BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution	:	CASE NO. 20-1651-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority	:	CASE NO. 20-1652-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	CASE NO. 20-1653-EL-ATA

APPLICATION FOR REHEARING OF AES OHIO

Pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35, The Dayton Power and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company") seeks rehearing from the Commission's December 14, 2022 Opinion and Order ("Order") on the following grounds:

1. The Order imposed a distribution rate freeze from the February 24, 2009 Stipulation and Recommendation approved in Case No. 08-1094-EL-SSO, *et al.* (the "2009 Stipulation"). That rate freeze expired on "December 31, 2012." 2009 Stipulation, p. 10. Imposing that distribution rate freeze a decade later is unreasonable and unlawful for the following reasons:

    a. When AES Ohio terminated ESP III in December 2019, the Commission was required to "issue such an order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer" pursuant to R.C. 4928.143(C)(2)(b). That standard service offer was ESP I. The rate freeze term from

the 2009 Stipulation was not revived upon the reversion to ESP I because the rate freeze, while a term of the 2009 Stipulation, was never a provision, term or condition of ESP I, for the following reasons:

i. Subsection (B)(2)(h) of the ESP statute does not "specifically authorize" a distribution rate freeze, and the Supreme Court of Ohio has held that the ESP statute does not authorize a term unless it is "specifically authorized" in the statute.

ii. The Supreme Court of Ohio has held that a "general grant of authority" to an agency is insufficient to grant authority to regulate "pricing." Thus, the general grant of authority in Subsection (B)(2)(h) to implement provisions regarding "distribution service" does not include the authority to implement a rate freeze.

iii. The Commission found (¶ 244) that AES Ohio's rates were "insufficient to provide AES Ohio with reasonable compensation." R.C. 4909.15(E) provides that the Commission "shall" implement new rates upon such a finding, and the Supreme Court of Ohio has held that it is the "duty of the Commission" to do so.

iv. Precedent from the Supreme Court of Ohio requires statutes to be interpreted so as to not violate the Constitution. Since

it would be a Constitutional violation for Subsection (B)(2)(h) to authorize the Commission to implement a distribution rate freeze, that Subsection should not be interpreted as authorizing one.

b. The intervenors waived any right they may have had to assert that AES Ohio was subject to a distribution rate freeze under ESP I, as follows:

i. None of the intervenors asked that the rate freeze be extended when ESP I was extended in 2012, and none of them sought rehearing from the Commission's order.

ii. None of the intervenors asked that the rate freeze be reinstated when ESP II was terminated and ESP I was reinstated in 2016, and none of them sought rehearing from the Commission's order.

iii. The intervenors failed to assert that the rate freeze barred AES Ohio's 2015 rate case.

iv. The Stipulation in AES Ohio's 2015 distribution rate case authorized AES Ohio to file this case; none of the intervenors sought rehearing from the Commission's order approving that Stipulation.

v. None of the intervenors asked that the rate freeze be reinstated when AES Ohio terminated ESP III in 2019.

c. AES Ohio's ability to provide reliable service will be hampered if its distribution rates are frozen.

2. The Order unreasonably and unlawfully excluded earnings-based incentive compensation from rate base (going forward) and recoverable expenses. There is no dispute that the total amounts that AES Ohio pays to its employees is consistent with market rates. The earnings-based portion of compensation is thus a cost to AES Ohio of providing service to customers, and should be recovered. There is no provision in R.C. 4909.15 that authorizes the Commission to deny recovery of otherwise recoverable expenditures on the ground that they allegedly benefit shareholders more than customers.

3. AES Ohio asks the Commission to clarify whether rate case expenses are included in the revenue requirement in this case.

4. AES Ohio asks the Commission to clarify that its approved cost of debt is 4.44%.

5. The Commission's decision requiring AES Ohio to allow customers to make a deposit payment in three installments was unreasonable and unlawful, because there is no such requirement in the Revised Code or the Commission's rules, and allowing the deposit to be paid over time unreasonably increases the risk that a customer will default without having paid their full deposit.

6. The Commission's decision to approve a customer charge of $9.75 – instead of the $15.66 charge sought by AES Ohio – was unreasonable and

unlawful because it is undisputed that AES Ohio's costs to provide distribution service to customers are fixed, and do not vary with customer usage. Those costs should thus be recovered through a customer charge, and not through an energy charge.

7. The Commission's decision that a partial phase-out of the Max Charge Provision should occur in AES Ohio's pending ESP IV case is unreasonable and unlawful because the evidence related to an appropriate level of that charge was presented in AES Ohio's application in this case, not in that case. To the extent that the Commission concludes that AES Ohio's proposed change to the Max Charge Provision should not be implemented at one time, the Commission should order that the proposal to be phased in over time.

8. AES Ohio asks the Commission to clarify its order regarding depreciation for accounts 362.13, 362.20, 362.60, 362.71 and 396.

9. AES Ohio asks the Commission or its Staff to provide the Schedules and Workpapers that were used to calculate the revenue requirement in this case, so that AES Ohio can further evaluate how that revenue requirement was calculated, and ensure that its books and records are consistent with the Commission's Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF AES OHIO

I. INTRODUCTION

The Commission (¶ 226) determined in this proceeding that AES Ohio's distribution service has an operating loss, yielding a zero percent earned rate of return under current rates. The Commission (¶ 244) found that such return is "insufficient to provide AES Ohio with reasonable compensation for distribution service rendered to its customers." The Commission (¶¶ 227, 245) further found that a just and reasonable increase to AES Ohio's annual revenue requirement would be $75,616,813 after grossing up for taxes.

Even though the Commission concluded that AES Ohio is not receiving reasonable compensation for providing distribution service, the Commission applied a distribution rate freeze from the February 24, 2009 Stipulation and Recommendation approved in Case No. 08-1094-EL-SSO *et al.* (the "2009 Stipulation") that expired by its terms on December 31, 2012. That decision was unreasonable and unlawful. On rehearing, the Commission should lift that freeze, reconsider or clarify other issues in its Order, and implement just and reasonable rates. R.C. 4903.10; Ohio Adm.Code 4901-1-35.[1]

II. THE DISTRIBUTION RATE FREEZE IS UNREASONABLE AND UNLAWFUL

This section demonstrates that the Commission should reconsider its Order implementing the rate freeze for the following reasons:

A. The ESP statute does not authorize the Commission to implement a distribution rate freeze, meaning that the rate freeze in the 2009

[1] The Company has filed an application for a new Electric Security Plan, which remains pending. Case No. 22-900-EL-SSO.

Stipulation was not a term of ESP I. Therefore, when ESP III was terminated and ESP I was reinstated, the rate freeze from the 2009 Stipulation was not reinstated.

B. Assuming for the sake of argument that the rate freeze was an ESP term (it is not), the intervenors waived the rate freeze issue by failing to raise it earlier.

C. A rate freeze will challenge AES Ohio's ability to provide reliable service.

A. The ESP Statute Cannot and Does Not Authorize a Rate Freeze

As demonstrated below, the Commission erred when it concluded that the ESP statute authorizes a distribution rate freeze.

Specifically, after AES Ohio terminated ESP III pursuant to R.C. 4928.143(C)(2)(a), the Commission was required ("shall") to reinstate "the provisions, terms, and conditions of the utility's most recent standard service offer." R.C. 4928.143(C)(2)(b). "*Only* a standard service offer *authorized in accordance with* Section 4928.142 or *4928.143* [the ESP statute] of the Revised Code, *shall serve as the utility's standard service offer* . . . ." R.C. 4928.141(A) (emphasis added).

Therefore, a term in the 2009 Stipulation is an ESP term "[o]nly" if it was "authorized" by the ESP statute; such a term would thus constitute a "provision[], term[], or condition[]" of ESP I and was reinstated when ESP I was reinstated. However, if a term in the 2009 Stipulation was not "authorized" by the ESP statute, then that term was not a "provision, term, or condition" of ESP I and was not reinstated when ESP I was reinstated.

The Commission (¶¶ 208-10) held that the "[p]rovision regarding . . . distribution service" phrase in R.C 4928.143(B)(2)(h) granted to it the power to implement a distribution rate freeze, and that the rate freeze provision in the 2009 Stipulation was thus a term of ESP I that was reinstated when ESP I was reinstated. As demonstrated below, the Commission should grant rehearing as to that conclusion because it is inconsistent with four separate decisions from the Supreme Court of Ohio:

1. Subsection (B)(2)(h) does not "specifically authorize" a distribution rate freeze, and the Supreme Court of Ohio has held that the ESP statute does not authorize a term unless it is "specifically authorized" in the ESP statute.
2. The Supreme Court of Ohio has held that a "general grant of authority" to an agency is insufficient to grant authority to regulate "pricing." Thus, the general grant of authority in Subsection (B)(2)(h) to implement provisions regarding "distribution service" does not include the authority to implement a rate freeze.
3. The Commission (¶ 244) found that AES Ohio's rates were "insufficient to provide AES Ohio with reasonable compensation." R.C. 4909.15(E) provides that the Commission "shall" implement new rates upon such a finding, and the Supreme Court of Ohio has held that it is the "duty of the Commission" to do so.
4. Precedent from the Supreme Court of Ohio requires statutes to be interpreted so as to not violate both the Federal and Ohio Constitutions. Since it would be a Constitutional violation for Subsection (B)(2)(h) to

authorize the Commission to implement a distribution rate freeze, that Subsection should not be interpreted as authorizing one.

1. A Rate Freeze is Not "Specifically Authorized" by the ESP Statute

The Supreme Court of Ohio has held that the "Commission erred in determining that ESPs may include items not *specifically authorized* by statute." *In re Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30-31 (agreeing with OCC's proposition of law) (emphasis added). In that case, the Court rejected the Commission's argument that the items listed under R.C. 4928.143(B)(2) were "illustrative . . . not exhaustive" of what an ESP could include. *Id*. at ¶ 33.

The Court held that "[t]he plain language of the statute controls." *Id*. at ¶ 34. The Court explained that the ESP statute "does not allow [ESPs] to include 'any provision'" and that "if a given provision does not fit within one of the categories . . . it is not authorized by [the ESP] statute." *Id*. at ¶ 32. The Court thus "reverse[d]" the Commission and held that an ESP cannot include "unlisted items." *Id*. at ¶ 35.

The Court's decision in *In re Columbus S. Power* is controlling. A distribution rate freeze is not "specifically authorized" by the ESP statute, and thus is not an ESP term. Therefore, when ESP I was reinstated, the rate freeze was not an ESP term and could not be reinstated.

2. The General Authority to Implement Provisions "Regarding . . . Distribution Service" Does Not Include the Authority to Implement a Rate Freeze

The Supreme Court of Ohio has held that "[i]n construing [a] grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 40 (citation omitted; emphasis added); *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 383, 329 N.E.2d 693 (1975) ("[i]n construing [a] grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.").

In *Burger Brewing*, the Ohio Liquor Control Commission ("Liquor Commission") passed "a price affecting regulation of substantial economic impact." *Id*. at 379. The Liquor Commission argued that it had authority to adopt that regulation because the General Assembly granted to the Liquor Commission the authority to "[c]ontrol the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof." *Id*. at 380 (quoting R.C. 4301.10; emphasis added).

The Court rejected that argument. *Id*. at 383. The Court held that the "general" authority granted to the Liquor Commission did not include express authority to regulate "pricing practices." *Id*. at 385. "Giving consideration to the wide discretion reposed in the [Liquor] [C]ommission . . . , *we, nevertheless, have concluded that claimed authority to regulate pricing*

practices . . . is not a power intended to be implied by the General Assembly in the general grants of express authority to the commission." *Id*. (emphasis added).

Here, Subsection (B)(2)(h) does not include a "clear" grant of authority to the Commission to implement a distribution rate freeze, and therefore interpretation of that subsection should be "resolved not in favor of the grant [of authority] but against it." *D.A.B.E.* at ¶ 40; *Burger* at 383.

Indeed, the grant of authority to implement "[p]rovisions regarding the utility's distribution service" in Subsection (B)(2)(h) is a general grant of authority similar to the authority granted to the Liquor Commission under R.C. 4301.10 to "[c]ontrol the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof." The Court in *Burger Brewing* specifically found that such a "general grant of express authority" to the Liquor Commission does not include the "authority to regulate pricing practices." *Burger* at 385. Similarly here, the Commission should conclude that the "general grant of authority" in Subsection (B)(2)(h) to implement provisions regarding "distribution service" does not include the authority to implement a rate freeze.

Further, *Burger Brewing* found it significant that the General Assembly regulates the Liquor Commission with "specificity . . . in the areas wherein it has determined regulation to be necessary" and that its "silence in a regulatory area of substantial importance" showed that the General Assembly did not grant the authority in question to the Liquor Commission. *Id*. at 385. Similarly here, the General Assembly regulates this Commission with great "specificity," and the power to implement a rate freeze would be of "substantial importance." The fact that the General

Assembly did not expressly grant that authority to the Commission establishes that it did not intend for the Commission to have that authority.

Note also that in determining the scope of authority that the General Assembly had provided to the Liquor Commission, the *Burger Brewing* Court gave "consideration to the wide discretion reposed in the [Liquor] [C]omission" (emphasis added), and the Court still determined that the agency was not granted the authority at issue. The Court has more recently held that "the judicial branch is *never* required to defer to an agency's interpretation of the law." *TWISWM Enterprises, LLC v. State Board of Registration for Professional Engineers and Surveyors*, 2022-Ohio-4677, ¶ 7 (emphasis in original). If the *Burger Brewing* Court could not conclude that the General Assembly allocated the authority at issue while the Court was giving "consideration to the wide discretion reposed in the [Liquor] [C]omission," that necessarily establishes that the General Assembly did not grant to the Commission the authority to implement a distribution rate freeze in Subsection (B)(2)(h) using the more rigorous standard of review that is in place now.

Burger Brewing thus establishes that the Commission erred when it concluded that its authority in Subsection (B)(2)(h) to implement provisions regarding "distribution service" included a grant of authority to implement a distribution rate freeze.

3. A Rate Freeze Would Violate R.C. 4909.15(E)

A rate freeze also violates R.C. 4909.15(E), which states in relevant part:

> "When the Commission is of the opinion, after a hearing . . . that any rate . . . is, or will be, unjust . . . , that the service is, or will be, inadequate, or that the maximum rates . . . are insufficient to yield reasonable compensation . . . , the Commission shall:

[Implement rates consistent with the rate making formula]"
(Emphasis added.)

In *Elyria Tel. Co. v. Public Util. Com.*, 158 Ohio St. 441, 442, 110 N.E.2d 59 (1953), "[t]he commission found . . . that the company's existing rates were not sufficient to provide an adequate return on the company's property . . . ." The Commission nevertheless refused to implement a rate increase until the utility improved its reliability. *Id*. at 443. The issue before the Court was whether the Commission could decline to increase rates when a utility's rates were inadequate. *Id*.

The Court reversed the Commission. *Id*. at 445-46. The Court held that it was the "duty of the Commission to set just and reasonable rates" once the Commission found that "current rates were inadequate":

> "In its original order, the commission, basing its conclusion on a valuation determined by its own staff, found that the current rates were inadequate, and that the requested rates were reasonable, having regard for the value of the existent company property. It must be remembered that we are not here faced with a question of valuation since all parties agreed to accept the commission's valuation; the question is whether when it is found that existing rates are inadequate an increase can be conditioned on an improvement of services and facilities.
>
> From an examination of the record it is apparent that the commission was justified in its determination that the current rates were inadequate to provide a fair return on the company's property. After determining this, it became the duty of the commission to set just and reasonable rates under the provisions of Section 614-23, General Code. Nowhere in the statutes can we find authority on the part of the commission to condition an increase in rates, under such circumstances, on an improvement of service."

Id. at 445-46.

Similarly here, the Commission found (¶ 244) that AES Ohio's rates were "insufficient to provide AES Ohio with reasonable compensation for distribution of electric service rendered to its customers." The Court's decision in *Elyria* establishes that it was the Commission's "duty" to implement new rates required by R.C. 4909.15 once it made that finding.

The Commission (¶ 222) concluded that the fact that "R.C. 4909.15(E) also requires the Commission to give 'due regard to all such other matters as are proper, according to the facts in each case' in fixing and determining a just and reasonable rate" meant that the Commission could implement a distribution rate freeze. However, Section 614-23, General Code (cited by the *Elyria* Court, and in effect at the time) allowed the Commission to consider "all such other matters as may be proper." The Court nevertheless held that "[n]owhere in the statutes can we find authority on the part of the Commission to condition an increase in rates . . . on an improvement of service." *Elyria* at 445-46. If that phrase does not authorize the Commission to condition a rate increase on an improvement of service, it follows that the similar phrase in R.C. 4909.15(E) does not authorize the Commission to implement a distribution rate freeze that expired on December 31, 2012.

4. A Rate Freeze Would Violate the Constitution

"[W]here the validity of an act is assailed, and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former so as to bring the act into harmony with the Constitution." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955) (emphasis added; citation omitted); *Buchman v. Bd. of Edn.*, 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (1995) ("A court is bound to give a constitutional rather than an unconstitutional construction to a statute.") (citation omitted); *State v. Keenan*, 81 Ohio St.3d 133, 150, 689 N.E.2d 929 (1998) (declining to adopt

the challenger's interpretation of a statute "when an equally plausible alternative reading of the statute would avoid any constitutional problems."); *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 27 ("[I]f an ambiguous statute is susceptible of two interpretations and one of the interpretations comports with the Constitution, then that reading of the statute will prevail[.]") (citation omitted).

Rates that do not provide a fair return to a utility constitute a taking in violation of the Fourteenth Amendment to the United States Constitution. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 690, 43 S.Ct. 675 (1923) ("[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.") (emphasis added).[2] *Accord*: Section 19, Article I, Ohio Constitution; *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 66 (interpreting the Ohio Constitution's protection against takings as stronger than the Federal Constitution). As the Supreme Court of Ohio has explained:

> "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property."

[2] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308, 109 S.Ct. 609 ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597, 17 S.Ct. 198 (1896) (a rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law."); *Transcontinental Gas Pipe Line Corp. v. Fed. Power Com.*, 518 F.2d 459, 464 (D.C. Cir. 1975) ("It is well settled that to deprive public utility investors of a return on capital currently dedicated to public use constitutes an unconstitutional confiscation of property.").

Marietta v. Pub. Util. Com., 148 Ohio St. 173, 184-185, 74 N.E.2d 74 (1947) (citations omitted).[3]

The Commission (¶ 97) concluded that a fair return for AES Ohio was 9.999%, and that (¶ 226) AES Ohio was earning a 0% rate of return under its existing rates. A rate freeze thus effectuates a taking of AES Ohio's property.

The Commission (¶ 210) concluded that "there is no ambiguity" in the ESP statute and "there is no call to determine whether our interpretation of that statute is violative of the Constitution." However, Subsection (B)(2)(h) does not specifically authorize the Commission to implement a distribution rate freeze, and it is "possible" to interpret the statute in a manner that is consistent with the Constitution, *i.e.*, as not authorizing the Commission to impose a distribution rate freeze. Since it is "possible" to interpret Subsection (B)(2)(h) as not violating the Constitution, the Commission must give that subsection that interpretation. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955).

The Commission (¶ 211) also said that "AES Ohio voluntarily agreed to freeze its distribution rates while operating under ESP I; a party cannot claim an unconstitutional taking of what has been voluntarily relinquished." However, AES Ohio did not agree in the 2009 Stipulation to a rate freeze "while operating under ESP I." AES Ohio agreed to a rate freeze

[3] A rate freeze is thus an unconstitutional taking, and AES is entitled to "just compensation." U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation"); *United States v. 50 Acres of Land*, 469 U.S. 24, 25, 105 S.Ct. 451 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation'… whenever it takes private property for public use."); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710, 119 S.Ct. 1624 (1999) ("As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy."); *Horne v. Dept. of Agric.*, 576 U.S. 351, 358, 376, 135 S.Ct. 2419 (2015) (awarding value of taken property because the Fifth Amendment "protects 'private property' without any distinction between different types") (citation omitted); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-20, 112 S.Ct. 2886 (1992) (reversing judgment of state supreme court overturning award of $1.2 million in compensation under the Takings Clause).

"through December 31, 2012" (2009 Stipulation, ¶ 18) so AES Ohio's agreement to freeze its rates has long since expired.

And again, after AES Ohio terminated ESP III, R.C. 4928.143(c)(2)(b) required ("shall") the Commission to reinstate AES Ohio's "most recent standard service offer," which was ESP I. And as demonstrated above, ESP I could not and did not include a distribution rate freeze because the ESP statute does not authorize the Commission to implement a distribution rate freeze.

B. The Intervenors Waived Any Argument They May Have Had to Enforce a Rate Freeze

The Commission (¶¶ 221-223) rejected arguments by AES Ohio that the intervenors had waived arguments regarding the rate freeze in prior Commission cases. The Commission should reconsider that decision, and should conclude that prior actions of the Commission bar a rate freeze from being enforced in this case for the following reasons.

1. The Intervenors Did Not Seek to Extend the Rate Freeze When the Commission Extended the Rates of ESP I in the December 19, 2012 Entry

In the ESP I Stipulation, the parties agreed "to extend AES Ohio's current rate plan through December 31, 2012," to continue the RSC rider "through December 31, 2012," and to freeze AES Ohio's base distribution rates "through December 31, 2012." AES Ohio Ex. 69, pp. 3, 4, 10. However, as December 31, 2012 approached without a new standard service offer in place, AES Ohio filed a motion seeking "an Order that will continue [the Company's] *current rates*" -- including the RSC -- until ESP II was approved. *ESP II Case*, Motion of Applicant The Dayton Power and Light Company to Continue Briefly Current Rates Until Implementation of

Terms of a Commission Order, p. 1 (Nov. 7, 2012) (emphasis added). AES Ohio did not ask that the rate freeze be continued. *Id*.

Although that Motion was opposed by several parties, not a single party asked the Commission to extend the rate freeze along with AES Ohio's then-current rates.[4] The Commission ordered that AES Ohio's "motion to continue its rates, including the rate stabilization charge, is granted," and that "the RSC should continue with the ESP until a subsequent standard service offer is authorized." *ESP I Case*, Entry, pp. 4, 6 (Dec. 19, 2012). The Commission's Order did not state that it continued the rate freeze. *Id*.

Several parties sought rehearing from that Entry, but again, they did not ask the Commission to continue the rate freeze.[5] The Commission denied rehearing without addressing the rate freeze, and no party appealed. *ESP I Case*, Entry on Rehearing (Feb. 19, 2013). Since no party asked that the rate freeze be extended, the rate freeze terminated by its own terms on December 31, 2012, and was not part of AES Ohio's standard service offer when ESP II was approved. *ESP II Case*, Opinion and Order (Sept. 4, 2013).

Therefore, when AES Ohio terminated ESP II,[6] it reverted to the most recent version of ESP I, which did not contain a rate freeze because the rate freeze was not extended when ESP I was extended past December 31, 2012. And when AES Ohio later terminated ESP

[4] *E.g.*, *ESP II Case*, Joint Memorandum Contra Dayton Power and Light Company's Motion to Extend Current Rates (Nov. 23, 2012).

[5] *ESP I Case*, Application for Rehearing by The Office of the Ohio Consumers' Counsel, Industrial Energy Users-Ohio, Ohio Partners for Affordable Energy, OMA Energy Group, Solarvision, The Kroger Company, Ohio Energy Group, Honda of America Manufacturing, Inc., Wal-Mart Stores East, LP and Sam's East, Inc. (Jan. 18, 2013).

[6] *ESP II Case*, Finding and Order, ¶ 17 (Aug. 26, 2016) (granting "[the Company's] motion to withdraw its application for an ESP, thereby terminating it").

III and again reverted to ESP I,[7] it reverted to the version of ESP I that was in effect when ESP III was approved, which did not include a rate freeze for the reasons identified above.

2. The Intervenors Did Not Seek to Reinstate the Rate Freeze When the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP II

Assuming for the sake of argument that the rate freeze survived the extension of ESP I passed December 31, 2012, the rate freeze did not survive the termination of ESP II.

Specifically, in July 2016, while the 2015 Distribution Rate Case was pending, AES Ohio moved to terminate ESP II pursuant to R.C. 4928.143(C)(2) and to "implement rates . . . that are consistent with the rates that were in effect before the Commission's September 4, 2013 Opinion and Order" in Case No. 12-426-EL-SSO pursuant to R.C. 4928.143(C)(2)(b). *ESP I Case*, Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016), p. 1. AES Ohio did not ask for the rate freeze to be reinstated. *Id*.

In response, no party argued that the 2009 rate freeze was part of the Company's "most recent standard service offer" under R.C. 4928.143(C)(2)(b) or otherwise sought to reinstate the freeze. The Commission granted the Company's Motion and did not state that it was reinstating the rate freeze. *ESP I Case*, Finding and Order (Aug. 26, 2016).

Several parties sought rehearing from that Finding and Order, but did not seek to reinstate the rate freeze,[8] and the Commission did not address the rate freeze in its Entries on

[7] *ESP III Case*, Finding and Order, ¶ 24 (Dec. 18, 2019) (ordering that "[the Company's] notice of withdrawal of its application in Case No. 16-395-EL-SSO be approved").

[8] *E.g.*, *ESP I Case*, Application for Rehearing by Office of the Ohio Consumers' Counsel (Sept. 26, 2016).

Rehearing. *ESP I Case*, Entry on Rehearing (Oct. 12, 2016); *ESP I Case*, Third Entry on Rehearing (Dec. 14, 2016). The intervenors thus forfeited the right to argue that the rate freeze should have been incorporated into AES Ohio's SSO, particularly since AES Ohio had a pending distribution rate case at the time.[9] *E.g.*, *City of Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724 (1999).

Therefore, when AES Ohio terminated ESP III, it reverted to the version of ESP I that was in effect following the termination of ESP II, and that version of ESP I did not include a rate freeze for the reasons identified above.

3. The Intervenors Did Not Seek to Dismiss the 2015 Distribution Rate Case

In its Fifth Entry on Rehearing in the *ESP I Case*, the Commission correctly rejected OCC's argument that it should reinstate the rate freeze because OCC failed to seek to impose a rate freeze in the 2015 Distribution Rate Case:

> "In the *Distribution Rate Case*, [AES Ohio's] current distribution rates were lawfully established by the Commission pursuant to the specific requirements of Chapter 4909 of the Revised Code. Although we are not persuaded that *Parma* should apply to OCC's failure to raise this issue during the comment period established by the November 27, 2019 Entry in this case, we do find that *Parma* applies to the failure of OCC to raise this issue during the *Distribution Rate Case*. While the *Distribution Rate Case* was pending before the Commission, the provisions, terms, and conditions of ESP I were reinstated for the period between September 1, 2016, and October 31, 2017; thus, OCC should have raised this issue, or otherwise preserved its rights, in the *Distribution Rate Case*, where the distribution rates were, in fact, established according to law. 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). However, OCC has offered no compelling argument regarding

[9] The Application in the 2015 Distribution Rate Case was filed on November 30, 2015.

> how the Commission, after approving distribution rates in the *Distribution Rate Case*, could retroactively modify [AES Ohio's] rates to the prior levels. Thus, we find that OCC's failure to raise this issue at an earlier juncture, during the *Distribution Rate Case*, constitutes a forfeiture of the objection 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, at ¶ 18 (citing *Parma*, 86 Ohio St.3d at 148, 712 N.E.2d 724)."

ESP I Case, Fifth Entry on Rehearing, ¶ 19 (June 16, 2021).

Nor did any of the other intervenors raise the rate freeze issue in the 2015 rate case. By failing to ask the Commission to enforce the rate freeze in the 2015 Distribution Rate Case during the 14 months during which AES Ohio operated under ESP I rates, the intervenors waived this argument. *Id*.

As the Commission found, *res judicata* and collateral estoppel block further argument of this issue.

> "Res judicata and collateral estoppel 'operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.' *Ohio Power Co.*, 2015-Ohio-2056 at ¶ 20 (*quoting Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). 'Collateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings.' Third Entry on Rehearing at ¶ 33 (*quoting Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908). 'The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.' *Grava*, 73 Ohio St.3d at, 382, 653 N.E.2d 226 ; *see also O'Nesti*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803."

Id. at ¶ 38.

The Commission held that because OCC was barred by res judicata and collateral estoppel from re-litigating issues that had already been decided, "[i]t would be disingenuous for the Commission, as requested by OCC, to modify our prior order . . . based upon arguments which we have found that OCC itself is barred from raising." *Id*. at ¶ 41. The intervenors are not entitled to an end-run around those principles by raising those arguments here.

4. The Stipulation From the 2015 Rate Case Authorized AES Ohio to File This Case

The Commission effectively eliminated the rate freeze provision when the Commission approved the Stipulation and Recommendation in the *2015 Distribution Rate Case*. Specifically, that Stipulation provides that AES Ohio may file a distribution rate case "on or before October 31, 2022" to maintain its Distribution Investment Rider. *2015 Distribution Rate Case*, Case No. 15-1830-EL-AIR, *et al*., Stipulation and Recommendation, 7 (June 18, 2018).

That Stipulation was signed by many of the intervenors in this case (including OCC, OEG, Kroger, Wal-Mart, OHA, OEC, OPAE, IEU, OMA, and One Energy) (*id*. at 17-18) and approved by the Commission. *2015 Distribution Rate Case*, Opinion and Order (Sept. 26, 2018). Since that decision was issued after the 2009 rate freeze was approved in the *ESP I Case*, it establishes that AES Ohio has the right to file this distribution rate case.

Indeed, as the Commission recently acknowledged, parties knew when they signed the ESP I Stipulation that AES Ohio may have a statutory right to revert to ESP I in the future. *ESP I Case*, Fifth Entry on Rehearing, ¶ 61 (June 16, 2021) ("We agree with [AES Ohio] that, when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified

and approved a subsequent application for an ESP and [AES Ohio] withdrew that application."). Similarly here, those intervenors signed the 2015 rate case Stipulation two years after AES Ohio had reverted to ESP I the first time, so they were on notice as to this issue when they signed the 2015 rate case Stipulation. The intervenors thus waived any right they may have had to enforce the rate freeze when they signed the 2015 rate case Stipulation, which authorized AES Ohio to file this rate case.

In addition, no party sought rehearing as to the Commission's order approving that Stipulation. All the intervenors are thus banned from raising that issue now. R.C. 4903.10.

5. The Intervenors Did Not Seek to Reinstate the Rate Freeze before the Commission Authorized AES Ohio to Implement ESP I Rates Following the Termination of ESP III

Assuming that the rate freeze issue survived the waivers identified above, the intervenors should have raised the rate freeze issue when AES Ohio terminated ESP III. Upon the termination of ESP III, the Commission solicited parties to submit comments regarding AES Ohio's proposed tariffs to reinstate ESP I rates. *ESP I Case*, Entry (Nov. 27, 2019). Numerous parties filed comments or other memoranda, none of which asked the Commission to reinstate the 2009 rate freeze.[10]

Although the Commission has questioned whether a party's failure to raise the rate freeze issue in its comments constituted a waiver,[11] controlling authority by the Supreme

[10] *E.g.*, *ESP I Case*, Memorandum Contra DP&L's Motions to Withdraw Its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company and IGS Energy (Dec. 4, 2019); *ESP I Case*, Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates by Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group and The Kroger Company (Dec. 4, 2019).

[11] *ESP I Case*, Fifth Entry on Rehearing, ¶ 19 (June 16, 2021).

Court of Ohio establishes that a party's failure to raise the issue in its comments constitutes a waiver. *City of 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."); *Lester v. Leuck*, 142 Ohio St. 91, 92, 50 N.E.2d 145 (1943) ("The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted.") (internal quotation and citation omitted).

The intervenors' failure to raise this argument before filing applications for rehearing constitutes a forfeiture of it. *Id*.

C. A Rate Freeze Would Severely Challenge AES Ohio's Ability to Provide Reliable Service

1. AES Ohio Currently is Struggling to Provide Reliable Service

As the Commission knows, AES Ohio has long been in a "fragile" financial condition. *In re AES Ohio's Application to Modernize Its Distribution Grid*, Case No. 18-1875-EL-GRD, et al. ("*Consolidated Cases*"), Opinion and Order, ¶ 58 (June 16, 2021). *Accord*: Tr. 1401 (Lipthratt) (AES Ohio is in financial "distress"); Tr. 239 (Lund) (AES Ohio has been in a "fragile financial condition for a long time"). AES Ohio had the lowest rates in the state when this case was filed and would have the lowest distribution rates in the state even if its request in this case had been granted in full. AES Ohio Ex. 19, pp. 6-7 and Ex. RJA-1 (Adams); Tr. 114-17 (Adams).

AES Ohio's current distribution rates were established based on a 2015 test year, and since then, the costs that AES Ohio incurs to provide reliable service have increased dramatically. AES Ohio Ex. 95, p. 8 (Storm). For example, "on average, it costs AES Ohio $5,148 to clear a mile of distribution line of vegetation in 2015; in 2019, that cost averaged $13,968, a 170% increase." *Id*. Other costs have also increased dramatically. *Id*.

Due to AES Ohio's fragile financial condition, low rates and rising costs, AES Ohio has not been able to implement its five-year vegetation management plan or make needed investments in its distribution system. *Id*. at pp. 5-9. As a result, AES Ohio's reliability metrics have been getting worse (lower numbers reflect better reliability):

Year	CAIDI Standard	CAIDI	SAIFI Standard	SAIFI
2020	125.04	132.17	0.88	0.84
2019	125.04	133.29	0.88	0.88
2018	125.04	118.41	0.88	0.83
2017	125.04	133.07	0.88	0.68
2016	125.04	119.08	0.88	0.69

Id. at p. 8.

AES Ohio failed its Commission-approved reliability metrics for 2017, 2019 and 2020. *Id*. at p. 7.

OCC witness Williams was critical of AES Ohio's inability to provide reliable service. OCC Ex. 1, pp. 15-31. He specifically criticized AES Ohio for failing to implement its Commission-approved vegetation management plan and for the fact that the largest contributor

to outages was equipment failures. *Id*. at pp. 15-23, 28. Mr. Williams agreed that it was "very important" that AES Ohio provide reliable service. Tr. 896.

2. A Rate Freeze Would Make It Difficult, if Not Impossible, for AES Ohio to Provide Reliable Service

OCC witness Willis asserted that AES Ohio's rates should be frozen at current levels. OCC Ex. 3, pp. 4-5. However, OCC witnesses Willis and Williams both admitted that they have done no analysis to determine whether AES Ohio could provide reliable service with its rates frozen at current levels. Tr. 866, 896.

Although the rate freeze is not an ESP I term for the reasons identified above, AES Ohio has been preparing in the event that there is no rate increase in this case. AES Ohio Ex. 95, pp. 9-19. It is important that the Commission understand two points.

First, AES Ohio has been operating under the assumption that a rate increase would be approved in this case, and has been spending more money than it has been recovering in rates. *Id*. at p. 10. If no rate increase is approved, "AES Ohio would be forced to cut its expenses and investments to a level that could be supported by its current rates." *Id*. As the Commission knows, AES Ohio is already struggling to provide reliable service, and further cuts will exacerbate that problem. *Id*.

Second, due to AES Ohio's poor financial condition, "AES Ohio has been carefully managing its business to find savings in areas not directly connected to reliability for years." *Id*. at p. 6. "The savings efforts over the years in areas not directly connected to reliability have been all but exhausted." *Id*.

If a rate freeze were to be implemented by the Commission, AES Ohio "will continue to endeavor to provide the most reliable service as possible to customers." *Id*. at p. 9. However, as described in detail in the testimony of AES Ohio Witness Storm, AES Ohio would be forced to make significant cuts to its reliability expenditures if no new increase is implemented in this case. *Id*. at 10-18.

III. FINANCIAL INCENTIVES

In its Order (¶¶ 68, 108), the Commission adopted the Staff's recommendation to remove all LTC financial incentives and 75 percent of STC financial incentives from test year expenses. The Commission (¶ 74) also concluded that incentive compensation should be removed from rate base going forward. AES Ohio asks the Commission to reconsider those rulings and allow recovery of financial bonuses for the following reasons.

First, AES Ohio is permitted to recover the cost of compensating its employees to provide service. R.C. 4909.15(A)(4). Specifically, the statute provides that the Commission "shall" determine "[t]he cost to the utility of rendering the public utility service for the test period." R.C. 4909.15(A)(4).

It is undisputed that AES Ohio needs to compensate its employees at market rates. AES Ohio Ex. 25, p. 3 (Buchanan); Tr. 868 (Willis); Tr. 1321 (Lipthratt). If AES Ohio does not do so, then the employees would not show up for work. Tr. 868-69 (Willis). AES Ohio needs to compete with utility and private-sector employers to hire employees. Tr. 1063 (Crocker).

It is further undisputed that the total compensation -- including the financial incentives -- that AES Ohio pays its employees is consistent with market rates. AES Ohio Ex. 24, pp. 4-11; AES Ohio Ex. 25, p. 3 (Buchanan); Tr. 1065 (Crocker) (Staff did not analyze the

issue); Tr. 1322 (Lipthratt) (same); Tr. 868-70 (Willis). Indeed, the Commission (¶ 108) held that AES Ohio could recover the same total employee expenses that it seeks to recover in this case by "increasing employee wages to the point where incentives are unnecessary."

The total amount that AES Ohio paid to its employees (including financial incentives) was thus necessary for AES Ohio to provide service to its customers, and that amount is recoverable under R.C. 4909.15(A)(4). That subsection does not authorize the Commission to disallow recovery of expenses that utilities incurred to provide service to customers based upon how the payments to employees are structured.

Second, the Commission's conclusion that shareholders are the primary beneficiaries of the expenditures is not accurate. AES Ohio needs to pay its employees a market rate to attract and retain necessary employees. Tr. 868-69 (Willis). Since there is no dispute that the total compensation (including bonuses) that AES Ohio pays to its employees is consistent with market rates (AES Ohio Ex. 24, pp. 4-11 (Buchanan); AES Ohio Ex. 25, p. 3 (Buchanan); Tr. 1065 (Crocker) (Staff did not analyze the issue); Tr. 1322 (Lipthratt) (same); Tr. 868-70 (Willis)), and AES Ohio needs to pay market rates to get its employees to show up to work, the Commission should conclude that the financial incentives benefits customers just like any other component of employee pay.

Third, providing earnings-based compensation incentivizes employees to reduce costs. AES Ohio Ex. 24, pp. 12-13 (Buchanan); Tr. 1324 (Lipthratt). Those cost savings go to shareholders in the short term. However, long term, sustained cost savings benefit customers. AES Ohio Ex. 24, pp. 12-13 (Buchanan); AES Ohio Ex. 25, pp. 4-5 (Buchanan); Tr. 178

(Buchanan); Tr. 871 (Willis). It is good that a utility's employees are looking for ways to lower costs. *Id*. The financial incentives thus benefit customers and should be recoverable.

Fourth, evaluating whether particular expenditures benefit customers or shareholders is an impractical test. Take, for example, employees who are paid only a salary (*i.e.*, no incentive compensation at all). Staff witness Lipthratt explained that employees who are paid only a salary still have an incentive "to find operational savings." Tr. 1326. And again, operational savings would benefit shareholders in the short term, and customers in the long term. Does that mean that a base salary should not be recoverable in rates? The point is that there is no reason that financial incentives should be treated any differently than other labor expenses. Financial incentives are a cost that AES Ohio incurs to provide service to customers.

Fifth, even if the financial portion of the incentives were not a cost incurred to provide safe and reliable service during the test year, only 45 percent of AES Ohio's incentive structure for the STC is expressly tied to financial performance. AES Ohio Confidential Ex. 88; Tr. 1073. Thus, if any of AES Ohio's STC financial incentives are excluded, *at most* the exclusion should be limited to the 45 percent tied to financial performance.

IV. RATE CASE EXPENSE

On February 17, 2022, AES Ohio filed its estimated rate case expense as a late-filed exhibit. *See* Ohio Admin. Code 4901-7-01, App. A, Chapter II, Section C, (D)(5) (p. 71 of the SFRs) ("A revised estimate of the current rate case expense shall be provided within ten days of the close of the hearings and shall be filed as a late filed exhibit."). In its Order (¶ 129), the Commission stated that "Staff agreed that the attorney fees [for the rate case] . . . are allowable expenses." AES Ohio asks the Commission to clarify whether rate case expense is included in

the allowed revenue requirement in this case, and if so, the amount of rate case expense that was included.

V. COST OF DEBT

AES Ohio seeks clarification on the approved cost of debt. In its Order (¶ 75), the Commission found that the record supported a long-term cost of debt of 4.4 percent. However, the record supports a cost of debt of 4.44 percent. Staff Ex. 1 at 21, 117; Schedule D-1; AES Ohio Ex. 9, Schedules D-1, D-1.1, and D-3; AES Ohio Ex. 35, 4:11-17 (Illyes). Accordingly, AES Ohio requests that the Commission clarify that the approved cost of debt is 4.44 percent.

VI. CUSTOMER TARIFF DEPOSITS

AES Ohio requests that the Commission reconsider its decision (¶ 179) that customer deposits may be paid in three installments, for three reasons.

First, Ohio Adm.Code 4901:1-17-05 requires only that the utility not assess "a cash deposit to establish or reestablish credit in an amount in excess of one-twelfth of the estimated charge for regulated service(s) provided by that utility company for the ensuing twelve months, plus thirty per cent of the monthly estimated charge." No rule or code provision in Ohio requires that a utility permit an installment plan for deposits. Tr. 1225 (Smith). In fact, no rule or code provision in Ohio prescribes a specific timeframe for which a utility should collect the deposit. AES Ohio Ex. 20, pp. 3-4 (Adams).

Second, AES Ohio already goes above and beyond the prescribed deposit requirements. AES Ohio permits customers to pay their full deposit amount with their first bill instead of requiring that the deposit be paid before initiation of electrical service, despite the fact that no such payment plan is required by the Ohio Administrative Code. *Id*.

Third, no other electric distribution utility in Ohio has the installment plan for deposits that Staff has recommended here. Tr. 1225-26 (Smith). If the Commission believes that an installment plan for deposits should be required, it should do so consistently across the state and introduce this change as part of a rule review proceeding. *Id*.

VII. CUSTOMER CHARGE

AES Ohio's current customer charge is $7.00 (AES Ohio Ex. 59, p. 14), and AES Ohio supported its request to increase that charge to $15.66. AES Ohio Ex. 10, Schedule E-4.1, pp. 1-2. That increase is requested because it better aligns with AES Ohio's costs to serve customers. AES Ohio Ex. 49, pp. 7-8 (Teuscher).

Staff recommended using a "minimum compensatory method" which is "designed to recover costs that vary directly with the number of customers, such as the cost of the meter, service drop, line transformer and customer billing." Staff Ex. 7, p. 7 (Bremer). AES Ohio witness Teuscher explained that the Staff's recommendation is not consistent with principles of cost causation:

> "Q. Does Staff's proposal better align costs with cost-causers?
>
> A. No. For example, Residential heating customers will pay more for the same distribution service as Residential non-heating customers, just because they use more kWh, not because they cause more costs. AES Ohio's proposal better aligns rates to cost causation so that customers can make better economic decisions. Additionally, AES Ohio's rate design proposal utilizes the COSS and aligns with Staff's conclusion that the COSS in this case properly assigns costs to the appropriate cost causers."

AES Ohio Ex. 49, p. 8.

The Commission (¶ 157) adopted Staff's recommendation:

> "The Commission accepts Staff's recommendation, finding that the flat monthly residential service charge should be set at $9.75. As witness Bremer testified, Staff's calculation of the residential customer charge is based on the minimum compensatory methodology, which Staff traditionally applies, and reasonably provides for the recovery of costs that vary directly with the number of customers such as the cost of meter, service drop, line transformer, and customer billing. In addition to accepting Staff's calculation methodology, we further accept both Staff's proposal to allow for the recovery of line transformers, finding that it is consistent with Staff recommendations in similar cases, and proposed carrying charge of 26.35 percent, finding that it is supported by Staff's calculations as described in its workpapers. While we are sensitive to the customer pricing protection arguments raised by OCC, we find that Staff's proposal reasonably mitigates the cost impacts to residential customers. Similarly, we reject AES Ohio's claim that the charge is understated. Staff's calculation methodology has been consistently employed in prior rate cases, and we find no errors in Staff's calculation. (Staff Ex. 7 at 7.)"

The Commission should grant rehearing on this issue because it is undisputed that AES Ohio's costs to provide distribution service are largely fixed. Tr. 1168. Lowering the customer charge – and thus raising the energy charge – results in more costs being allocated to customers with high usage, even though it costs the same amount to provide distribution service to both groups of customers. Tr. 1168.

Collecting those fixed costs through an energy charge creates risks to AES Ohio that its recovery of revenues will vary with changes in weather and customer usage, so that its earned revenues will not be aligned with its fixed costs.

VIII. LOW LOAD FACTOR

The Commission (¶ 152) recognized that AES Ohio's distribution rates reflect a suboptimal level of subsidization within its primary and secondary classes, which are subject to a set of rates known as the Maximum Charge Provision (*i.e.*, the "Low-Load Factor Charge").

Currently customers with monthly load factors of up to 28 percent trigger cost caps pursuant to the Low-Load Factor Charge. The Commission recognized that in the past four years, the number of customers eligible for these cost caps has grown from 4,000 customers per month to 21,000 customers per month. AES Ohio proposed to revise the Low-Load Factor Charge to target customers with approximately 10 percent load factors to limit these intraclass subsidies.

The Commission was concerned that AES Ohio's proposal would result in rate shock to certain customers, but nevertheless directed the Company to work towards a phase out of the Load-Load Factor Charge "whether in its entirety or until only those customers whose atypical load profiles require such a safety net." Although the Commission contemplated that this change would be made in the Company's current electric security plan case, Case No. 22-900-EL-SSO, AES Ohio believes that this proceeding is the appropriate venue to adjust the participation usage cap.

The Low-Load Factor Charge triggers cost caps based on the total amounts charged under (1) base distribution rates, (2) the TCRR-N, and (3) the Rate Stabilization Charge. AES Ohio has not proposed to continue the Rate Stabilization Charge in its current ESP case, so upon approval, the Load-Load Factor Charge would apply only to the total of the first two charges. AES Ohio, therefore, proposes that the components of the Low-Load Factor Charge be revised annually to evenly phase-in rates to gradually achieve AES Ohio's initial proposal to target customers with approximately 10 percent load factors. AES Ohio proposes to begin this

phase-in upon implementation of base distribution rates and the Company's pending ESP. As a result, customers with approximately the following load factors would continue to be billed under the Low Load Factor Charge:

-Year 1: 16%
-Year 2: 12%
-Year 3: 10%

IX. DEPRECIATION

The Commission (¶ 74) has adopted Staff's recommendation on how to handle depreciation for Accounts 362.13 (Station Equipment – Computers) and 362.20 (Station Equipment – Vehicles). AES Ohio seeks clarification on how to handle depreciation in those accounts, for the following reasons. First, the Commission (¶ 70) states that "Staff recommended that each of these accounts be reserved at zero as the plant investments in these accounts have been fully depreciated, and that the accrual rates for new plant investments in these accounts be set at 10 and 7.5 percent, respectively." These accounts are not fully depreciated as of the study date, however, the vintages that are older than the life and net salvage characteristics (Account 362.13 - 10 years and Account 362.20 – 12 years and 10 % net salvage) are fully depreciated using the whole life method. AES Ohio asks the Commission to clarify whether the vintages older than the life characteristics are fully depreciated and the remaining vintages and new vintages should be depreciated at 10 and 7.5 percent, respectively. Further, if the Order requires the use of a square curve instead of the L3 curve, then AES Ohio asks the Commission to clarify the vintages to which the 7.5% rate should be applied. Based on the square curve and the study date, AES Ohio believes that vintage 2008 and subsequent should have depreciation of 7.5%.

In addition, AES Ohio asks the Commission to clarify how to handle the assets in Account 362.60, 362.71 and 396. The Commission (¶ 70) stated "Staff recommended accrual

rates of five percent for Accounts 362.60 and 362.71, and 5.88 percent for Account 396 for future plant investments in these accounts" and that "Staff recommended that assets in Account 362.20 . . . and Account 396[] be depreciated according to a square curve method." AES Ohio asks the Commission to clarify whether it requires use of the square curve method for all three of these accounts, with a 20-year life for Accounts 362.60 and 362.71, and a 17-year life for Account 396. Further, similar to the issue above, these accounts are not fully depreciated, so AES Ohio asks the Commission to clarify whether its order requires that vintages that are older than the 20, 20 and 17 year life are fully depreciated, and the more recent vintages as well as new investments get depreciated at 5%, 5% and 5.88% respectively.

X. SUPPORTING SCHEDULES AND WORKPAPERS

The Commission should provide the schedules updated for the individual components that calculate the revenue requirement ordered by the Commission. To ensure that AES Ohio's books and records are consistent with the Commission's order, AES Ohio needs the information that would typically be included in the A, B, C, D & E Schedules along with any supporting workpapers. AES Ohio thus requests that the schedules be provided in the docket and be made available in Excel format upon request. Doing so would ensure that all parties and the public know how the revenue requirement was determined and eliminate any potential ambiguity for AES Ohio's next rate case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing of AES Ohio has been served via electronic mail upon the following counsel of record, this 13th day of January, 2023:

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Summary: Application for Rehearing of AES Ohio electronically filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company