brewing*, 42 Ohio St.2d at 383.

[36] *Id.* at 380-83.

[37] AES Motion, Exhibit 1 at 1-3.

4928.1432(B)(2)(h) expressly allows the Commission to include provisions regarding distribution service in an ESP. Unlike the Liquor Commission in *Burger Brewing*, the Commission in this case is not granting itself, through a regulation, a power that lacks statutory authorization. Instead, the Commission is acting pursuant to statutory authority expressly granted by the General Assembly. Any arguments to the contrary are without merit and should be rejected.

IV. CONCLUSION

AES's Motion and Surrpely are factually incorrect, procedurally improper, and unduly prejudicial to OMAEG and Kroger and should be denied and the Surreply rejected as filed. AES is not entitled to a surreply. As such, Kroger and OMAEG respectfully request that the Commission reject AES's Motion in its entirety, and strike the proposed Surreply attached as Exhibit 1 to the Motion from the docket. If the Commission does not reject the Surreply outright, the Commission should conclude that the Surreply is without merit and Kroger and OMAEG should be afforded an opportunity to respond to the Surreply.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Counsel of Record
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4124
Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for the Ohio Manufacturers' Association Energy Group

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Counsel of Record
Jonathan B. Wygonski (0100060)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
Paul@carpenterlipps.com
Wygonski@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

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 May 23, 2022 upon the parties of record.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Memorandum Joint Memorandum Contra The Dayton Power and Light Company's Motion to File a Surreply electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group and The Kroger Co.