

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

In the Matter of the :
Application of The Dayton :
Power and Light Company : Case No. 20-1652-EL-AAM
for Accounting Authority. :
:

In the Matter of the :
Application of The Dayton :
Power and Light Company : Case No. 20-1653-EL-ATA
for Approval of Revised :
Tariffs. :

- - -

PROCEEDINGS

before Chair Jenifer French, Commissioner M. Beth
Trombold, Commissioner Dennis P. Deters, Commissioner
Daniel R. Conway, and Commissioner Lawrence K.
Friedman, the Commission, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 1:57 p.m. on Wednesday, May
18, 2022.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481

- - -

APPEARANCES:

Faruki PLL
By Mr. Jeffrey Sharkey,
110 North Main Street, Suite 1600
Dayton, Ohio 45402

On behalf of the Applicant.

Carpenter Lipps & Leland LLP
By Ms. Angela Paul Whitfield
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of The Kroger Company.

Carpenter Lipps & Leland LLP
By Ms. Kimberly W. Bojko
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'
Association Energy Group.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Maureen Willis
Assistant Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215

On behalf of the Residential Customers of
Dayton Power and Light d/b/a AES
Corporation.

ALSO PRESENT:

Attorney Examiner Patricia Schabo.
Attorney Examiner Michael Williams.

- - -

1 Wednesday Afternoon Session,
2 May 18, 2022.

3 - - -

4 CHAIR FRENCH: Okay. Let's go ahead and
5 go on the record, please.

6 We are here for today's oral argument in
7 Case Nos. 20-1651-EL-AIR, 20-1652-EL-AAM, and
8 20-1653-EL-ATA.

9 For the members of the public to
10 understand the procedural status of this case, an
11 evidentiary hearing was held beginning on January 25,
12 2022, and concluding on February 7, 2022, with
13 witnesses testifying and evidence being taken into
14 the record. The Attorney Examiners presided over the
15 evidentiary hearing.

16 As is often the case, the parties filed
17 legal briefs including an opportunity for initial and
18 reply briefs on various issues in this case in March
19 of 2022. On March 14, 2022, AES Ohio filed a motion
20 seeking oral arguments to be held on the issue of
21 whether a rate freeze can be lawfully implemented in
22 this case.

23 The motion was opposed, but in an entry
24 issued on March 31, 2022, the Commission granted AES
25 Ohio's motion and ordered that oral arguments be held

1 today, May 18, 2022.

2 This afternoon's oral argument will be
3 conducted in accordance with the Commission's
4 March 31, 2022, entry. The parties participating in
5 today's oral arguments, AES Ohio, Ohio Consumers'
6 Counsel, Ohio Manufacturers' Association Energy
7 Group, and The Kroger Company. AES Ohio has been
8 allotted 10 minutes of initial time. OCC will be
9 given 10 minutes. OMAEG and Kroger together have 10
10 minutes for argument. And AES Ohio will be given 5
11 minutes for rebuttal.

12 For your reference Attorney Examiner
13 Williams will hold up signs indicating when you have
14 2 minutes and then 30 seconds which for your time
15 will be concluded. After each argument, the
16 Commissioners will have an opportunity to pose
17 questions, and the arguing party will be able to
18 respond to the questions without regard to the
19 prescribed time limitations. So we are going to wait
20 until after you've presented your argument to ask
21 questions. We won't be interrupting you during your
22 argument.

23 I want to emphasize that today's oral
24 argument is an extension of the Commission's
25 consideration of the rate freeze issue in this case.

1 The argument is not an opportunity to introduce new
2 evidence in the case, and instead the Commission is
3 only interested in the legal positions of the arguing
4 party as it relates to the rate freeze issue.

5 We have all read the applicable briefing
6 and are familiar with the procedural histories
7 relevant to today's argument, so we would encourage
8 you to use your allotted time to focus on your legal
9 arguments, though we certainly understand that some
10 references to earlier cases are expected to the
11 extent that they arguably shape the issues before us
12 today.

13 We ask that counsel speak clearly into
14 the microphone so that all present or watching
15 remotely can hear. Today's arguments are being
16 transcribed by a court reporter and will be
17 incorporated into the official record of this case.

18 Are there any questions?

19 Okay. Let's go ahead and take
20 appearances -- appearances from those counsel who
21 will be presenting argument today or who are here on
22 behalf of their clients.

23 We will start with AES Ohio, please.

24 MR. SHARKEY: Thank you, your Honor.
25 Jeff Sharkey on behalf of Ohio AES. I will be

1 arguing for it today.

2 CHAIR FRENCH: Thank you.

3 Okay. And OCC.

4 MS. WILLIS: Thank you, Madam Chair.

5 Maureen Willis on behalf of Ohio Consumers' Counsel.

6 CHAIR FRENCH: Thank you.

7 And OMAEG.

8 MS. BOJKO: Thank you, Madam Chair.

9 Kimberly W. Bojko with the law firm Carpenter Lipps
10 and Leland on behalf of Ohio Manufacturers'
11 Association Energy Group.

12 CHAIR FRENCH: Okay. Thank you.

13 And Kroger.

14 MS. WHITFIELD: Thank you, Madam Chair.

15 On behalf of The Kroger Company, Angela Paul
16 Whitfield with the law firm Carpenter Lipps and
17 Leland.

18 CHAIR FRENCH: Okay. Thank you.

19 And, Ms. Bojko, it's my understanding
20 that you'll be arguing on behalf of Kroger and OMAEG,
21 correct?

22 MS. BOJKO: Yes.

23 CHAIR FRENCH: Okay. Thank you.

24 We will begin by hearing arguments of AES
25 Ohio, please. Give you a minute to... When you

1 begin, you will have 10 minutes.

2 MR. SHARKEY: Thank you, your Honor. My
3 name is Jeff Sharkey. I represent AES Ohio in this
4 matter. It is undisputed, your Honors, that the
5 Commission was required by statute to implement ESP I
6 when AES Ohio terminated ESP III back in 2019.

7 Staff and Intervenors argue that a rate
8 freeze term that was included in a 2009 Stipulation
9 in DP&L's -- formerly DP&L's rate case is an ESP term
10 and this was reinstated when ESP I was reinstated.

11 We assert that the Commission should
12 reject that argument and should conclude that the
13 rate freeze was not an ESP term for four reasons.
14 First of all, your Honor, not every term in that 2009
15 Stipulation is an ESP term.

16 Secondly, your Honor, a rate freeze is
17 not specifically authorized by the ESP statute.

18 Third, your Honor, the subsection in the
19 ESP statute that's (B)(2)(h) that authorizes the
20 Commission to implement provisions regarding
21 distribution service is not sufficiently specific to
22 grant the Commission the power to implement a rate
23 freeze.

24 And then, finally, your Honor, a rate
25 freeze would be very bad for customers. It would be

1 damaging to the Company's credit ratings and make it
2 difficult, if not impossible, for the Company to
3 provide reliable service.

4 So those are the four points I intend to
5 cover in my comments today. As background, in 2019,
6 after a Commission order that invalidated a charge
7 that AES Ohio was collecting, AES Ohio terminated ESP
8 III. It did that pursuant to 4928.143(C)(2)(a).

9 That's a mouthful, I know, but the critical point is
10 that subsection (B) of that statute identifies what
11 it is the Commission is required to do after AES Ohio
12 terminated ESP III. And that statute says "The
13 Commission shall," shall is, of course, mandatory,
14 "shall issue such orders as is necessary to continue
15 the provisions and terms and conditions of the
16 utility's most recent standard service offer."

17 And, your Honors, the parties, the AES
18 Ohio, Staff, and the Intervenors agree on a lot of
19 points. But one point they all agree on in their
20 briefs is that pursuant to that statute, the
21 Commission was required to reinstate ESP I. There is
22 no dispute on that point.

23 The principal issue before the Commission
24 I intend to focus on today is whether or not a rate
25 freeze is a provision, term, or condition of an ESP.

1 So, your Honor, one of the arguments advanced by
2 Staff and Intervenors is that the rate freeze is an
3 ESP term because it was included in that 2009
4 Stipulation that established ESP I. Not so.

5 Your Honor, that 2009 Stipulation was a
6 complex Stipulation that resolved a wide range of
7 things. It involved energy efficiency materials
8 which are under 4928.66, not the ESP statute. The
9 2009 Stipulation involved alternative energy terms.
10 Those are -- those are included under 4928.64. It
11 addresses reasonable arrangements, your Honors.
12 That -- those are under RC 4905.31. It also
13 addressed some issues relating to corporate
14 separation. Corporate separation statute is 4928.17.

15 The critical point, your Honor, is just
16 because something is included in that 2009
17 Stipulation does not mean that it's an ESP term.
18 There are some ESP terms in that Stipulation. Many,
19 perhaps most of the terms of that Stipulation are not
20 ESP terms.

21 Staff and Intervenors also argue, your
22 Honor, that an item does not need to be specifically
23 authorized by the ESP statute to be an ESP term. Not
24 so. In fact, the Commission made that argument to
25 the Supreme Court in the In Re: Columbus Southern

1 Power case. That's 2011-Ohio-1788. Again,
2 2011-Ohio-1788, paragraphs 13 -- paragraphs 31 to 35.
3 In that case OCC had argued to the Court that the ESP
4 statute did not allow a utility to recover certain
5 costs. The Commission -- I will read it, what the
6 Court described the Commission's argument, "The
7 Commission believes that the phrase 'without
8 limitation' allows unlisted items." In other words,
9 the Commission argued that something didn't need to
10 be specifically authorized by the ESP statute to be
11 included.

12 The Supreme Court reversed the Commission
13 there. The Supreme Court specifically said, and I
14 will quote "We reversed the Commission's legal
15 determination that ESP statute permits ESPs to
16 include unlisted items." So, your Honor, for
17 something to be authorized by the -- something to
18 constitute an ESP term needs to be specifically
19 authorized by the ESP statute.

20 Two of the parties, Kroger and OMAEG,
21 argue that a provision in subsection (B)(2)(h) that
22 allows the Commission to implement provisions
23 regarding distribution service allows the Commission
24 to implement a rate freeze. We are going to say that
25 there's two reasons that the Commission should reject

1 that argument.

2 First reason, your Honor, it's a Burger
3 Brewing case we cited in our surreply brief that we
4 filed a motion for relief to file. And in that case
5 the Ohio Liquor Commission had passed an ordinance, a
6 rule that had a -- Court described it as a
7 substantial economic impact. The Liquor Commission
8 argued that it had authority to pass that -- that
9 rule because the Liquor Commission had power to
10 "control the sale" of intoxicating liquor.

11 They said that our authority to control
12 the sale by statute is broad enough. The Supreme
13 Court said no. They reversed the Liquor Commission.
14 They said that when you're talking about a grant of
15 substantial economic powers, the grant "must be clear
16 that in the case of doubt that doubt is to result not
17 in favor of the grant but against it."

18 So the -- the -- they went on to say that
19 the fact that the Commission was significantly
20 regulated by the General Assembly demonstrated that
21 if the General Assembly had intended to grant the
22 power to the Liquor Commission, it would have done so
23 expressly.

24 So similarly here, your Honor, if the
25 General Assembly had intended to grant to the

1 Commission the very broad and substantial power to
2 implement a rate freeze, it would have done so
3 expressly. And such a power shouldn't be bound --
4 can't be bound in a general grant of power just
5 referring to distribution service.

6 In addition, your Honor, the second
7 reason that the (B) (2) (h) clause does not grant the
8 power to implement a rate freeze is the fact that it
9 would be unconstitutional. The Supreme Court of Ohio
10 has repeatedly held that when interpreting a statute,
11 the Courts and also the Commission must do so in such
12 a way as to be consistent with the Constitution of
13 the -- of Ohio and of the United States.

14 A rate freeze would violate the
15 Constitution. It's well settled that utilities have
16 a constitutional right to rates that are sufficient
17 to earn a reasonable return, and if they don't
18 receive such rates, that is a violation of the 14th
19 Amendment. So in interpreting the ESP statute, the
20 Commission should conclude that it can't and doesn't
21 have the power to implement a rate freeze because
22 that would be unconstitutional.

23 In fact, here, your Honors, the Staff
24 recommended a \$70 million increase in rates, and so
25 it's clear that implementing a rate freeze here would

1 deprive AES Ohio the opportunity to earn a reasonable
2 return.

3 Last and finally, your Honor, I want to
4 talk about the effects that a rate freeze would have
5 on AES Ohio, and they would be significant. AES Ohio
6 is currently struggling to provide reliable service.
7 It has failed the Commission's reliability metrics
8 for the last three years, and AES Ohio has been
9 spending more money on reliable service -- to provide
10 reliable service than it's earning in rates. It's
11 been borrowing money so that it could do so. But if
12 a rate freeze were to be implement -- to be
13 implemented, AES Ohio is going to need to make
14 drastic cuts to its -- its spending on reliability,
15 its spending on O&M, its spending on capital.

16 And if you read no other piece of
17 testimony in this case, please read Kathy Storm's
18 testimony. She discusses it at great length.

19 In addition, your Honor, AES Ohio has
20 among the lowest credit ratings in the state for --
21 they are either below investment grade or just barely
22 investment grade. And the various credit rating
23 agencies have recently issued reports that say they
24 are watching this case, and a rate freeze would have
25 an adverse impact on AES Ohio's credit ratings. And,

1 your Honor, a utility like AES Ohio who has poor
2 credit ratings, that's going to lead to higher cost
3 of debt, and its also poor credit ratings and
4 unreliable service could make it very difficult for
5 AES Ohio to attract additional investment. And, of
6 course, Ohio needs additional investment.

7 So imposing a rate freeze in this case
8 would be very bad for customers for those reasons,
9 your Honors.

10 That's the end of my prepared remarks. I
11 appreciate you letting me get through them without
12 interruption and obviously happy to answer any
13 questions that you have.

14 CHAIR FRENCH: Thank you, Mr. Sharkey.

15 Okay. Are there any questions?

16 Commissioner Friedman.

17 COMMISSIONER FRIEDMAN: Thank you very
18 much.

19 Mr. Sharkey, thank you for your comments.
20 I appreciate them. Help me understand a little bit
21 better one of the themes of your comments and your
22 arguments. If I understand you correctly, you are
23 basically saying a rate freeze is not a lawful term,
24 provision, or condition in the ESP I Stipulation
25 because no specific authoriz -- authorizing provision

1 in the statute.

2 And I understand your reference to -- to
3 the other procedural matters but what do you suggest
4 the Commission do with Stipulation and Settlements
5 Agree -- Settlement Agreements that contain
6 provisions not specifically authorized? Where does
7 it stop? You referenced energy efficiency and
8 thing -- other -- other issues that have been
9 settled.

10 And then, if I may, one final question,
11 and in your mind is there a distinction to be drawn
12 between a provision that is -- that is not
13 specifically authorized versus a provision that is
14 not specifically prohibited by statute?

15 MR. SHARKEY: Okay. So to your first
16 question, your Honor, the stipulations frequently
17 contains lots of terms that fall under lots of
18 statutes, and I don't think the Commission needs to
19 go back and identify specifically in every order
20 which statute is being -- it's being approved under
21 because it's not a contested point. So it doesn't
22 need to do that every order and didn't do it in most
23 of the orders that you've seen.

24 But I think the Commission does need to
25 evaluate, if any parties are arguing, hey, this

1 particular term is unlawful, it needs to go and
2 evaluate whether it's lawful under that specific
3 statute or not. But I don't see any reason for the
4 Commission on a going-forward basis to go looking for
5 each individual term and matching it up to is this an
6 ESP statute or isn't it. That doesn't seem to be
7 practically necessary.

8 Here as to the rate freeze term in
9 particular, your Honor, it's not authorized under any
10 statute, and it was lawful only because AES Ohio
11 agreed to it. So AES Ohio agreed to a rate freeze
12 term through December 31, 2012. That's all AES Ohio
13 has agreed to in terms of a rate freeze and it was
14 lawful for that reason.

15 Sorry. I apologize. Your second
16 question was? I apologize.

17 COMMISSIONER FRIEDMAN: That's all right.
18 Do you draw a distinction between a provision that is
19 not specifically authorized as opposed to a provision
20 that may not specifically be prohibited?

21 MR. SHARKEY: Yeah, most definitely, your
22 Honor. In the In Re: Columbus Southern Power case
23 that I mentioned in my prepared remarks, the
24 Commission had argued that it -- that something
25 could -- a provision that is not specifically listed

1 in the statute could be approved. The Commission
2 relied on the fact that (B) (2) allowed the Commission
3 to approve a series of items and that phrase it said
4 including without limitation and then all of the
5 items. And the Commission said, hey, that without
6 limitation phrase gives us broad powers to approve
7 items that aren't specifically listed in the statute.

8 The Supreme Court of Ohio said no. No.
9 Something needs to be specifically listed in the
10 statute to be an ESP term. So just because it's not
11 prohibited, that doesn't mean it's an ESP term.
12 Something has to be -- for a rate freeze to be an ESP
13 term, it has to be something that's specifically
14 authorized by the ESP statute. That's a very clear
15 holding of In Re: Columbus Southern Power.

16 COMMISSIONER FRIEDMAN: Forgive me. I
17 don't want to monopolize. Just a really quick
18 follow-up question. You reference contestability in
19 the Settlement Agreement. Are you suggesting that if
20 something is not contested, we need not look at the
21 legality of the issue?

22 MR. SHARKEY: No, no. I think the
23 Supreme Court of Ohio has approved a three-part test
24 for the Commission, and one of the items is whether a
25 particular Stipulation violates any important

1 regulatory principles. So I think the Commission has
2 an ongoing regulatory responsibility to look at
3 whether something is lawful or not. I think the
4 Commission would probably better focus its attention
5 more closely on items that are contested.

6 COMMISSIONER FRIEDMAN: Are you
7 distinguishing the lawfulness as opposed to
8 contestability? There's the distinction I am trying
9 to draw out. Do you think -- do you think a lack of
10 contestability moots discussion relative to
11 lawfulness?

12 MR. SHARKEY: No. I think the Commission
13 probably still needs to look at whether particular
14 terms are lawful before it approves a Stipulation,
15 even if it's not contested.

16 COMMISSIONER FRIEDMAN: And how about the
17 reverse? If it's lawful, does the issue of
18 contestability have any impact?

19 MR. SHARKEY: Well, if it's lawful, then
20 the question remains is it reasonable and smart for
21 the Commission to do so even if the Commission has
22 lawfully entry -- entered things that may not be in
23 the public's best interest. And so I think, yes, the
24 Commission would still need to evaluate if something
25 is lawful whether it's reasonable.

1 COMMISSIONER FRIEDMAN: Thank you.

2 CHAIRMAN TROMBOLD: Madam Chair, thank
3 you.

4 Hi. I guess I was wondering, you
5 mentioned that AES is struggling to provide reliable
6 service. They have the lowest credit rating of the
7 companies in the state. So should the financial
8 condition of the Company have any influence on the
9 legal determination of the rate freeze as an
10 enforceable provision of ESP I?

11 MR. SHARKEY: Your Honor, I think the
12 lawyer in me says no. But as a practical matter, we
13 think it's important to the extent the Commission has
14 any -- let me tell you why I say that. I say that
15 because the statute says shall. The statute says
16 shall, the Commission shall implement the terms of
17 ESP I. A rate freeze is not an ESP term. And I
18 believe that's the end of the story.

19 To the extent the Commission has any
20 discretion and believes that there is a close call
21 and has some discretion, then, yes, in that instance
22 understanding the effect of its decision on the
23 Company's ability to provide reliable service for its
24 customers is important.

25 So if you agree with our legal arguments,

1 then -- then I would say that there's no need to
2 really be considering those, but to the extent you
3 believe you have discretion, there is some gray area,
4 I think that, yes, those are important things for the
5 Commission to consider.

6 CHAIRMAN TROMBOLD: Okay. Thank you.

7 COMMISSIONER CONWAY: Mr. Sharkey, thank
8 you for your argument, your comments. You would --
9 you would -- would you agree that it certainly is
10 unfortunate or extremely well thought through on
11 behalf of you and your client that the provision that
12 provides the greatest advantage out of the ESP, which
13 is the Rate Stabilization Charge provision, is part
14 of the ESP I, while the provision that I imagine
15 those who are in opposition to your -- your points
16 here, that provision that benefits them or protects
17 them from the -- over the term of the ESP from some
18 of the impacts of the -- of that kind of provision,
19 the rate freeze provision, is actually not part of
20 the ESP, that that was very -- very smart to have the
21 rate freeze provision not be something that's part of
22 the ESP but the RSC provision included within the
23 ESP?

24 MR. SHARKEY: Your Honor, I worked the
25 2008 case, and I can represent to you that at the

1 time that was not in our thinking in terms of the
2 drafting of the Stipulation. But the question before
3 the Commission now is in terms of positioning the
4 Stipulation that way, the Commission now is left to
5 follow the statute, and the statute identifies what
6 it is the Commission is required to do.

7 I would note that the Intervenor back in
8 the 2000 -- back in 2008 and 2009 when we were
9 negotiating that Stipulation could have asked that
10 the Stipulation say that the rate freeze would be
11 reinstated if ESP I was reinstated. They could have
12 asked for that to be included in the Stipulation.
13 It's not in the Stipulation. They are essentially
14 asking the Commission to add a term to the
15 Stipulation that's just not there.

16 COMMISSIONER CONWAY: Assume for a moment
17 for purposes of discussion that the Commission -- and
18 don't read anything into this or into my prior
19 question to you. Assume for the moment that the
20 Commission decides as part of the resolution of this
21 case that the rate freeze provision is, in fact, a
22 part of the Stipulation -- I'm sorry, is part of the
23 ESP. It is a provision, term, condition of ESP I,
24 and so we can't actually complete the rate case and
25 approve rates that are -- you know, that represent an

1 increase for the Company while the rate freeze is in
2 effect, while ESP I -- ESP I is in effect and the
3 rate -- as a result the rate freeze is in effect.

4 What alternatives do you have, what is
5 the thinking that -- without getting into anything
6 that's confidential, what alternatives do you have to
7 mitigate the risk of that kind of decision, the
8 decision that the rate freeze is still in effect?
9 And in particular, what -- what would be the
10 viability of just simply filing another ESP ASAP, get
11 it -- get the process moving and be in a position to
12 get past the rate freeze issue by putting in effect a
13 new ESP which would have presumably provisions in it
14 that you could either litigate or negotiate that
15 would provide opportunities for the Company, business
16 opportunities, earnings opportunities for the
17 Company, revenue -- revenue opportunities for the
18 Company for the distribution business? Is this an
19 option, a viable option for you to manage the risk of
20 an adverse decision by us on the rate freeze issue
21 for you?

22 MR. SHARKEY: Your Honor, the Company is
23 certainly preparing for any eventuality here and has
24 considered the possibility of filing an ESP. The ESP
25 IV would not come anywhere close to resolving the

1 adverse effects that I have described earlier because
2 ESP IV, if you assume that it's not going to include
3 an RSC, it's going to have not nearly the types of
4 financial benefits that the Company would have.

5 So ESP IV is not a good solution to this
6 problem. It may be -- ESP IV may be better than
7 operating under ESP III with a rate freeze but maybe
8 not. There's some financial pluses and minuses so
9 that's not something that I think you should think of
10 as, ah, the Company can solve this problem by
11 implementing ESP IV. I don't think that's the case.

12 COMMISSIONER CONWAY: That leads to --
13 frankly, Mr. Sharkey, leads to a kind of a rock and a
14 hard -- between a rock and a hard place position. It
15 seems to me that what I am getting from your comment
16 is that you only like the RSC and the revenues that
17 you get through the RSC, and yet, I mean, I think you
18 would have to agree that when the ESP I was
19 negotiated, there was not an expectation that the
20 Rate Stabilization Charge would be in effect for
21 really more than 3 years, let alone going on 10 years
22 now, or 12 years now, whatever the -- whatever the
23 term of the ESP I is. And then I guess that was
24 three years and now here it is 2022. It's 10 years
25 later so that's 13 years of the Rate Stabilization

1 Charge.

2 At some point it seems to me that there
3 needs to be a different regulatory approach for DP&L
4 than to have the RSC in place as a revenue mechanism.
5 It is -- it just doesn't seem to be feasible to me to
6 keep on going indefinitely with it. So hence my
7 question what's the alternative to -- to the RSC?
8 And what you just told me, I think, is that ESP IV is
9 not really going to give you the same kind of results
10 financially that you -- that you would have with --
11 with the -- with the RSC.

12 MR. SHARKEY: Can I elaborate, your
13 Honor?

14 COMMISSIONER CONWAY: Yes; yes, please.

15 MR. SHARKEY: I have got a good answer to
16 that question. The Company -- and a lot of this
17 relates to evidence that was presented in another
18 case. It was presented in the case regarding whether
19 the Company would im -- whether it passed the SEET
20 MFA test, the prospective test.

21 And the evidence in that case showed near
22 term the Company is heavily reliant upon the RSC to
23 enable it to provide safe and reliable service. It
24 also showed that the Company as it implements Smart
25 Grid, Smart Grid has a couple of benefits, the

1 immediate reliability benefits but also longer term
2 it helps the Company to get out of this financial
3 hole that it has been in.

4 So the Stipulation in that -- that case,
5 which the Commission approved, said the Company would
6 file an application for ESP IV in I believe it's
7 October of next year, your Honor, and that would be
8 presumably the application that would give the
9 Commission a good opportunity, if it was so inclined,
10 to eliminate the RSC and allow the Company
11 essentially for the next period of time until that
12 application was filed to recover it and end that
13 charge.

14 And I understand why you might want to
15 end that charge but that's essentially what the
16 Stipulation that the Commission approved in that case
17 said, file for ESP IV in the -- in the fall of next
18 year. Lots of financial documents that were
19 supported by our witnesses showed that it was a
20 viable financial path to the Company.

21 So the Company does agree getting off the
22 RSC is a good thing for it, a good thing for its
23 customers, and the timing should be fall of next year
24 when the filings get made.

25 COMMISSIONER CONWAY: So let me get back

1 to -- I will leave to the side for the moment the
2 financial hole that you mentioned that you need to --
3 you need to have something to take care of that but
4 get back to the reliability and financial condition
5 of the company. Help me with -- help me with that --
6 that area. I look at the -- the case and I see, you
7 know, on the one hand you have got the RSC which is
8 non-cost-based revenue collection device, roughly \$80
9 million currently. And then you have the rate case
10 that's been litigated and not completed yet but
11 litigated. And there is a range of results for your
12 distribution business separate from the Rate
13 Stabilization Charge which is outside of the
14 distribution business as I understand it.

15 But within that distribution business
16 valuation, you have -- you have the Company's
17 position which -- under which you're 120 million or
18 so short. And then you have the Staff position which
19 is you're 60 to 65 million short per year. And then
20 you have OCC which agrees that there's -- that you
21 are short some amount, I think 45 million perhaps.
22 So the distribution business according to the -- to
23 this evaluation that's occurred among, at least that
24 range of results by those parties, indicates that,
25 you know, you are short 45 to 120 million dollars.

1 And on the other hand, you have the RSC
2 which is producing \$80 million, and it doesn't have a
3 cost basis to it. And it's actually more than what
4 the Staff has recommended.

5 And so I -- I struggle to reconcile the
6 argument which may be fact based but the argument
7 that you're not earning enough revenue to take care
8 of your -- your blocking and tackling in your
9 business, you know, vegetation management, storm
10 restoration, you know, repairing and maintaining your
11 distribution network, that you're not able to do that
12 either with the RSC and the rate freeze on the one
13 hand or with the new rates that you'll get from the
14 rate case without the RSC.

15 So explain to me why I'm not seeing a
16 kind of balance between the two options and why is it
17 that if you don't get the RSC plus the rate increase,
18 you are -- you are facing financial peril or a
19 degradation in your ability to maintain and -- repair
20 and maintain and operate your networks.

21 MR. SHARKEY: Sure, your Honor. A number
22 of things there. First of all, to understand AES
23 Ohio's rates have been the lowest in the state for a
24 long time. AES Ohio's rates even if they were
25 approved at the figure asked about, the full

1 120 million that AES Ohio asked to approve that, AES
2 Ohio would still have the lowest distribution rates
3 in the state. And AES Ohio is currently trying to
4 work under a -- under 2015 costs. And evidence we
5 submitted in the case showed, for example, the
6 tree-trimming costs have increased 170 percent since
7 that occurred.

8 So AES Ohio is facing a lot of financial
9 difficulties through -- and due to those -- those
10 various items. And I think, your Honor, the proof is
11 in the pudding, is if you look at what neutral
12 third-party credit rating agencies, what do they say
13 about the financial condition of the Company? And
14 they make it very clear that they believe the Company
15 is in a perilous financial condition. It's below
16 investment grade rating acclu -- according to S&P and
17 just barely above investment grade credit rating
18 according to Fitch and Moody's. And AES Ohio has
19 among the lowest credit ratings of any utility in the
20 state.

21 So, you know, the Commission recently had
22 just found that AES Ohio is in poor financial
23 condition and that was in the order approving the --
24 the SEET MFA Stipulation. So I think those are --
25 those are the explanations.

1 COMMISSIONER CONWAY: I hear your
2 explanation; and, of course, it makes -- on the
3 surface at least it makes sense. But I go back to
4 the -- I don't know it's a fact, but the position
5 that there's been a fairly thorough review of your
6 distribution business costs and revenues, and the
7 result was that that business in order to be able to
8 conduct itself proper -- be conducted properly
9 requires a rate increase, but it's -- but it's
10 45 million to 120 million and that's without
11 reference to the 80 million that you are collecting
12 through the RSC.

13 And so I -- I just -- it's hard to
14 square -- for me to square why you need the RSC if
15 you get a thorough, fair, assuming it's fair,
16 thorough and fair valuation of your costs and
17 expenses and revenues in a distribution rate case,
18 and so I am just telling you that I -- it's -- maybe
19 we get back to the hole you mentioned previously, and
20 I am not sure what -- what that involves that you
21 need to take care of, but if it's not -- if it's --
22 if it's -- if the hole involves the money you need to
23 do the blocking and tackling for your distribution
24 business, okay, but it seems to me you ought to be --
25 you ought to be able to do your -- you know, perform

1 your obligations and your -- take advantage of your
2 opportunities on the distribution business side with
3 a -- with an updated thorough, fair base rate
4 calculation for the distribution business.

5 I don't understand quite the connection
6 between the RSC, which I can understand how the RSC
7 would have been helping you manage your way through
8 the fact that you've had -- you've had cost increases
9 since the 2015 rate case rates went into effect, and
10 you are using that money to support your -- your
11 requirements to do your -- do your -- you know, incur
12 the costs and perform the, you know, the activities
13 that you need on the distribution side since that
14 time.

15 But now we've had the rate case. It
16 seems like you ought to be able to run the business
17 based on the revenues that are being collected
18 through the base rates for the distribution business
19 along with whatever riders you got that are cost
20 based.

21 MR. SHARKEY: Yeah, I think you are on
22 the right track as the Company should be able to do
23 so and believes it will be able to do so within a
24 year and a half, two years when the ESP IV is filed.
25 I believe you are on the right track.

1 It is just the Company is in -- has been
2 in perilous financial conditions for quite some time.
3 And so the financial projections in the SEET MFA case
4 that the Company provided and essentially the
5 Commission Stipulation -- the Company signed and
6 Commission approved said, you know, through September
7 or October of next year when the Company would file
8 an application for ESP IV.

9 COMMISSIONER CONWAY: Thank you.

10 MR. SHARKEY: Happy to. Thank you for
11 your questions.

12 COMMISSIONER DETERS: And, counsel, thank
13 you.

14 I wanted to get back to the basic of --
15 basic premise of your argument as it relates to the
16 Ohio Revised Code. I think if we look at the plain
17 language of the ESP statute, and there's provisions
18 in there that allow terms relating to the utility's
19 distribution service. How -- how does the Public
20 Utilities Commission of Ohio conclude that a fully
21 stipulated and approved agreement as it relates to
22 rates is not related to the utility's distribution
23 service as it's discussed in the statute?

24 MR. SHARKEY: Sure, your Honor. Yes.
25 Kroger and OMAEG have made that argument and

1 essentially said that a -- the ESP statute authorizes
2 the Commission to implement provisions regarding
3 distribution service and that -- that authorization
4 is sufficiently broad to allow the Commission to
5 implement a rate freeze.

6 And we believe that's incorrect for two
7 reasons. First reason, your Honor, is the Burger
8 Brewing case I mentioned in my initial comments. In
9 that case the Ohio Liquor Commission had argued that
10 a very general phrase that allowed it to control the
11 sale of intoxicating liquor, control the sale in the
12 statute allowed it to implement provisions that would
13 have substantial economic impacts and regulate rates.

14 And the Supreme Court essentially said if
15 you are going to find -- if the General Assembly is
16 going to grant to an agency a broad, significant
17 power, something important, something significant,
18 then that grant must be clear. You can't find a
19 grant of a broad, significant power in general
20 language. And the Court was very clear that in the
21 case of doubt, that doubt is resolved in favor -- not
22 in favor of the grant but against it.

23 And in particular, that Court, the Burger
24 Brewing Court found it significant that the General
25 Assembly had significantly regulated the Liquor

1 Commission. There were lots of regulations that the
2 Liquor Commission could and couldn't do, and the
3 General Assembly said if -- the Court said if the
4 General Assembly had intended to grant this very
5 important power to the Liquor Commission, it would
6 have done so expressly.

7 And similarly here, your Honor, the
8 phrase regarding distribution service is a general
9 phrase. It's akin to the control, the sale of liquor
10 that was in the Liquor Commission case, and it's a
11 very general grant of power. If the General Assembly
12 had intended to grant to the Commission the very
13 broad, very significant power to implement a rate
14 freeze, it would have done so expressly and they --
15 you can't go find vague -- you can't go find broad
16 extensive powers in vague grants of power like that.

17 In addition, your Honors, as I also
18 mentioned, there is a second reason that (B) (2) (h)
19 subsection does not grant the Commission the power to
20 implement a rate freeze and that's the Supreme Court
21 has repeatedly held that a statute, if it's subject
22 to different interpretations, should be interpreted
23 in a way that's constitutional. You shouldn't unless
24 the statute needs to be interpreted as violating the
25 Constitution, as it plainly does. It should be

1 interpreted in a way that's consistent with the
2 Constitution. And going back for over 100 years,
3 it's been well settled that a utility has a
4 constitutional right to -- to compensatory rates.
5 And if it does not get compensatory rates, that's a
6 violation of the 14th Amendment. And, therefore, if
7 the ESP statute purported to grant to the Commission
8 the power to implement a rate freeze, that would be
9 granting to the Commission the power that is
10 inconsistent with and violative of both the U.S. and
11 the state Constitution.

12 So in interpreting what the ESP statute
13 means, and in particular what that (B) (2) (h) phrase
14 regarding distribution service means, the Commission
15 is required, according to the Supreme Court of Ohio,
16 to give that phrase a constitutional interpretation
17 and authorize the Commission to a rate free --
18 institute a rate freeze would not be consistent with
19 the Constitution.

20 COMMISSIONER DETERS: Thank you.

21 MR. SHARKEY: Thank you, your Honor.

22 CHAIR FRENCH: Thank you. Just in
23 follow-up to that, so under just that plain language
24 of the ESP statute that you were just talking about,
25 what are we able to do?

1 MR. SHARKEY: The (B) (2) (h)?

2 CHAIR FRENCH: Right.

3 MR. SHARKEY: Your Honors --

4 CHAIR FRENCH: Because there's nothing
5 specific so what does it mean for us?

6 MR. SHARKEY: There is. And the Burger
7 Brewing case is instructive there and what it has
8 said is in this type of language, it could grant to
9 the Commission powers that are implied that are
10 necessary for it to carry out its other express
11 powers. So if the Commission has an express power to
12 do A, but it never says B, which you need B to do A,
13 you could do that.

14 So it's not intended to be and shouldn't
15 be interpreted to be granting to the Commission broad
16 powers that aren't, you know -- that would be, you
17 know, something very important, something very
18 significant. Those need to be expressly granted but
19 if the Commission needed to be able to do whatever
20 the specific examples might be, to do something to
21 implement another provision, it would allow the
22 Commission to do that.

23 It's sort of an implied power to carry
24 out other provisions that the Commission is allowed
25 to do. That's what the Burger Brewing case

1 discusses.

2 CHAIR FRENCH: Okay. Thank you.

3 Any other questions? Okay. Thank you,
4 Mr. Sharkey.

5 MR. SHARKEY: Thank you so much for your
6 time.

7 CHAIR FRENCH: Okay. Next, we will hear
8 from the Ohio Consumers' Counsel. You too will have
9 10 minutes after you begin.

10 MS. WILLIS: Thank you.

11 Chair French, Vice Chair Trombold,
12 Commissioners Deters, Commissioner Conway,
13 Commissioner Freedom -- Friedman, welcome. Good
14 afternoon.

15 Thank you for this opportunity to address
16 DP&L's rate freeze agreement in the settlement that
17 it signed with OCC and others and that the PUCO
18 adopted. We appreciate the opportunity to advocate
19 for the nearly half a million DP&L residential
20 consumers that we represent.

21 My arguments today are a summary of the
22 detailed and interrelated positions that OCC has
23 explained in numerous filings. In short, our message
24 to the Commission is DP&L already decided that the
25 rate freeze is part of its Electric Security Plan

1 when it signed the 2009 Stipulation. The PUCO
2 already decided that the rate freeze was part of the
3 DP&L Electric Security Plan when it signed the order
4 approving the Settlement. DP&L is bound by the
5 agreement, and the PUCO is bound by its order.

6 This afternoon OCC will cover two issues
7 for the Commission's focus, justice for consumers and
8 the integrity of the PUCO settlement process. DP&L
9 consumers, especially those in need in the Dayton
10 area, are entitled to justice where the PUCO makes
11 DP&L honor its rate freeze agreement and the PUCO
12 abides by its order adopting the settlement.

13 The ratemaking in the 2008 law for
14 Electric Security Plans is a failure for consumers,
15 but it's not as much of a failure as DP&L would have
16 it. Let's step back for a moment to February 24,
17 2009. DP&L and other parties, including OCC and the
18 PUCO Staff, reached a Settlement to resolve DP&L's
19 first Electric Security Plan. As part of the
20 Settlement, the parties agreed to a quid pro quo.
21 Consumers would pay a Rate Stability Charge to DP&L
22 in exchange for DP&L's agreement to freeze the
23 distribution rates while charging customers under its
24 Electric Security Plan.

25 The PUCO approved the Settlement as a

1 package without modification. DP&L got favorable
2 terms in the Settlement. Consumers got a rate
3 freeze. DP&L now wants to renege on its Settlement.
4 The PUCO needs to enforce that Settlement. This
5 comes down to justice for consumers under the law.

6 As often, DP&L plays the victim. But
7 consumers in the Dayton area will be the victims of
8 DP&L's Settlement violation. And many of those
9 Dayton area consumers are truly the ones in a fragile
10 economic state. Dayton area consumers have issues of
11 poverty, food insecurity, a financial crisis coming
12 out of the pandemic, soaring energy prices as alluded
13 to in the Commission's earlier meeting, inflation,
14 and pain at the pump.

15 DP&L right now is charging consumers a 76
16 to 80 million dollar stability charge every year
17 courtesy of the Settlement. There are no costs -- as
18 Commissioner Conway noted, there are no costs
19 associated with the stability charge, only revenues
20 to DP&L. But DP&L wants to cherry-pick from the
21 Settlement and not give consumers their related
22 benefit of the rate freeze.

23 OCC did not sign consumers up for a
24 \$76 million stability charge for nothing, without a
25 rate freeze. But that's how DP&L is rewriting the

1 Settlement after the fact. That's not justice for
2 consumers under the law.

3 But it's not just the \$76 million
4 stability charge. In violation of OCC's Settlement,
5 DP&L is seeking \$120 million distribution rate
6 increase. That's not the rate freeze the PUCO
7 ordered when it adopted the Settlement.

8 The PUCO is very aware that OCC has
9 criticisms of the PUCO's settlement process and wants
10 it reformed. But here we are not even talking about
11 reforming the settlement process. We are simply
12 talking about the PUCO enforcing the order approving
13 the Settlement. That order needs to be enforced to
14 give consumers the benefit of the signed Settlement
15 and not just the costs of the signed Settlement.

16 I urge you to not cater to -- I urge you
17 to not cater to DP&L's cherrypicking of the
18 Settlement. That approach undermines the integrity
19 of the settlement process. It also violates the law.
20 The PUCO has already ruled that it cannot selectively
21 implement provisions in the 2009 Settlement. Instead
22 it must treat the Settlement as a package where all
23 the terms as written and agreed to are enforced.

24 In 2013, the Commission ruled that it
25 cannot arbitrarily choose some of the provisions of

1 DP&L's plan to continue and choose other provisions
2 not to continue. And it was DP&L back then who
3 argued that the PUCO should not permit parties "to
4 elect to take the benefits of the Settlement package
5 but rid themselves of the corresponding obligations."
6 DP&L seems to have forgotten those words.

7 Just like the stability charge was a
8 provision, term, or condition of DP&L's ESP I, so was
9 the distribution rate freeze. Consumers have paid
10 dearly for that stability charge. All told consumers
11 will have paid \$1.2 billion to DP&L by the end of
12 DP&L's reinstated plan under the stability charge.

13 The integrity of the settlement process
14 itself is at issue here. The PUCO should step in to
15 enforce its order.

16 In conclusion, your Honors, the Ohio
17 Consumers' Counsel urges the PUCO to enforce its
18 settlement order and give Dayton area consumers the
19 benefit of their bargain with their electric utility.
20 You the PUCO adopted the Settlement as a
21 quote-unquote package. It's too late for DP&L to
22 break up that package. Please give consumers a PUCO
23 process that has justice and integrity. Thank you.

24 CHAIR FRENCH: Thank you, Ms. Willis.

25 Any questions? Start at this end this

1 time.

2 COMMISSIONER DETERS: Thank you, counsel.
3 Can you address the AES's position on the
4 constitutional taking of their, I guess, right to
5 collect on return on capital?

6 MS. WILLIS: Yes, yes, Commissioner.
7 With respect to the constitutional taking, the case
8 law holds that in order for a constitutional taking
9 to occur, it must violate the 5th and the 14th
10 Amendment. And in -- in looking at that issue, the
11 revenues of Dayton must be looked at as a whole.
12 Dayton gets not only distribution revenues but also
13 has the ability to collect revenues in riders, so it
14 is -- it is as a whole, it is taken as a whole. And
15 without viewing it as a whole, one cannot conclude
16 that there has been a constitutional taking.

17 So when you consider all the forms of
18 revenue that Dayton has coming in including revenues,
19 the DIR revenue, the stability charge revenue,
20 revenues for vegetation management, all the various
21 revenues must be taken into consideration before the
22 Court would find or the Commission would find that a
23 constitutional taking has occurred. And when we
24 consider all of those revenues, I believe the
25 argument falls flat.

1 COMMISSIONER DETERS: Thank you.

2 COMMISSIONER CONWAY: Thank you,
3 Ms. Willis, for your comments and arguments.

4 I have two questions basically. One is
5 how do you respond to the -- to the point that we're
6 not operating under 2009 frozen rates at this point?
7 We already had a rate case in 2015 which the rate
8 freeze provision did not prevent or did not interfere
9 with, and so we're past the point of arguing about
10 whether or not the rate freeze provision applies or
11 should be implemented because we already -- we
12 already dealt with that back in 2015-16 where we
13 processed that case, and nobody -- nobody stood up
14 and objected to going through that ratemaking
15 process.

16 And so it's -- this rate freeze argument
17 or provision, whether it's part of the ESP or not, is
18 in the rearview mirror now.

19 MS. WILLIS: Respectfully, your Honor, we
20 disagree. You may recall that when the 2015 rate
21 increase was implemented, DP&L was not under ESP I.
22 DP&L was under its third electric security plan. So
23 there has not been a rate -- a distribution rate
24 increase to DP&L while it is operating under Electric
25 Security Plan I.

1 So we -- that issue is not in the -- in
2 the rearview mirror. It is in the front. It is
3 directly in front of the headlights.

4 COMMISSIONER CONWAY: Okay. All right.
5 Let me turn to what for me is a pretty fundamental
6 objective to keep in mind or set of objectives. And
7 I've mentioned this from time to time, and hopefully
8 you are not tired of hearing about it, but it seems
9 to me that when you -- when you -- as we wind our way
10 through or work our way through all the -- all the
11 process and -- and the details of the regulatory
12 structure, our goal is to provide for safe, adequate,
13 reliable service at reasonable rates.

14 And assuming that the utility company
15 involved is operating in a -- in a reasonable
16 fashion, a prudent fashion, it's entitled to recover
17 all the costs that are incurred in getting to those
18 safe, reliable, adequate services and is en -- is
19 entitled to recover its costs including its costs of
20 capital.

21 And one of the measures about -- of
22 whether or not it's making ends meet is -- obviously
23 its -- rate case process helps us with that -- that
24 determination. But if -- if the debt credit ratings
25 are getting closer to being in the ditch, that's a

1 real front and center front of the headlights warning
2 to us that there is something awry with the balance
3 between the rates being charged and the ability to
4 recoup enough revenue to cover all the costs that are
5 necessary in order to provide what we really have to
6 have for customers which is adequate amounts of
7 reliable service safely provided.

8 And so we've heard today about -- about
9 the challenges that Dayton is facing and the -- and
10 in their view of the fine edge that they are on as
11 far as being able to provide and -- provide service
12 that meets those -- those really basic parameters.
13 And so I find -- I find myself cautioned by that --
14 by that presentation, and I would also just point out
15 so I want you to respond to what I'm -- what I'm
16 saying. Help me out here with it because I have
17 sympathy -- not just sympathy, I have respect for,
18 and I think the arguments you are making have -- have
19 some traction.

20 But -- but the other point before
21 responding to my -- my -- my soliloquy here, the
22 other point that comes to mind is -- is the point
23 that the rates that Dayton has been charging even
24 while it's been collecting the 1.3 billion or
25 whatever the number is, the Rate Stabilization Charge

1 has provided the rates that they've been charging
2 throughout the entire period and currently, this is
3 not a measure for this is how you do rate making, but
4 the rates that they've been charging are at the very
5 low end of the scale in Ohio which itself is -- has,
6 I think, a record of fairly moderate ratings compared
7 to other places around the country. And although,
8 like I said, that's not the measure of whether or not
9 the rates are too high or too low, really it does get
10 to your point about the equity, justice, and treating
11 customers that are -- that are having a hard time
12 making ends meet, treating them fairly.

13 I think it does have an impact on that
14 part of the arguments, the set of arguments you make.
15 So how do we get to the goal which is safe, adequate,
16 reliable services at reasonable rates which means the
17 utility has got to cover its costs and be able to be
18 in good financial standing with its creditors and its
19 investors so it can continue to, you know, to invest
20 in its business and cover its -- cover, pay its
21 bills.

22 MS. WILLIS: Thank you for your question.
23 I scratch my head just the way you were scratching
24 your head earlier about how the numbers don't seem to
25 work where they are getting revenues in their rate

1 case and it's between 45 and 120 million and yet even
2 if they get that, they are going to continue to
3 collect the \$76 million stability charge. I do
4 struggle with the fact that under the Stipulation,
5 the 2009 Stipulation, there was an exception to
6 distribution rate increases and that exception said
7 that if there was a financial emergency, DP&L could
8 come in for a rate distribution increase, that they
9 could do that without violating the Stipulation. Why
10 haven't they come in for -- if they are in such
11 financial peril and such a fragile state, why haven't
12 they come in for an emergency rate case?

13 COMMISSIONER CONWAY: Well, I think one
14 of the answers is we haven't rendered our decision in
15 this matter yet, and shouldn't we be looking forward
16 past the status, you know, the point we are at this
17 date to having this conversation looking ahead and
18 not saying, well, we got to wait until the emergency
19 takes root, God knows where it might lead to before
20 we can then intervene with an emergency rate remedy?
21 I mean, would -- do you disagree with that or do
22 you --

23 MS. WILLIS: I do -- I do disagree with
24 that, your Honor. We -- what has brought DP&L here
25 today is the choices it made. It wasn't the choices

1 that consumers made. It was the choices it made. It
2 chose to revert back to ESP I. It chose to treat --
3 or to enter a Stipulation, a global Stipulation,
4 where it committed to spend all kinds of money on
5 Grid Mod and where it agreed to a lot of other
6 special deals for a lot of parties. It chose that.
7 OCC opposed it. The Commission approved it. It made
8 that choice.

9 And if you use their words, it chose to
10 assume that it would get the rate increase and has
11 been spending more money than it's taking in. That's
12 their words. These are choices that they've made and
13 consumers -- you know, those were not choices
14 consumers made.

15 DP&L needs to come to the table. It --
16 it had an agreement. Consumers lived up to their
17 part of the agreement. They've been paying that
18 stability charge since 2009. And so all of a sudden
19 we are supposed to say, okay, wait a second. They
20 don't have to live by their agreement. That's a very
21 bad precedent or policy to go -- it's bad for the
22 Commission to say this Stipulation -- you can choose
23 which parts of this Stipulation you want to -- you
24 want to abide by, but the other parts don't worry
25 about it. That's a really horrible precedent, bad

1 policy, and it's going to undermine the settlement
2 process in this state. It will have an extremely
3 chilling effect if we start picking apart settlements
4 and trying to determine what is an ESP provision and
5 what's not an ESP provision. They agreed to it all.
6 If it wasn't an ESP provision, term, or condition,
7 what was it?

8 COMMISSIONER CONWAY: Would you -- I get
9 your point. I understand your I guess it's
10 indignation what's happening or what's proposed to
11 happen here. I understand that. But do you -- do
12 you -- does your office agree that at the end of the
13 day what our goal and objective is -- to accomplish
14 is to ensure that customers get reliable service,
15 adequate amounts of it to suit their needs and
16 preferences, and -- and to pay whatever the
17 reasonable -- not whatever but pay the reasonable
18 costs of doing that?

19 MS. WILLIS: Certainly, your Honor, we
20 would agree under the statute DP&L has an obligation
21 to provide service and facilities that are reasonable
22 and just in all respects and that would include
23 reasonable rates. It's the policy of the state to
24 ensure that customers have reasonably priced service;
25 so, yeah, absolutely we would agree with that. But

1 we also would state that there was an order. It was
2 approved. There was an agreement. It was signed.
3 Consumers deserve to have that rate freeze honored.

4 COMMISSIONER CONWAY: Thank you.

5 COMMISSIONER FRIEDMAN: Ms. Willis, thank
6 you for your comments. A follow-up question for you.
7 Is it your suggestion that the Commission cannot,
8 should not address the taking issue, the fair
9 compensation issue simply by virtue of the fact that
10 AES elected to trigger the mechanism in your opinion
11 that resulted in the rate freeze?

12 MS. WILLIS: Absolutely. DP&L -- you
13 know, again, it was a choice that DP&L made to go
14 back to ESP I. When they go back to ESP I, it has to
15 be governed by the terms of the Stipulation from the
16 2009 order.

17 COMMISSIONER FRIEDMAN: Is it your
18 suggestion, therefore, that this Commission should
19 not concern itself with constitutional rights?

20 MS. WILLIS: Your Honor, I don't believe
21 constitutional rights are at issue here. I do
22 believe it is a legal issue that confronts the
23 Commission that they should not give weight to
24 factual issues such as credit ratings, and I would --
25 I would be remiss if I didn't say that some of the

1 information that I heard this morning -- this
2 afternoon about credit ratings is not part of the
3 record. I believe that a lot of the information you
4 might have heard today about the credit ratings and
5 what the agencies have done relates to post-test year
6 and post-briefing information that was provided by
7 DP&L.

8 So I think we have got to keep that in
9 mind. We are talking about a record here in this
10 case, and we shouldn't be extending to issues beyond
11 the record or evidence beyond the record so.

12 COMMISSIONER FRIEDMAN: Thank you.
13 Appreciate it.

14 CHAIR FRENCH: Any other questions?

15 Okay. Thank you very much.

16 MS. WILLIS: Thank you.

17 CHAIR FRENCH: Okay. Next up are Kroger
18 and OMAEG. Ms. Bojko, I believe you are handling
19 this, so you have all 10 minutes for those two
20 Intervenors.

21 MS. BOJKO: Madam Chair, Commissioners,
22 thank you for the opportunity to present a commercial
23 and industrial sector's view on the legality of the
24 rate freeze agreed upon in DP&L's ESP I.

25 My name is Kim Bojko, and I will be

1 presenting collectively on behalf of the Ohio
2 Manufacturers' Association Energy Group and The
3 Kroger Company. DP&L faces a simple problem of its
4 own making under the terms of its first ESP I
5 Stipulation which DP&L willingly agreed to enter into
6 originally and then voluntarily chose to revert back
7 to twice. DP&L is prohibited from increasing its
8 base distribution rates while operating under that
9 ESP I.

10 The solution, however, is also simple.
11 DP&L can implement a new ESP or they can implement a
12 new Market Rate Offer or they could file an emergency
13 rate case. But instead of making one of those
14 filings, DP&L wants the best of both worlds at the
15 expense of customers. DP&L wants to raise its
16 rate -- rates while still operating under the
17 remaining more favorable terms of the ESP, and they
18 are accepting those favorable terms of the ESP such
19 as the Rate Stabilization Charge.

20 DP&L's request is unlawful and
21 unreasonable, and the Commission should deny it.
22 DP&L should not be able to retain those favorable
23 benefits while avoiding any obligations under the
24 same agreement. But if the Commission determines
25 that DP&L's rate case application -- remember, we are

1 here about a rate case, not an ESP, so if the
2 Commission determines that the rate case application
3 has any merit and approves an increase at all, it
4 should stay the implementation of that rate increase
5 until DP&L is no longer operating under the
6 stipulated ESP I because that's what DP&L agreed to.

7 Under the terms of the ESP I, the
8 stipulated rate freeze remains in effect and bars
9 implementation of any increases in base rates. The
10 stipulated rate freeze may not preclude DP&L from
11 applying for a rate increase or filing a rate
12 increase, but it most certainly precludes Dayton
13 Power and Light or the Commission from implementing
14 any approved increase until DP&L is no longer
15 operating under that ESP I.

16 Now, you heard DP&L explain that a rate
17 increase is vital to their operations. We've talked
18 about that today. They said it was dire that they
19 receive this rate increase. So I have the same
20 questions that Ms. Willis had. Why hasn't DP&L done
21 everything that it can to make sure that it's in a
22 better financial condition? Why hasn't DP&L filed an
23 ESP or an MRO like the other electric distribution
24 utilities have done in the past?

25 DP&L is the only utility that has

1 reverted back to a prior Electric Security Plan case.
2 The other utilities when they had a provision removed
3 or unlawful provision taken out and overturned by the
4 Court filed a new ESP. Why hasn't Dayton done this?
5 Why haven't they filed an emergency rate case?

6 Instead of filing an emergency rate case,
7 to Commissioner Conway's point, they asked for an
8 oral argument. Instead of getting to the rate case
9 and getting an order from you, they asked to have an
10 oral argument that is going to delay the decision
11 from the Commission.

12 Maybe the answer is that Dayton doesn't
13 really need a rate increase. Maybe they believe it's
14 more lucrative to operate under the ESP I and receive
15 the Rate Stabilization Charge. Either way it's
16 Dayton's choice; it's not consumers.

17 Now, let's take a closer look at some of
18 the arguments that Dayton Power and Light has raised
19 today. Originally DP&L seemed to recognize the
20 Commission extended all terms and conditions and
21 provisions of the ESP I Stipulation when it extended
22 ESP I when Dayton argued that the RSC continue. That
23 was challenged. And at that time DP&L said, no, all
24 terms must continue. But now DP&L seems to pivot and
25 argue that the rate freeze is not really a term of

1 that Stipulation, or maybe they are arguing that it
2 was never valid to begin with. I'm not sure.

3 But in its briefs, Dayton argued that the
4 stipulated rate freeze which it knowingly agreed to
5 and operated under for years is now somehow unlawful.
6 Well, the argument is without merit. The Commission
7 has routinely authorized stipulated rate freeze even
8 in -- absent any specific statutory authorization for
9 other Ohio utilities, and it has also done it for
10 Dayton numerous times.

11 In 2003, DP&L agreed to a Stipulation to
12 create a Rate Stabilization Plan. That Rate
13 Stabilization Plan included a rate freeze. The Rate
14 Stabilization Plan was not statutorily mandated, and
15 it predated the statutorily mandated transition plan
16 and ESP.

17 Also the Supreme Court of Ohio at
18 Dayton's urging upheld the Stipulation, the Rate
19 Stabilization Plan including the rate freeze. The
20 Commission also upheld the Stipulation and the rate
21 freeze in a subsequent DP&L storm rider case. The
22 Commission recently upheld the ESP I Stipulation and
23 all terms and conditions in the recent Global
24 Settlement Stipulation.

25 In addition, 4928.143(B)(2)(h)

1 specifically permits rate freezes. The statute
2 states that an ESP may include provisions regarding a
3 utility's distribution service. If distribution
4 rates and a rate freeze of those rates are not -- do
5 not fall under that statutory provision, I don't know
6 what does. They clearly are part of a utility's
7 distribution service.

8 And the cases cited by Dayton Power and
9 Light are inapplicable to the case here today.
10 DP&L's argument is interesting though. If a
11 stipulated rate freeze was not lawful or authorized
12 by the ESP statute, then why did DP&L knowingly agree
13 to it and advocate for its enactment in front of the
14 Supreme Court? Also, by the way, the Rate
15 Stabilization Charge, that is not specifically
16 authorized by the statute. In fact, many would say
17 it's a POLR charge or financial integrity charge that
18 the Supreme Court has specifically overturned. If
19 that's not authorized by the statute, why isn't DP&L
20 asking for that to not continue?

21 If a term is deemed to be unlawful, then
22 the ESP I Stipulation must be voided in its entirety.
23 If ESP I is voided, DP&L would lose the benefits of
24 the ESP including the RSC. Also it's well
25 established contract law that no rights can arise for

1 either party from an illegal contract or a contract
2 executed in violation of the public policy. So if
3 DP&L asserts that the ESP I Stipulation has an
4 invalid, unlawful term, or it's somehow illegal, then
5 that Stipulation needs to be void, and they lose
6 their RSC.

7 4928.143(C)(2)(b) required the Commission
8 to issue an order necessary to continue the
9 provisions, terms, and conditions of the utility's
10 most recent Standard Service Offer until a subsequent
11 offer is authorized. It doesn't say some provisions
12 may continue or only a select few continue. It says
13 shall continue the provisions, terms, and conditions.
14 That's what the Commission did.

15 Now, the second argument DP&L raises is
16 that the rate freeze will harm the Company's
17 financials. DP&L has not presented record evidence
18 showing that a distribution rate freeze would, in
19 fact, harm its overall financial integrity.

20 Remember, the rate case is a small portion of its
21 overall rates. DP&L also benefits from guaranteed
22 cost recovery through various riders including the
23 RSC.

24 The information presented today is not
25 record evidence. It's beyond the scope of this

1 proceeding, and it's outside the test year of this
2 case. Any information presented about what may
3 happen at some point in the future is beyond the
4 scope of this rate case, and it's outside the test
5 year and, thus, cannot be considered.

6 Let's talk about the third argument that
7 the rate freeze is somehow confiscatory. Well,
8 upholding a stipulated rate freeze would not be a
9 governmental takings and would not constitute
10 confiscatory rates. Setting aside the fact that DP&L
11 agreed to the rates, a rate is not confiscatory where
12 either the utility possesses a mechanism to raise its
13 rates, or rates as a whole are not so unjust as to
14 destroy the value of the property for all the
15 purposes for which it was acquired and in so doing
16 practically deprived the owner of property without
17 due process of law.

18 For the first criterion, DP&L still has
19 several mechanisms to raise its rates under the
20 stipulated rate freeze. I won't reiterate those. We
21 have already talked about them.

22 As for the second criterion, DP&L's
23 current revenue in its entirety and without an
24 increase in rates does not threaten the financial
25 stability due to several forms of guaranteed cost

1 recovery. There is case law out there. The U.S.
2 Supreme Court held in Market Street Railway that no
3 regulated utility has a constitutional claim to
4 increased compensation to offset losses due to market
5 forces or its own voluntary actions. So, no, Dayton
6 doesn't have a constitutional right because of its
7 voluntary actions.

8 The RSC is a relic of DP&L's ESP I. The
9 Commission has authorized DP&L to continue collecting
10 the RSC until the Commission approves DP&L's next
11 ESP. However, in exchange for creating that RSC,
12 DP&L agreed to freeze its rates for the duration of
13 the ESP I.

14 In another recent settlement, DP&L agreed
15 to be bound by the terms of its ESP I in its entirety
16 and not challenge any provision of the ESP I which is
17 what they are doing today. DP&L cannot have its cake
18 and eat it too. Thank you.

19 CHAIR FRENCH: Thank you, Ms. Bojko.

20 Any questions? Start at this end.

21 COMMISSIONER FRIEDMAN: Just -- yeah.

22 Sorry.

23 Ms. Bojko, thank you for your -- for your
24 comments. Question for you, are there any
25 circumstances that would justify a severability of

1 the Stipulation as an agreement?

2 MS. BOJKO: Commissioner, of course,
3 there are -- there are reasons or opportunities to do
4 that. Unfortunately for Dayton Power and Light in
5 this particular case, there is a provision in the ESP
6 that says it's not severable and also that it cannot
7 be severed. So if you look at ESP I's Stipulation at
8 paragraph 34, it says that the Stipulation is the
9 consensus among the signatory parties of an overall
10 approach to rates so basically that it's in the
11 package and that it should be taken as a whole and
12 the Commission should consider it as a whole. So in
13 this case it cannot be severed as you suggest.

14 COMMISSIONER FRIEDMAN: Are you
15 suggesting that the Commission should -- has no
16 authority to -- to engage in severability if it
17 perceives a Settlement Agreement to be against public
18 interest theoretically? Are we bound to respect the
19 terms and conditions of a stipulated agreement
20 between parties at interest?

21 MS. BOJKO: Madam Chair, Commissioner, of
22 course not except for the problem that we have here
23 that you've already approved that Stipulation, and
24 you already said that the parties would be bound by
25 it because the Commission approved the Stipulation as

1 a package.

2 That's not the situation. If back in
3 2009 when the Commission was going to approve the
4 package and decided to sever out -- like it decided,
5 okay, the RSC is unlawful and it removes it, yes, of
6 course, you have that ability. The statute says you
7 have that ability to modify an ESP.

8 But here you already approved the
9 Stipulation and it was DP&L's choice to go back to
10 the Stipulation. So since we are going back to the
11 Stipulation by DP&L's choice, then we have to honor
12 the Stipulation as it was approved, the benefit of
13 the bargain, because the problem we also have is if
14 you don't do that now, then parties had a right to
15 withdraw if the Commission modified that ESP way back
16 in 2009.

17 Now some would argue do we have that
18 right to withdraw or not withdraw. And that's
19 another case I think that you will be hearing quite
20 soon. But, I mean, that's -- you approved it, and
21 the Stipulation was approved as a package, so if we
22 are going back to that package, then we need to honor
23 all terms and conditions of that package, all the
24 benefits of the bargain on both sides.

25 Otherwise, we are going to, you know,

1 thwart settlements because one party can withdraw or
2 say that they don't like one provision. Another
3 party can say they don't like this provision. What's
4 the point of the settlement at that point?

5 COMMISSIONER FRIEDMAN: Thank you.

6 COMMISSIONER CONWAY: Just one clarifying
7 point or question. Ms. Bojko, thank you for your
8 comments and your arguments. Very helpful. I think
9 that my understanding of what Mr. Sharkey described
10 as Dayton's position is that the rate freeze
11 provision, while -- while it is a provision of the
12 Stipulation, it's not a provision of the ESP I. And
13 so when 2012 rolled around, the three-year period
14 rolled around, the rate freeze Stipulation ended
15 while the RSC provision which was not -- was also
16 part of the Stipulation but -- as I understand it,
17 but also part of the ESP I, it continued on.

18 And so he is not -- he is not suggesting
19 that you pick and choose which ESP stipulations go
20 forward, but rather you -- in this case you rec --
21 he's suggesting, arguing that you recognize that one
22 of the provisions is not actually a provision of the
23 ESP but -- and the other -- other is.

24 So he's not -- his -- I think -- I'll let
25 him get up and talk about it, but I don't think his

1 view is that he is -- that he is picking and choosing
2 between provisions of the ESP. That is -- is that
3 your understanding about his -- of his position at
4 least? I know you don't agree with it, but I just
5 want to make clear I understand -- I'm following
6 you -- your argument and that you are also following
7 his arguments.

8 MS. BOJKO: Madam Chair, Commissioner,
9 that -- I don't know what to believe to be honest
10 with you. Their position has changed so many times.
11 When they wanted the RSC and parties argued against
12 the RSC and the RSC wasn't a term, they said no, no,
13 no. The RSC and everything else is a term. They
14 didn't argue at that time that the rate freeze wasn't
15 a term. They said all terms and conditions and
16 provisions of the ESP I -- I should continue. That
17 was their argument at the time so we believed --

18 COMMISSIONER CONWAY: Where are you
19 referring to that being their argument?

20 MS. BOJKO: The first time they reverted
21 back. All parties -- and we filed applications for
22 hearing and some people appealed it and the Court
23 said it wasn't ripe and sent it back, and it's an
24 ongoing litigation. But, you know, that was the
25 point is that we don't know. It seems to us they are

1 saying that back when they wanted the RSC, that all
2 terms and conditions of the ESP should continue, but
3 now when they don't want the rate freeze, oh, no,
4 that's not really a term.

5 The Commission has historically called
6 this ESP I. The Commission actually when they took
7 out the CBP -- you know, the phasing into the market
8 because it didn't even make sense any more because we
9 were fully in the market for the Standard Service
10 Offer, the Commission called it a modified ESP I and
11 said all the other terms and conditions still apply.

12 So there's -- it's impossible to say that
13 the Commission said this is a term of the ESP and
14 this wasn't a term of the ESP. I don't think that's
15 accurate, and I'm confused by their argument of why
16 it wouldn't be a term and condition of the ESP and
17 what is or is not unlawful at this point.

18 COMMISSIONER CONWAY: I mean, would you
19 concept -- from a hypothetical, conceptual
20 standpoint, would you agree that you could have
21 provisions in the Stipulation that is as a package
22 used to resolve an ESP? You could have some
23 provisions in the Stipulation that are not actually
24 part of the ESP that's being -- that's being resolved
25 by the Stipulation?

1 MS. BOJKO: That -- Chairman,
2 Commissioner, very interesting question because what
3 is an Electric Security Plan? There's been arguments
4 that if you really read 4928.143, the Electric
5 Security Plan is only the Standard Service Offer and
6 that could even be done by the Electric Security Plan
7 or through a Market Rate Offer so that all those
8 other terms and conditions are not part of the ESP.
9 The only thing that's the ESP is the SSO. So, I
10 mean, that argument has been made too.

11 So what is an Electric Security Plan? I
12 think the orders are quite clear that ESP I equals
13 what they approved as a package. They've used as a
14 package so many times the Stipulation is as a
15 package. ESP is as a package. No term should be
16 modified.

17 The Commission actually already ruled on
18 this. The Commission interpreted that it meant --
19 that this 4928.143(C)(2)(b), the Commission
20 interpreted it to say that withdrawing an ESP and
21 reverting to a previous ESP reinstates all of the
22 terms of the ESP. They found that in the 2012
23 reversion case, 12-426-EL-SSO. So the Commission
24 already ruled on what does this mean and what
25 constitutes an ESP, and the rate freeze is part of

1 that package.

2 COMMISSIONER CONWAY: One more question.
3 Would you -- would it be your position that if a
4 Stipulation among the parties to an ESP proceeding,
5 if they enter into a Stip -- if those parties enter
6 that Stipulation, the Stipulation, all of its terms
7 and conditions become part of the ESP that's --
8 that's approved as a result of the Stipulation? So
9 all -- what I am asking you is it your position that
10 all provisions of the Stipulation used to resolve an
11 ESP case become part of the ESP?

12 MS. BOJKO: Chairman, Commissioner, I
13 believe that's what the Stipulation says itself.
14 There was actually a paragraph that I read before
15 that says that all of the provisions of the
16 Stipulation are, you know, part of this package that
17 we are all agreeing to and that included the RSC and
18 it included the rate freeze.

19 So if we are going to eliminate the rate
20 freeze, maybe we should reconsider the RSC. But more
21 importantly Dayton just agreed to be bound again by
22 the terms of the ESP I in a separate proceeding that
23 many parties signed onto. So they've continually
24 agreed to the ESP I and the Stipulation as a package
25 and that's why they should be held accountable and

1 held to that package and the rate freeze should be
2 upheld and no rate should go into effect -- effect
3 into DP&L files a new ESP I. Thank you.

4 CHAIR FRENCH: All right. Thank you very
5 much.

6 Okay. Lastly, we will hear rebuttal from
7 AES Ohio, please. You will have 5 minutes once you
8 begin.

9 MR. SHARKEY: Thank you, your Honor.
10 Your Honor, counsel for OCC and counsel for OMAEG
11 have argued that AES Ohio is not complying with the
12 bargain struck in the 2009 Stipulation so let's talk
13 very specific what the bargain was. The bargain in
14 that 2009 Stipulation is that the rate freeze would
15 be in effect until December 31, 2012.

16 Also, your Honor, the bargain in that
17 Stipulation was that the RSC would be in effect
18 through December 31, 2012. That bargain was
19 solidified, complied with. There was no rate
20 increase by AES Ohio during that period of time. AES
21 Ohio collected the RSC during that period of time.

22 After that Stipulation is over, what
23 controls is the statute. The statute governs what
24 happened after AES Ohio withdrew ESP III. The
25 Commission is required -- it's a creature of statute.

1 It's required to comply with that statute and that
2 statute says the Commission shall, mandatory, shall
3 implement the terms of the prior ESP.

4 And as I've described in my initial
5 comments, a rate freeze is not an ESP term. There is
6 nothing in the ESP statute that authorizes an ESP.
7 That's the central issue before the Commission, is
8 there anything in the ESP statute that would
9 authorize the Commission to implement a rate freeze?

10 Note counsel for OCC and counsel for
11 OMAEG almost entirely ignored that issue. They talk
12 about what's in the Stipulation. Irrelevant. That
13 Stipulation is gone, done. The Commission is
14 required to comply with the statute. They largely
15 ignore it. The word shall is mandatory, and the rate
16 freeze term is not a -- is not authorized by the ESP
17 statute.

18 A couple of other points. I believe,
19 Commissioner Friedman, into one of your questions, I
20 may -- I have been informed by my client I may have
21 made a mistake, but just to be clear it's the
22 Company's position a Stipulation can include ESP
23 terms and other terms, so it can include terms like
24 the rate freeze which was lawful only because AES
25 Ohio had agreed to it through December 2012. It

1 could include alternative energy terms. Those terms
2 don't become ESPs -- ESP terms. They just become
3 other terms of the Stipulation. The ESP terms are
4 only the ones in the Stipulation.

5 So I think I may have made a mistake in
6 response to one of your questions. I apologize if I
7 did.

8 COMMISSIONER FRIEDMAN: Thank you for the
9 clarification.

10 MR. SHARKEY: Happy to.

11 Another point is that the argument by the
12 Intervenors was that the Commission shouldn't
13 choose -- the Company shouldn't pick and choose which
14 terms are reinstated after A -- ESP term is stip --
15 is terminated. That's exactly right. The General
16 Assembly chose. The General Assembly identified what
17 would happen after an ESP is terminated and it's very
18 clear, again, that it's the terms of the ESP and,
19 again, a rate freeze is -- is not an ESP term.

20 I also want to address one of Ms. Bojko's
21 comments that there's nothing in the record that
22 shows that AEP Ohio would be in a -- would be in poor
23 financial condition and would be unable to provide
24 reliable service if a rate freeze is implemented.
25 That absolutely is not true. Pick up Kathy Storm's

1 testimony and her testimony very clearly describes
2 the poor financial condition of the Company and the
3 drastic cuts that it's going to need to make to its
4 spending on reliability and capital. There would be
5 significant cuts the Company would need to be making
6 and, again, the Company is already struggling to
7 provide reliable service. It's struggling to
8 implement its tree-trimming plan. It's not been able
9 to trim trees as many times as it is supposed to. It
10 just doesn't have the money. So a rate freeze is
11 going to have a drastic adverse financial effect.

12 And then the last -- last question I
13 wanted to talk about briefly was the RSC. The RSC,
14 unlike a rate freeze, is an ESP term. The Commission
15 has held so four times, a December 19, 2012, entry,
16 paragraph 5, and three other times in other cases at
17 least. So it's very clear that the RSC is an ESP
18 term and, therefore, was reinstated.

19 And then, finally, Ms. Bojko was making
20 assertions that, you know, there is no benefits to
21 the customers associated with the RSC. The RSC
22 provides significant benefits. First of all, the
23 Company needs the RSC to enable it to provide
24 reliable service as I just described.

25 In addition, as we've proven in numerous

1 cases when it was initially established, the Company
2 is subject to POLR risks, and those POLR risks
3 compensate it. Either the RSC is compensating it for
4 those POLR risks, and by implementing the RSC, the
5 Company was able to move to market-based rates. That
6 was part of the quid pro quo was market-based
7 rates -- market-based rates were being implemented,
8 but the RSC would be implemented as well. So there
9 have been significant benefits to customers. And I
10 think my time is up.

11 CHAIR FRENCH: Thank you.

12 MR. SHARKEY: I apologize for talking so
13 fast.

14 CHAIR FRENCH: No, no.

15 MR. SHARKEY: I had a lot I wanted to
16 say.

17 CHAIR FRENCH: It's necessary when you
18 are timed, right? I have a question for you. So you
19 did just now indicate that the Commission has, in
20 fact, determined that the RSC is authorized under or
21 part of an ESP, right?

22 MR. SHARKEY: Yes.

23 CHAIR FRENCH: On several occasions.

24 MR. SHARKEY: Four at least.

25 CHAIR FRENCH: Okay. Where is that

1 authorized? Where is the RSC specifically authorized
2 under the ESP statute?

3 MR. SHARKEY: That would be
4 4928.143(B)(2)(d). And that statute the Supreme
5 Court has held has three elements, your Honor. The
6 first element it refers to something being a charge
7 or something along those lines but there is no --
8 there is no dispute that the RSC is a charge. It
9 satisfies that element very easily.

10 The next element is a relating to
11 element. A charge is lawful under that charge if it
12 relates to a variety of things that include default
13 and standby service. If it relates to default or
14 standby service, then it's lawful. And the RSC, if
15 you will give me a couple of minutes, it sort of has
16 a long history, but the idea is that when a utility
17 like AES Ohio has an obligation to provide service --
18 generation service to customers who -- who have
19 switched or who are on a Standard Service Offer, it
20 has an obligation to standby and provide service to
21 them.

22 And that creates substantial risks
23 because if one of the generation suppliers, the
24 winning bidder or competitive provider were to
25 default, they can, they are not violating a statute.

1 AES Ohio has a statutory obligation to step in and
2 serve them at frozen rates and that's a default
3 service or a standby service.

4 And the RSC back in -- originally in the
5 2005 case was established to compensate our -- AES
6 Ohio for the costs and principally risks that that
7 puts on AES Ohio. AES Ohio is sort of providing
8 catastrophe insurance is what I like to describe it
9 as. So it relates to standby or default service.

10 And then the third element in that
11 statute is that it would have the effect of
12 stabilizing or providing certainty regarding service.
13 And the RSC -- without the RSC, as I have described
14 at significant length, the Company is going to have
15 significant -- significant difficulty providing
16 stable and reliable service.

17 So it's (B) (2) (d) that has been the
18 statute under which the RSC has been authorized and
19 approved.

20 CHAIR FRENCH: Thank you.

21 Any other questions?

22 COMMISSIONER FRIEDMAN: I just have one
23 bit of a digression. The -- you characterize
24 supplier default as an AES assumed risk. Isn't it a
25 risk to the other defaulting -- or the other default

1 providers, the other SSO providers?

2 MR. SHARKEY: Sure, your Honor. So years
3 ago before AES -- when AES supplied the generation
4 itself, it had generation assets. It supplied all
5 the generation. It was a risk -- it was just a risk
6 of a competitive provider. The competitive provider
7 defaulted, they would come back to AES Ohio, and AES
8 Ohio has that risk.

9 Now AES Ohio's risks are different, but
10 they still have significant provider of last resort
11 risk. So if a competitive provider defaults, they
12 still default to the competitive retail -- the
13 customer will default to the competitive retail
14 electric service Standard Service Offer.

15 COMMISSIONER FRIEDMAN: That's correct.

16 MR. SHARKEY: But if one of those -- now
17 there is a risk that what happens if those winning
18 bidders default and those winning bidders, if they
19 default, they -- AES Ohio has a statutory obligation
20 to step in, so AES Ohio's risks -- POLR risks have
21 changed a little bit but still has significant POLR
22 risks.

23 And I would argue, your Honor, back in
24 the day when -- originally when the -- the RSC was
25 established, AES Ohio owned generation assets. So

1 the risks of market turmoil, if that's were going
2 crazy in the market, lessen a little bit. It could
3 rely on its own generation assets to supply the
4 power.

5 Now, at the Commission's urging, AES Ohio
6 sold all of its generation assets. So when a
7 competitive supplier, competitive supplier winning
8 bidder, that is, were to default, AES Ohio needs to
9 go into the market to buy generation, and they are
10 likely to default when market prices are sky high and
11 they are having financial difficulties for them to
12 acquire generation. So the idea being they have a
13 contractual obligation to sell power to AES Ohio at a
14 low rate and might default when market prices are
15 really high so they are taking massive losses.

16 COMMISSIONER FRIEDMAN: So your POLR risk
17 exists only if every defaulting SSO supplier
18 defaults.

19 MR. SHARKEY: No, no. If they default
20 and the others elect not to or are unable to step in.

21 COMMISSIONER FRIEDMAN: That's correct.
22 And if they are unable or unwilling to step in, then
23 they, in fact, default, so it's only when all of the
24 SSO suppliers default.

25 MR. SHARKEY: My understanding, your

1 Honor, they have some obligations to step in but some
2 optionality too. I need to look at those. I don't
3 think that it's that they all default. I don't think
4 they have an obligation. I think they have -- as I
5 understand it, and again, this is not my area of
6 expertise, when another -- when a winning bidder
7 defaults, the other winning bidders don't have an
8 obligation to come in and supply that -- that
9 person's power. They have an obligation only to
10 serve their own power that they have already
11 contractually agreed to.

12 They may have an option to step in and
13 provide more, but I don't believe they have an
14 obligation. But again, your Honor, that's not an
15 area of expertise so if I have misstated it, I
16 apologize. I believe that to be correct.

17 COMMISSIONER CONWAY: Just one follow-up
18 to that line of question and answer. So the other
19 EDUs in Ohio, they would face the same default risk
20 that you just described that Dayton currently faces
21 with regard to the SSO, correct?

22 MR. SHARKEY: I believe so, yes.

23 COMMISSIONER CONWAY: All right. And do
24 any of the other ones have an RSC in place?

25 MR. SHARKEY: Not to my knowledge, your

1 Honor. But again, AES Ohio long had the lowest rates
2 in the state, and they have got numerous charges AES
3 doesn't have.

4 CHAIR FRENCH: Okay. All right. Thank
5 you very much, Mr. Sharkey.

6 MR. SHARKEY: Thank you so much for your
7 time. We very much appreciate you being willing to
8 hear oral argument on this issue given its importance
9 to AES Ohio.

10 CHAIR FRENCH: Absolutely.

11 Thank all of you actually for being here
12 today. The oral arguments are now concluded.

13 The transcript of this argument will be
14 filed in the corresponding case dockets and will be
15 considered part of the record along with testimony,
16 documentary evidence, and briefs.

17 A decision regarding this specific issue
18 will be part of any future Opinion and Order issued
19 on the entirety of the rate case proceeding, okay?

20 Are there any additional comments from
21 our Legal Department? No?

22 Okay. Thank you, everyone. We are
23 adjourned.

24 (Thereupon, at 3:34 p.m., the hearing was
25 adjourned.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter on Wednesday, May 18,
2022, and carefully compared with my original
stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-7283)

- - -

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

6/1/2022 9:02:27 AM

in

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

Summary: Transcript May 18th 2022 In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution. In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority. In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.