BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

JOINT MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP AND THE KROGER CO.

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JOINT MEMORANDUM CONTRA

I. INTRODUCTION

The Application for Rehearing (AFR) filed by the Dayton Power and Light Company D/B/A AES Ohio (AES) on January 13, 2023[1] rehashes the same flawed arguments that it has made to the Public Utilities Commission of Ohio (Commission) on multiple occasions, and which the Commission has already rejected,[2] and fails to set forth specific grounds in which the Commission's December 14, 2022 Opinion and Order is unlawful or unreasonable.[3]

In their briefs, the Ohio Manufacturers' Association Energy Group (OMAEG)[4] and The Kroger Co. (Kroger)[5] both explained why the Commission should enforce the stipulated rate

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[1] Application for Rehearing of AES (Jan. 13, 2023) (AES AFR).

[2] *See* Opinion & Order at ¶¶ 211, 221-23 (Dec. 14, 2022).

[3] *See* R.C. 4903.10; Ohio Adm.Code 4901-1-35.

[4] *See* Post-Hearing Brief of the Ohio Manufacturers' Association Energy Group (Mar. 4, 2022) (OMAEG Brief); Post-Hearing Reply Brief of the Ohio Manufacturers' Association Energy Group at 14-23 (Mar. 30, 2022) (OMAEG Reply Brief).

[5] *See* Post-Hearing Brief of The Kroger Co. at 11-16 (Mar. 4, 2022) (Kroger Brief); Post-Hearing Reply Brief of The Kroger Co. at 3-9 (Mar. 30, 2022) (Kroger Reply Brief).

freeze. Other parties, including Commission Staff,[6] Industrial Energy Users-Ohio (IEU),[7] the Ohio Hospital Association (OHA),[8] and the Office of the Ohio Consumers' Counsel (OCC)[9] also supported enforcement of the stipulated rate freeze.

After the post-hearing briefs were filed in this case, AES sought an additional 'bite at the apple,' and requested that the Commission hold oral arguments on the issue of the rate freeze.[10] The Commission granted this request, and oral arguments occurred on May 18, 2022.[11] More than a month after parties filed reply briefs, and less than two weeks before oral arguments, AES sought *yet another* bite at the apple, by attempting to file, instanter, a surreply to OMAEG and Kroger's reply briefs.[12]

At the oral arguments, Commissioner Conway noted that AES seemed to be taking the position that terms that benefit AES were part of its electric security plan (ESP) and therefore enforceable, while terms that benefited customers at the expense of AES were not part of the ESP, and therefore not enforceable.[13]

Throughout this proceeding, OMAEG and Kroger have noted that AES could have avoided the stipulated rate freeze by simply filing a new ESP as it agreed to do.[14] When questioned at the

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

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

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

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

[10] *See* Motion for Oral Argument by The Dayton Power and Light Company D/B/A AES Ohio (Mar. 14, 2022).

[11] *See* Entry (Mar. 31, 2022).

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

[13] *See* Tr.at 20 (Conway) (May 18, 2022).

[14] *See, e.g.*, OMAEG Reply Brief at 15; Kroger Brief at 9; Tr. at 52-53 (Bojko) (May 18, 2022) ("DP&L is the only utility that has reverted back to a prior Electric Security Plan case. The other utilities when they had a provision removed or unlawful provision taken out and overturned by the Court filed a new ESP. Why hasn't Dayton done this? Why haven't they filed an emergency rate case?").

oral argument why AES has not done so, AES' counsel revealed the answer: because the current ESP is more financially beneficial to AES based on the Rate Stability Charge (RSC):

> ESP IV would not come anywhere close to resolving the adverse effects that I have described earlier because ESP IV, if you assume that it's not going to include an RSC, it's going to have not nearly the types of financial benefits that the Company would have.
>
> So ESP IV is not a good solution to this problem. It may be—ESP IV may be better than operating under ESP III with a rate freeze but maybe not. There's some financial pluses and minuses so that's not something that I think you should think of as, ah, the Company can solve this problem by implementing ESP IV. I don't think that's the case.[15]

In short, when AES first created the nonbypassable RSC as part of its first ESP (ESP I), which collects about $75 million annually from customers,[16] parties agreed to the stipulation and RSC charge in exchange for a distribution rate freeze for the duration of ESP I.[17] However, AES has twice reverted *back* to modified versions of ESP I. When AES most recently reverted by withdrawing its ESP III, the Commission authorized AES to continue to operate under a modified version of ESP I, including the collection of the RSC, until the Commission approves AES' next ESP.[18] The Commission, pursuant to Ohio law, issued an order "to continue the provisions, terms, and conditions of the utility's most recent standard service offer…until a subsequent offer is authorized."[19]

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[15] Tr. at 22-23 (Sharkey) (May 18, 2022).

[16] OCC Ex. 3, Direct Testimony of William Ross Willis at 5 (Aug. 25, 2021).

[17] Company Ex. 69 (ESP I Stipulation) at ¶ 1 ("To assist in maintaining rate certainty, the parties agree to extend DP&L's current rate plan through December 31, 2012, except as expressly modified herein."), ¶ 3 ("The current [RSC] charge will continue as a nonbypassable charge through December 31, 2012."); ¶ 18 ("DP&L's distribution base rates will be frozen through December 31, 2012.").

[18] Tr. Vol. III at 498 (McKenzie) (Jan. 26, 2022); *In The Matter Of The Application Of The Dayton Power And Light Company For Approval Of Its Plan To Modernize Its Distribution Grid*, Case Nos. 18-1875-EL-GRD, et al., Opinion and Order (June 16, 2021).

[19] R.C. 4928.143(C)(2)(b); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case Nos. 12-426-EL-SSO, et al., Entry at ¶ 5 (Dec. 19, 2012) ("Although the General Assembly has not provided specific guidance in the event that an electric distribution utility were to terminate an MRO and file a new ESP, as is the case here, the Commission finds that it would be consistent with both Section 4928.141 and

However, despite negotiating to freeze its distribution rates in exchange for continuing to charge the RSC, AES now seeks to unlawfully raise its rates while still operating under its modified ESP I and charging the RSC. Importantly, under a new ESP, AES would be unable to collect a similar charge to the RSC due to the Supreme Court of Ohio's decision overturning similar charges in other utilities' ESPs.[20]

Instead of doing what it promised to do, AES asks the Commission to allow AES to benefit from the terms of an agreement while absolving AES of its own obligations under that same agreement. After reviewing briefs, post-hearing briefs, and oral arguments, and rejecting AES' attempt to file an improper surreply on the subject, the Commission has declined to do so.[21] The Commission found and stated, unambiguously, "that the rate freeze can and should be enforced in this proceeding."[22]

Despite this, AES seeks *yet another* bite at the apple by seeking rehearing. While AES, in its AFR, attempts to twist the words of case law and statutes in new ways, it does not offer any convincing argument as to why the Commission should reconsider and modify its ruling.

II. ARGUMENT

A. R.C. 4909.15(E) does not require the Commission to implement new rates.

Throughout its AFR, AES argues that "R.C. 4909.15(E) provides that the Commission 'shall' implement new rates upon such a finding."[23] This is untrue. The Commission has noted

Section 4928.143(C)(2)(b), Revised Code, to order that the terms and conditions of the current ESP should continue until a subsequent offer is authorized.").

[20] *See In re Application of Ohio Edison Co*., 157 Ohio St.3d 73, 2019-Ohio-2401.

[21] Opinion & Order at ¶ 252 (Dec. 14, 2022).

[22] *Id.* at ¶ 221.

[23] AES AFR at 2, 3, 7-9.

that "the inquiry and analysis is [not] this simple" as claimed by AES.[24] A more detailed analysis of the plain text of R.C. 4909.15 shows that the statue does not require the Commission to implement new rates immediately.

AES relies on a heavily and selectively edited 'quotation' of the statute to convolute the statute's true meaning. If the actual text of the statute supported AES' position, it would not need to edit the statute as selectively as it did. AES' 'quotation' reads as follows:

> 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:
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> [Implement rates consistent with the rate making formula]"
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> (Emphasis added.)[25]

Nowhere in the statute does the phrase "implement rates consistent with the ratemaking formula" appear. The statute only requires that the Commission "fix and determine the just and reasonable rate…and order such just and reasonable rate…to be substituted for the existing one."[26] The statute requires that the Commission "fix and determine" a rate, and order it to be substituted. The Commission has done so here. It fixed and determined a rate,[27] and ordered AES to substitute that rate by filing new tariffs with the Commission for final review.[28] The statute plainly does not speak as to the time when that increase must go into effect.

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[24] *See* Opinion & Order at ¶ 222 (Dec. 14, 2022).

[25] AES AFR at 7-8.

[26] R.C. 4909.15(B).

[27] *See* Opinion & Order (Dec. 14, 2022) at ¶ 245 ("A just and reasonable increase to AES Ohio's revenue requirement is $58,271,067."), ¶ 255 ("ORDERED, That the application of AES Ohio for authority to increase its electric distribution rates, for accounting authority, and for approval of revised tariffs are granted to the extent provided in this Opinion and Order.").

[28] *Id.* at ¶ 253 ("AES Ohio is authorized to submit final revised tariffs for the Commission's review. The new tariffs will not become effective until they are final filed with the Commission pursuant to future Commission order."), ¶

AES' only support for its contrary proposition is a 1953 Supreme Court of Ohio case, *Elyria Tel. Co. v. Pub. Util. Comm'n*.[29] In that case, the Commission, refused to authorize a rate increase for a utility because the increase was "conditioned on an improvement of services and facilities," which the Commission found deficient.[30] Although AES quotes extensively from *Elyria* in its AFR, AES ignores the most important language in the case: "[n]owhere 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."[31]

The Court then went on to state "[t]here is, of course, no doubt that a utility must render adequate service to its patrons, and the General Assembly recognizing that at times service might be inadequate has provided a means whereby a utility may be compelled by the commission to improve its services and facilities."[32] As noted by the Supreme Court in *Elyria*, the statutory framework approved by the General Assembly controls. Had the General Assembly wanted the Commission to have the discretion to condition rate increases on improvements in service, it could have done so.

The flaw in AES's argument, and the applicability of *Elyria*, is that *Elyria* turned on the statutory framework, and the statutory framework for a rate increase seventy years ago differs from the statutory framework surrounding distribution rates and ESPs today. As the Court noted, the General Assembly *could have* granted the Commission more authority to control the provision of

256 ("ORDERED, That AES Ohio is authorized to submit final revised tariffs consistent with this Opinion and Order for the Commission's review.").

[29] 158 Ohio St. 441 (1953).

[30] *Id.* at 445.

[31] *Id.* at 445-46.

[32] *Id.*

distribution service if it so intended.[33] By passing R.C. 4928.143, the General Assembly subsequently did so. Since a distribution rate freeze may be implemented pursuant to R.C. 4928.143(B)(2)(h), the Court's ruling from 1953 does not control.

B. Ohio law permits the inclusion of a distribution rate freeze in an ESP, and the rate freeze is a term of ESP I.

AES continues to attempt to circumvent the fact that the rate freeze is a term of its ESP I stipulation by raising the novel and inexplicable argument that the rate freeze is not permitted by statute and is not a term of ESP I. The reality is that the plain text of the ESP statute allows rate freezes. R.C. 4928.143(B)(2)(h) specifically grants the Commission authority to set, through an ESP, "provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary." The Commission and Supreme Court of Ohio have held that this provision allows the Commission to implement distribution rate freezes.[34] AES does not offer any authority that contradicts the precedent and prior interpretation of R.C. 4928.143(B)(2)(h), and only repeats the same arguments that the Commission has already soundly rejected.[35]

AES attempts to argue that, based on the Supreme Court of Ohio's decision in *In re Application of Columbus S. Power Co*.,[36] distribution rate freezes are excluded from the ESP

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[33] *Elyria*. 158 Ohio St. at 445-46 (1953).

[34] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (Sept. 2, 2003) (approving a stipulation for AES's predecessor's rate plan that contained a rate freeze despite a lack of statutory authority); C*onstellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530 (2004) (approving the Commission's decision in Case No. 02-2779-EL-ATA); *In the Matter of the Application of Ohio Power Company for Approval of Line Extension Tariff Modifications*, 08-65-EL-ATA, Finding and Order (Apr. 16, 2008); *In the Matter of the Application of Dayton Power and Light Company for Approval of Tariff Changes Associated With a Request to Implement a Storm Cost Recovery Rider*, 05-1090-EL-ATA, Entry on Rehearing (Aug. 30, 2006).

[35] *See* Opinion & Order at ¶¶ 201-04 (Dec. 14, 2022).

[36] 128 Ohio St.3d 512, 2011-Ohio-178.

statute.[37] But AES omits from its analysis the actual language of the statute even though this case turns on the "plain language of the statute."[38] As discussed above, R.C. 4928.143(B)(2)(h) specifically grants the Commission authority to establish, through an ESP, "provisions regarding the utility's distribution service," which has been determined to include rate freezes. The Court in *Columbus S. Power Co*. did not interpret the language of R.C. 4928.143(B)(2)(h). Instead, the Court interpreted R.C. 4928.143(B)(2). This distinction is important due to the operative language in (B)(2) which is absent from (B)(2)(h). As the Court noted:

> By its terms, R.C. 4928.143(B)(2) allows plans to include only "any of the following" provisions. It does not allow plans to include "any provision." So if a given provision does not fit within one of the categories listed "following" (B)(2) [(B)(2)(a) through (B)(2)(i)], it is not authorized by statute.[39]

Since a distribution rate freeze fits within the category of "provisions regarding the utility's distribution service" under (B)(2)(h), it is not excluded by the "any of the following" language in (B)(2). Since (B)(2)(h) does not contain the same "any of the following" language as (B)(2), a term fitting within (B)(2)(h) need not be specifically enumerated. AES does not mention the "any of the following" language in its analysis, even though this is the operative language that the Court relied upon in rendering its decision. Again, this is because a plain reading of the applicable statute disproves AES' position.

Similarly, AES asserts that *Burger Brewing Co. v. Thomas* stands for the proposition that the ESP statute does not enable a stipulated rate freeze.[40] According to AES, since "[i]n construing [a] grant of power, particularly administrative power through and by a legislative body, the rules

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[37] AES AFR at 4.

[38] *Columbus S. Power Co*., 2011-Ohio-178 at ¶ 34.

[39] *Id.* at ¶ 32.

[40] AES AFR at 5-7.

are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear," the Commission lacks the authority to freeze rates.[41]

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

> Appellants assert that a number of statutes in the two chapters, singularly or in combination, authorize the commission to adopt the regulation. The first is R.C. 4301.03 which provides with respect to the rule making authority of the commission…
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> The statute then enumerates nine specific areas of regulation, none of which, however, confers any express or specific authority in the area of pricing, at any level, of any segment of the liquor industry.
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> From the above, it is evident that the General Assembly has not specifically expressed an intention that the commission have authority in the area of pricing in the liquor industry generally or in the malt beverage industry specifically.[42]

Numerous Revised Code provisions, including the entirety of Chapter 4909, are expressly dedicated to the Commission's authority to establish rates. Moreover, R.C. 4928.1432(B)(2)(h) expressly allows the Commission to include provisions regarding distribution service in an ESP. Unlike the Liquor Commission in *Burger Brewing*, the Commission in this case is not granting itself, through a regulation, a power that it otherwise lacks statutory authorization for. The power to set rates and establish provisions concerning distribution service inherently must include the

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

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

power to freeze (or even lower) rates for distribution service, or else it would only be the power to *increase* rates.

C. The rates approved by the Commission are not confiscatory.

AES also attempts to argue that enforcing the stipulated rate freeze would be unconstitutional and confiscatory.[43] According to AES, 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.[44] However, the Constitution only requires that a utility has available to it a mechanism by which to increase rates, or rates which as a whole are not so unjust as to destroy the value of the property of the utility.[45]

First, AES agreed to the stipulated rate freeze that it is now claiming is confiscatory.[46] As noted by the Commission, "a party cannot claim an unconstitutional taking of what has been voluntarily relinquished."[47] Second, the stipulated rate freeze would not leave AES without "a mechanism through which [it] may challenge the imposition of rates."[48] The ESP I Stipulation, in which AES agreed to the stipulated rate freeze, states that AES can still "seek emergency rate relief pursuant to Section 4909.16, Revised Code."[49] Moreover, AES is still free to implement a new ESP, which would automatically terminate the rate freeze provision of the ESP I stipulation. As noted by AES' counsel during the oral argument on this issue, AES chooses not to pursue either

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[43] AES AFR at 9-12.

[44] *Id.*

[45] *See* Opinion & Order at ¶ 207 (Dec. 14, 2022), *citing Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 906, 918 (S.D. Ohio 2004), *and* Covington & L. Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 41 L.Ed. 560 (1896).

[46] *Id.* at ¶ 210.

[47] *Id.*

[48] *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 593 (6th Cir. 2001).

[49] Company Ex. 69 (ESP I Stipulation) at ¶ 18.

option because doing so would be less financially beneficial to AES than raising its base distribution rates while continuing the favorable provisions of ESP I, including the RSC.[50]

Moreover, AES' "earnings in total, not just those recovered through base rates,"[51] are not so unjust as to destroy the value of the property of the utility.[52] Because of its many riders and its COVID-19 deferral authority, AES has less financial risk than many comparable utilities.[53] For example, AES recovers over $75 million annually from the RSC alone, in addition to the amounts it recovers through other riders and through base distribution rates.[54] When considering these other sources of income, AES' rates overall are not financially harmful to AES. At a minimum, AES has not demonstrated that the totality of its rates are so unjust as to destroy the value of its property. AES has not even filed an emergency rate case claiming such.

Nonetheless, the Commission has already soundly rejected AES' arguments that its voluntary, stipulated rate freeze somehow constitutes a taking:

> 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. Furthermore, even if the entirety of AES Ohio's earnings were somehow deemed so unjust and unreasonable that a constitutional claim was colorable (which they are not), AES Ohio has available to it at least two different escape mechanisms: file for emergency rate relief pursuant to R.C. 4909.16 or seek to operate under a new SSO.[55]

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[50] Tr. at 22-23 (Sharkey) (May 18, 2022).

[51] *See* Opinion & Order at ¶ 207 (Dec. 14, 2022).

[52] *See* Opinion & Order (Dec. 14, 2022) at ¶ 207, *citing Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 906, 918 (S.D. Ohio 2004), *and* Covington & L. Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 41 L.Ed. 560 (1896).

[53] OMAEG Brief at 5, Kroger Brief at 6-7.

[54] *See* OCC Brief at 17.

[55] Opinion and Order at ¶ 210 (Dec. 14, 2022).

Despite attempting to re-litigate the issue of confiscatory rates *yet again*, AES has made no attempt to address the guaranteed cost recovery it receives.[56] AES offers no new arguments to show that its rates overall are unjust. Nor does AES explain why it cannot file an emergency rate case or operate under a new ESP.[57] As such, enforcing the stipulated base distribution rate freeze is not confiscatory or a takings in violation of the Constitution.

D. The stipulated rate freeze does not impact AES' ability to provide reliable service.

For the same reasons that enforcing the stipulated rate freeze is not confiscatory, it is apparent that enforcing the stipulated rate freeze will not jeopardize AES' ability to provide reliable service to its customers.[58] While OMAEG and Kroger agree that AES needs to improve its reliability,[59] AES has a legal responsibility to provide safe, reliable, and adequate service.[60] And AES may still file an emergency rate case in the event it is "necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency."[61]

But again, reviewing AES' rates as a whole, it is clear that this argument is a red herring. AES has not explained why it will not file an emergency rate case or implement a new ESP if it cannot provide safe, reliable, and adequate service under the totality of its current rates.[62] Instead, AES is attempting to benefit from the ESP I Stipulation by continuing to collect the RSC without fulfilling its own obligations, because that outcome would be the most financially beneficial to

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[56] *See* AES AFR at 9-12.

[57] *See id*.

[58] *See id.* at 19-21.

[59] *Id.* at 20.

[60] R.C. 4905.22.

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

[62] *See* AES AFR at 19-21.

AES.[63] If the enforcement of the rate freeze would prevent AES from providing safe, reliable, and adequate services to its customers, then AES is gambling with customers' safety by choosing to remain under ESP I.

E. The opposing parties properly asserted their rights to enforce the stipulated rate freeze.

Finally, AES extensively repeats its failed argument that the intervenors have somehow waived their rights to enforce the stipulated rate freeze.[64] AES dedicates a large portion of its AFR to this argument, but ignores this fatal fact: AES has never raised its rates while operating under any version of ESP I.

AES claims that parties should have moved to dismiss AES' 2015 rate case.[65] However, the Commission has ruled that ESP I "does not bar [AES] from filing a distribution rate case in order to prepare for implementing the rates at the conclusion of the rate freeze."[66] Instead, the stipulated rate freeze would bar AES from *implementing* an increase to base distribution rates at this time while continuing to operate under ESP I.[67]

AES also asserts that the intervenors should have specifically argued for inclusion of the rate freeze both times AES willingly reverted to ESP I.[68] But the rate freeze was already included in ESP I as it is a term of ESP I. Additionally, AES' argument directly contradicts the

[63] Tr. at 22-23 (Sharkey) (May 18, 2022).

[64] AES AFR at 13-21.

[65] *Id.* at 17-20.

[66] Entry at ¶ 20 (Oct. 20, 2021).

[67] *Id.* ("Accordingly, we conclude that this case is ripe for consideration in spite of the fact that implementation of any rate changes in the case may, subject to the remaining outstanding legal arguments of the parties, be stayed as part of our determination in this case.").

[68] *See* AES AFR at 14-17, 20-21.

Commission's previous holdings that every term of ESP I expressly continued, unless otherwise stated:

> There was no need, however, to specifically enumerate each portion of the ESP that would be carried forward. Instead, except where explicitly modified, all provisions, terms and conditions of ESP I were extended or continued.[69]

Notably, on every occasion that AES willingly reverted to ESP I, the Commission held that this had the effect of continuing each term of ESP I. Although AES now argues that the intervenors failed to specifically assert that each and every term of ESP I continued with ESP I, AES made that very argument each time it reverted to ESP I. In each instance that AES reverted to ESP I, the Commission agreed with AES that this automatically reinstated and continued the terms of ESP I. In the first instance, the Commission noted that:

> [a]lthough the General Assembly has not provided specific guidance in the event that an electric distribution utility were to terminate an MRO and file a new ESP, as is the case here, the Commission finds that it would be consistent with both Section 4928.141 and Section 4928.143(C)(2)(b), Revised Code, to order that the terms and conditions of the current ESP should continue until a subsequent offer is authorized.
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> ***
>
> The Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.[70]

In the second instance, the Commission again rejected the argument that terms of ESP I should not be reinstated, finding that:

> [p]ursuant to R.C 4928.143(C)(2)(b), if the utility terminates an ESP, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO. We note that we have granted [AES]'s motion to withdraw ESP II, thereby terminating it. Accordingly, with the termination of ESP II, the Commission finds that [AES] shall implement the

[69] Opinion and Order at ¶ 221 (Dec. 14, 2022).

[70] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case Nos. 12-426-EL-SSO, et al., Entry at ¶ 5 (Dec. 19, 2012).

> provisions, terms, and conditions of ESP I, along with any expected increases or decreases in fuel costs, pursuant to R.C. 4928.143(C)(2)(b), until a subsequent SSO is authorized.[71]

The third time AES voluntarily reverted to ESP I, and argued that this had the effect of continuing the terms of ESP I, the Commission reaffirmed its decision:

> [AES] has exercised its statutory right to withdraw ESP III. [AES]'s most recent SSO would be ESP I, which was reinstated by the Commission in the Finding and Order issued on August 26, 2016 in these proceedings. ESP I remained in effect until the effective date of ESP III, on November 1, 2017. According to the plain language of the statute, the Commission must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.[72]

Thus, AES cannot argue that the intervenors have waived the right to enforce the stipulated rate freeze. AES has repeatedly argued, and the Commission has repeatedly held, that reverting to ESP I reinstates the terms of ESP I—including the stipulated rate freeze. Until now, however, the intervenors have never had the reason or the opportunity to enforce the stipulated rate freeze.

[71] *In the Matter of the Application of the Dayton Power and Light Company to Establish aStandard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Finding and Order (Aug. 26, 2016) at ¶ 20.

[72] *Id.*, Second Finding and Order (Dec. 18, 2019) at ¶ 27.

III. CONCLUSION

AES has already had more than enough chances to argue its case. The Commission has heard them, and found "that the rate freeze can and should be enforced in this proceeding."[73] AES has failed to offer any new or compelling argument to the contrary. As such, the Commission should deny AES' AFR and enforce the stipulated rate freeze.

Respectfully submitted,

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[73] *Id.* at ¶ 221.

CERTIFICATE OF SERVICE

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Summary: Memorandum Joint Memorandum Contra Application for Rehearing electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group and The Kroger Co.