

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.

CASE NO. 08-1094-EL-SSO

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF REVISED
TARIFFS.

CASE NO. 08-1095-EL-ATA

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF CERTAIN
ACCOUNTING AUTHORITY.

CASE NO. 08-1096-EL-AAM

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR WAIVER OF CERTAIN
COMMISSION RULES.

CASE NO. 08-1097-EL-UNC

EIGHTH ENTRY ON REHEARING

Entered in the Journal on August 10, 2022

I. SUMMARY

{¶ 1} In this Eighth Entry on Rehearing, the Commission finds that the application for rehearing filed by Ohio Consumers' Counsel should be granted, in part, and denied, in part. The Commission further finds that The Dayton Power and Light Company d/b/a AES Ohio should be directed to file revised final tariffs, as approved by the Commission in the Sixth Entry on Rehearing, within seven days, specifying an effective date of August 11, 2021 for the tariffs.

II. HISTORY OF THE PROCEEDING

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio or the Company) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized.

{¶ 5} By Opinion and Order issued in this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish AES Ohio's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission extended ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved AES Ohio's application for a second ESP (ESP II). *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II as directed by the Court and then granted AES Ohio's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). In light of AES Ohio's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted AES Ohio's motion in this case to

implement the provisions, terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2016); Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing AES Ohio's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, et al. (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied*, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554.

{¶ 8} Subsequently, Interstate Gas Supply (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case*, Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case* by eliminating AES Ohio's distribution modernization rider (DMR) based upon the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 454, 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, AES Ohio filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). AES Ohio also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy

Supply Association (RESA). Joint comments were filed on December 4, 2019, by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers' Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) filed a motion on December 4, 2019, seeking rejection of AES Ohio's proposed tariff filing.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved AES Ohio's proposed tariffs, implementing the provisions, terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019). Subsequently, on January 17, 2019, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger.

{¶ 11} AES Ohio timely filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instant to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing. Fourth Entry on Rehearing (Feb. 14, 2020).

{¶ 13} Meanwhile, in *In re Dayton Power and Light Co.*, Case Nos. 18-1875-EL-GRD et al., (*Quadrennial Review Case*), the signatory parties to the global stipulation submitted in that proceeding—including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger—requested on October 23, 2020, that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represented that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn within 7 days after

the Commission issues a final appealable order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case*.

{¶ 14} Subsequently, on June 16, 2021, the Commission issued the Fifth Entry on Rehearing in this case granting, in part, and denying, in part, OCC's application for rehearing. Fifth Entry on Rehearing (June 16, 2021). In the Fifth Entry on Rehearing, the Commission directed AES Ohio to file proposed tariffs making the RSC refundable "to the extent permitted by law." Fifth Entry on Rehearing at ¶¶ 61-64. On July 16, 2021, AES Ohio filed proposed tariffs as directed by the Commission in the Fifth Entry on Rehearing. OCC and AES Ohio each filed an application for rehearing regarding the Fifth Entry on Rehearing on July 21, 2021. On July 30, 2021, OCC timely filed a memorandum contra the application for rehearing filed by AES Ohio; AES Ohio also timely filed a memorandum contra the application for rehearing filed by OCC.

{¶ 15} On August 11, 2021, the Commission denied the applications for rehearing filed by OCC and AES Ohio. Sixth Entry on Rehearing (Aug. 11, 2021). In addition, the Commission approved the tariffs filed by AES Ohio on July 16, 2021, and the Commission authorized AES Ohio to file final tariffs consistent with the Sixth Entry on Rehearing. Sixth Entry on Rehearing at ¶¶ 48, 51-53. On August 27, 2021, OCC filed a notice of appeal to the Supreme Court of Ohio. AES Ohio filed a notice of cross-appeal on October 8, 2021.

{¶ 16} Meanwhile, on June 16, 2021, the Commission adopted the global stipulation in the *Quadrennial Review Case* without modification. *Quadrennial Review Case*, Opinion and Order (Jun. 16, 2021). After rehearing, the Commission issued a final appealable order in the *Quadrennial Review Case* on December 1, 2021. *Quadrennial Review Case*, Third Entry on Rehearing (Dec. 1, 2021). Subsequently, pursuant to the commitments made in the global stipulation in the *Quadrennial Review Case*, IEU-Ohio withdrew its pending application for rehearing in this case. Further, Dayton/Honda and OMA/Kroger withdrew their pending applications for rehearing in this case. Seventh Entry on Rehearing at ¶¶ 19-21.

{¶ 17} On April 13, 2022, the Supreme Court of Ohio dismissed, sua sponte, OCC's appeal and AES Ohio's cross-appeal. *In re Dayton Power & Light Co.*, 166 Ohio St.3d 1471, 2022-Ohio-1156, 185 N.E.3d 1106, *reconsideration denied*, 167 Ohio St.3d 1409, 2022-Ohio-2047, 188 N.E.3d 1104..

{¶ 18} On June 15, 2022, the Commission issued a Seventh Entry on Rehearing in this case. In the Seventh Entry on Rehearing, the Commission found that the application for rehearing filed by IEU-Ohio should be deemed withdrawn and that the joint applications for rehearing filed by Dayton/Honda and OMA/Kroger should also be deemed withdrawn. Seventh Entry on Rehearing at ¶¶ 22, 27. The Commission also approved, again, the proposed tariffs filed by AES Ohio on July 16, 2021. Seventh Entry on Rehearing at ¶¶ 23, 28. Further, the Commission granted OCC's uncontested request for a stay in this proceeding.

{¶ 19} On June 22, 2022, AES Ohio filed final tariffs, with an effective date of June 22, 2022.

{¶ 20} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 21} On July 15, 2022, OCC filed an application for rehearing regarding the Seventh Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on July 25, 2022.

III. DISCUSSION

{¶ 22} In its third assignment of error, OCC claims that the Commission erred when it approved, a second time, AES Ohio's proposed tariffs filed on July 16, 2021, as if the Commission had not already approved those tariffs in the August 11, 2021 Sixth Entry on Rehearing. OCC submits that the Commission's ruling shows misapprehension or mistake

and should be modified to reflect the Commission's earlier approval of the tariff with an effective date of August 11, 2021.

{¶ 23} In its memorandum contra, AES Ohio claims that it has substantially complied with the Commission's directive to include language in its tariff that the RSC is "refundable to the extent permitted by law." Fifth Entry on Rehearing at ¶ 64. AES Ohio stresses that it did not, and would not, deliberately disobey or disregard any order of the Commission. AES Ohio represents that it would not object to any clarification or order on rehearing that the RSC tariff is effective as of August 11, 2021, consistent with the Sixth Entry on Rehearing. AES Ohio notes that the Commission held in the Sixth Entry on Rehearing that, if refunds of the RSC were to be ordered, such refunds would be made "at least for any period the RSC is collected after this Sixth Entry on Rehearing." Sixth Entry on Rehearing at ¶ 47.

{¶ 24} The Commission finds that rehearing on this assignment of error should be granted. As OCC points out, following AES Ohio's timely submission of proposed tariffs on July 16, 2021, the Commission approved the proposed tariffs in the Sixth Entry on Rehearing on August 11, 2021. AES Ohio did not file final tariffs as directed by the Commission. However, on March 8, 2022, during the briefing of an appeal and cross-appeal of this case to the Supreme Court of Ohio, now dismissed, AES mistakenly represented to the Supreme Court that AES had filed a "proposed" tariff with the Commission on July 16, 2021, "but that tariff has not been approved and is not currently operative." *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief at 1 (Mar. 8, 2022). Based upon AES Ohio's mistaken representation to the Supreme Court, the Commission sought to cure this alleged deficiency by approving the proposed tariffs in the Seventh Entry on Rehearing; however, as OCC correctly points out, this action was unnecessary and redundant. In order to correct this error, the Commission vacates Paragraphs 23, 28, 29 and 30 of the Seventh Entry on Rehearing, which contained the unnecessary and redundant approval of the proposed tariffs.

{¶ 25} The Commission will not ascribe bad faith to AES Ohio or its counsel without evidence. Further, with the dismissal by the Supreme Court of the appeal and cross-appeal of this proceeding, we are not convinced that there is any substantive difference in an effective date of the tariff of August 11, 2021, or June 22, 2022. However, AES Ohio did mistakenly fail to timely file final tariffs in response to the approval of the proposed tariffs in the Sixth Entry on Rehearing dated August 11, 2021, and AES Ohio should not be perceived to benefit from an inadvertent delay in filing final tariffs. Moreover, AES Ohio states that it would not oppose an order on rehearing clarifying that the current tariff became effective as of August 11, 2021, the date of the Sixth Entry on Rehearing. Accordingly, in order to ensure that AES Ohio's customers are held harmless from this inadvertent delay, AES Ohio is directed to file revised final tariffs for the RSC, within seven days, which reflect an effective date of August 11, 2021. We agree with AES Ohio that this filing, when made, will eliminate any and all prejudice claimed by OCC in its application for rehearing.

{¶ 26} In its first assignment of error, OCC alleges that the Commission erred when it failed to find that AES Ohio's collection of RSC charges (about \$60 million) from consumers since August 11, 2021, was unauthorized and in violation of law and a Commission order. OCC also claims in its fifth assignment of error the Commission erred by failing to order AES Ohio to pay forfeitures of \$9.45 million for AES Ohio's violations of the Sixth Entry on Rehearing, R.C. 4905.22, R.C. 4905.32, R.C. 4905.54, and other laws and by failing to determine if AES Ohio personnel involved in these tariff noncompliances are liable for forfeitures under R.C. 4905.56.

{¶ 27} AES Ohio responds that no penalty or refund is warranted because AES Ohio is in substantial compliance with the Commission's orders. AES Ohio further avers that there is no evidence suggesting that AES Ohio acted in bad faith or that it deliberately disobeyed a Commission order. AES Ohio claims that, in light of its agreement not to oppose a clarification that the tariff was effective as of the date of the Sixth Entry on Rehearing, there is no prejudice to OCC. AES Ohio also claims that, with respect to the requested refund, refunds are unlawful under R.C. 4905.32. Further, AES Ohio argues that

it charged customers the amounts included in their tariffs; therefore, it has not violated R.C. 4905.22 or 4905.32.

{¶ 28} The Commission finds that rehearing on this assignment of error should be denied. The Commission has ensured that there is no prejudice to OCC by requiring AES Ohio to file revised final tariffs for the RSC with an effective date of August 11, 2021. In the absence of any prejudice to OCC or AES Ohio's customers, we find that either the imposition of a forfeiture or an order that AES Ohio refund a portion of the RSC collected since August 11, 2021, would be unnecessary and inappropriate. In addition, there is no evidence of bad faith or the deliberate failure to perform a duty on the part of AES Ohio or its counsel.

{¶ 29} With respect to a refund, AES Ohio lawfully collected RSC charges between August 11, 2021, and the present under its tariff filed with the Commission pursuant to R.C. 4905.32. It is settled law in Ohio that retroactive ratemaking is not permitted. *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). The Commission has no authority to order a refund of charges collected under a Commission-approved tariff. OCC's remedy for AES Ohio's failure to file final tariffs is not a refund but to raise this issue in a timely manner with the Commission.

{¶ 30} While we reject OCC's first and fifth assignments of error for the reasons provided above, it is worth noting that, in any event, OCC did not raise the underlying issue in a timely manner and, thus, arguably deprived the Commission of the opportunity to correct it earlier in the proceeding. *Parma v. Pub. Util. Comm.*, 86 Ohio St. 3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred"). OCC had several opportunities to raise with the Commission AES Ohio's failure to file final tariffs, including after AES Ohio mistakenly claimed that the Commission had not approved that proposed tariffs in AES Ohio's Fourth Merit Brief on March 8, 2022, in *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief

(Mar. 8, 2022). Instead, OCC did not raise the issue until after the Commission issued the Seventh Entry on Rehearing on June 15, 2022. The failure to raise this issue at an earlier juncture precludes any claim for a forfeiture because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, ¶ 18, citing *Parma*, 86 Ohio St.3d at 148, 712 N.E.2d 724.

{¶ 31} In its second assignment of error, OCC claims that the Commission erred by misusing the statutory process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10. OCC claims that R.C. 4903.10 limits the Commission's authority to only hold rehearing on matters specified in the application for rehearing: "Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application if in its judgment sufficient reason therefore is made to appear." We find that, in light of our ruling on the third assignment of error, this assignment of error should be denied as moot.

{¶ 32} However, even if this assignment of error were not moot, the assignment of error would be denied. OCC ignores the remaining language of R.C. 4903.10, which states that "[i]f, after such rehearing, the commission is of the opinion that the original order *or any part thereof is in any respect unjust or unwarranted, or should be changed*, the commission may abrogate or modify the same; otherwise such order shall be affirmed." (Emphasis added.) The plain language of the statute does not limit "to matters raised on rehearing" the Commission's authority to modify the original order. *See also Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108, 10 O.B.R. 166 (1984) ("Following a rehearing, the commission need only be *of the opinion* that the original order should be changed for it to modify the same." (Emphasis sic.))

{¶ 33} In its fourth assignment of error, OCC claims that the Commission erred by issuing a ruling that departed from its past ruling in its Sixth Entry on Rehearing, without

an explanation, violating R.C. 4903.09 and Supreme Court of Ohio precedent. And the PUCO failed to show that its new course of action was lawful and reasonable, in violation of Supreme Court of Ohio precedent. We find that, in light of our ruling on the third assignment of error, this assignment of error also should be denied as moot.

IV. ORDER

{¶ 34} It is, therefore,

{¶ 35} ORDERED, That the application for rehearing filed by OCC be granted, in part, and denied, in part. It is, further,

{¶ 36} ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of final tariffs, consistent with the Sixth Entry on Rehearing. AES Ohio shall file one copy in its TRF docket and one copy in this case docket. It is, further,

{¶ 37} ORDERED, That the final tariffs shall be effective as of August 11, 2021. It is, further,

{¶ 38} ORDERED, That nothing in this Eighth Entry on Rehearing shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 39} ORDERED, That a copy of this Eighth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:

Lawrence K. Friedeman

GAP/hac

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**Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-
UNC**

Summary: Entry on Rehearing finding that the application for rehearing filed by Ohio Consumers' Counsel should be granted, in part, and denied, in part. The Commission further finds that The Dayton Power and Light Company d/b/a AES Ohio should be directed to file revised final tariffs, as approved by the Commission in the Sixth Entry on Rehearing, within seven days, specifying an effective date of August 11, 2021 for the tariffs. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio