Office of the Ohio Consumers' Counsel

May 30, 2023

Ms. Tanowa Troupe, Secretary
Public Utilities Commission of Ohio
180 East Broad Street, 11th Floor
Columbus, Ohio 43215

RE: *In the Matter of the Application of the Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan,* Case Nos. 22-900-EL-SSO, 22-901-EL-ATA and 22-902-EL-AAM

Dear Ms. Troupe:

Today we received a notice from the PUCO Docketing division that our May 26, 2023 Initial Brief "must be rejected" because "the case number is incorrect."

We are by this filing responding to that notification. To be clear, the case number we filed our initial brief in was correctly identified as Case No. 22-900-EL-SSO. OCC, inadvertently, did not file its brief in the associated dockets, Case No. 22-901-EL-ATA, and 22-902-EL-AAM. With this filing, that is now corrected.

Please note that OCC's initial brief was served on all parties of record on May 26, 2023.

Thank you.

Very truly yours,

/s/ John Finnigan

John Finnigan (0018689)
Assistant Consumers' Counsel

cc: All Parties of Record & Attorney Examiners

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan.	))))	Case No. 22-900-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Revised Tariffs	)))	Case No. 22-0901-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	)))))	Case No. 22-0902-EL-AAM

CORRECTED INITIAL BRIEF FOR CONSUMER PROTECTION BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

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CORRECTED INITIAL BRIEF FOR CONSUMER PROTECTION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

For the protection of the public, the PUCO's settlement process is in desperate need of reform by the PUCO or the Ohio legislature. The AES Ohio/PUCO settlement is a prime example why. Numerous parties (16 in all) signed a Settlement[1] that will cost consumers over $160 million over the next three years.[2] There are benefits galore to AES Ohio. It gets to collect over $76 million in past "costs,"[3] some dating back nearly ten years. AES Ohio gets to collect transition costs even though the time to collect those costs ended by law in 2010. It gets to collect even more from consumers through a rider

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[1] Three parties agreed not to challenge the Settlement.

[2] *See* OCC Ex. 8.

[3] Some of the charges are for revenues and not costs. For instance, AES Ohio is charging $13 million in lost revenues to consumers associated with decoupling that went along with AES Ohio's ESP III. But when AES Ohio withdrew from ESP III, it lost the ability to collect those revenues from consumers.

charge to consumers that allows it a return on and of its distribution investment. In return, consumers are asked to believe that AES Ohio will provide more reliable service, and that the more reliable service will more than outweigh the $160 million in charges they will pay over the next three years.

When parties are capable, knowledgeable and stand equal before the Commission, a settlement is an indicator of the parties' general satisfaction that the jointly recommended result will meet their private or collective needs. But here, it is impossible to ignore AES Ohio's superior bargaining power vis-a-vis its right to terminate if the PUCO modifies its electric security plan. And while there are a few bones thrown to the Signatory Parties, the Settlement sadly reflects the fact that the Signatory Parties may not have known the cost impacts or may have eschewed what was in their best interests for the best terms they could manage, a scenario described by former PUCO Commissioner Roberto.[4]

While the PUCO tends to give substantial weight to settlements, it is well established that "a stipulation entered by the parties...is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration but must determine what is just and reasonable from the evidence presented at the hearing."[5] A settlement, however, is not a substitute for the PUCO's judgment regarding the public interest. The PUCO is

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[4] *In re Matter of the Application of Ohio Edison Co., the Cleveland Electric Illuminating Co., & the Toledo Edison Co. for Authority to Establish a Standard Service Offer*, Case No. 08-395-EL-SSO, Second Opinion & Order, Concurring in Part and Dissenting in Part Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[5] *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 592 N.E.2d 1370.

obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.[6]

The PUCO should carefully consider the terms of the Settlement in this proceeding. It should conclude, as OCC has, that the Settlement violates all three prongs of the PUCO settlement standard. The parties were not knowledgeable about the ultimate cost to their clients of the Settlement they signed. The Settlement, while benefiting AES Ohio, provides little corresponding benefits to consumers for the $160 million they will pay over the next three years. And the Settlement violates important regulatory practices and principles. The PUCO should reject the Settlement in favor of a market rate offer.

II. STATUTORY REQUIREMENTS

In many ways, the allowance of electric security plans, since 2008, has favored electric utilities with new opportunities for charges while disfavoring the consumers who pay the charges. Ohio law does not provide a detailed mechanism for establishing rates under an ESP.[7]

The statute does, however, contain some limits that are intended to protect consumers from being charged rates that are too high. One of those limits is what has become known as the "more favorable in the aggregate test." Under Ohio law, the PUCO is required to approve, modify and approve or disapprove a utility's application for an electric security plan "if it finds that the electric security plans so approved, including its pricing and all other terms and conditions, including any deferrals and any future

[6] *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921.

[7] *In re Ohio Edison Co*., 146 Ohio St.3d 222, 223, quoting *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 4.

recovery of deferrals, is more favorable in the aggregate as compared to the expected result that would otherwise apply under section 4928.142 of the Revised Code."[8]

AES Ohio bears the burden of proof on these issues.[9] Because the PUCO is required by statute to address these issues, they must be considered separate and apart from the Settlement.[10] Upon consideration of these issues, the PUCO should conclude that AES Ohio's ESP IV is less favorable in the aggregate *to consumers* than an MRO. Consequently, the PUCO must conclude that the Settlement violates important regulatory practices and principles given the electric security plan fails the statutory test.[11]

A. AES Ohio's electric security plan is less favorable in the aggregate than a market rate offer.

1. The PUCO should consider the test from the consumers' perspective and in the short term, consistent with the three-year term of AES Ohio's electric security plan.

OCC Witness Fortney testified that the electric security plan, as proposed in the Settlement, is less favorable in the aggregate for consumers than a market rate offer.[12] Unlike other witnesses who ran the more favorable in the aggregate test, Mr. Fortney did so from a consumer perspective. Mr. Fortney considered the short-term effects of AES Ohio's electric security plan, consistent with the short, three-year term of AES Ohio's

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[8] R.C. 4928.143(C)(1).

[9] *In re Filing by [FirstEnergy] of a Grid Modernization Bus. Plan*, Case No. 16-481-EL-UNC, Opinion & Order ¶ 106 ("utilities continue to bear the burden of proof for any application submitted for our consideration"); R.C. 4928.143(E) ("The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility."); R.C. 4928.143(F) ("The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility.").

[10] *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶¶ 62-64 (rejecting utility's argument that statutory issues must be addressed in the context of the PUCO's three-part settlement test).

[11] OCC Ex. 2 at 5 (Fortney).

[12] OCC Ex. 2 at 4 (Fortney).

electric security plan.[13] Mr. Fortney's approach is reasonable and carries out the objective of the test—the more favorable in the aggregate test is supposed to provide consumers protection from paying too high electricity rates under an electric security plan.

2. Considering the consumer perspective and the three-year term of AES Ohio's electric security plan, the plan imposes extra quantifiable costs on consumers because it features accelerated cost recovery for a number of charges (through riders), requiring consumers to pay quicker than they would otherwise pay under an MRO. These costs were not considered in either the PUCO Staff's or AES Ohio's analysis.

Unlike the PUCO Staff and AES Ohio's Witness Malinak, Mr. Fortney considered the *cost to consumers* of what Mr. Malinak calls "Accelerated Cost Recovery Riders."[14] Mr. Malinak identifies these riders as the Distribution Investment Rider, the Storm Cost Recovery Rider, the Proactive Reliability Optimization Rider, the Customer Programs Rider, and the Infrastructure Investment Rider.

Mr. Malinak explains that under these riders AES Ohio would be able to recover its costs from consumers on an accelerated basis.[15] Mr. Malinak acknowledges that these riders avoid the "more delayed recovery under standard rate cases, such as those that would be filed under an MRO."[16] Mr. Malinak acknowledges that AES Ohio's collection of these costs from consumers under an MRO (through a distribution rate case or otherwise) "would be slower, on the order of approximately three years before costs would be included in rates, versus approximately 15 months or less under ESP IV."[17]

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[13] *Id*. at 17.

[14] AES Ohio Ex. 3 at 8, footnote 20 (Malinak).

[15] *Id.* at 7.

[16] *Id.* at 7-8.

[17] *Id.* at 8.

Although Mr. Malinak and AES Ohio Witness Schroder admit that under these accelerated riders customers will pay sooner than under an MRO, neither Ms. Schroder nor Mr. Malinak considered that as a quantifiable cost under AES Ohio's electric security plan.[18] PUCO Staff Witness Messenger failed to consider these quantifiable costs of the MRO as well.[19]

Mr. Fortney testified that collecting added costs more quickly from consumers is not a wash from the consumers' perspective.[20] Mr. Fortney recommended that the PUCO consider the riders from the consumers' perspective as adding costs during the ESP term and weighing against finding that an electric security plan is more favorable than an MRO.

In other words, the regulatory lag associated with the collection of costs from consumers is a benefit to consumers of the MRO, and a cost to consumers for the ESP. It should have been quantified and considered as a cost of the ESP, not found on the MRO side in the more favorable in the aggregate test. Regulatory lag also benefits consumer by imposing discipline on AES Ohio's capital spending, ensuring that projects which benefit consumers most get completed first. In addition, the Supreme Court of Ohio has held that the time value of money is a relevant consideration which must be considered in comparing the financial impact of various outcomes.[21] The time value of money (just like carrying costs on the utility's end) matters to consumers. Because these costs were not

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[18] *Id.* at 20 (Malinak); Tr.I at 83-88 (Schroder).

[19] Tr. III at 580 (Messenger).

[20] OCC Ex. 2 at 7 (Fortney).

[21] *Phoenix Lighting Grp., L.L.C. v Genlyte Thomas Grp., L.L.C., 2020-Ohio-1056, 153 N.E.3d 30.*

included in either the PUCO Staff's or AES Ohio's analysis, the costs of AES Ohio's electric security plan were understated vis-à-vis an MRO.

3. The coal plant deferral costs related to past electric security plans could not be included in an MRO, and thus on a quantitative basis, the MRO is at least $36.8 million less costly to consumers than AES Ohio's electric security plan.

Mr. Fortney also explained that Mr. Malinak failed to consider other quantifiable costs that weigh in on the electric security plan side but not the MRO side.[22] (PUCO Staff witness Messenger did not consider any quantifiable costs, instead she broad brushed the analysis, finding no difference quantifiably between the ESP and a hypothetical MRO.)[23] One significant electric security plan cost to consumers, not permitted under an MRO, is for approximately $38 million of the coal plant subsidies. [24]

Specifically, under the Settlement, AES Ohio will charge consumers to subsidize AES Ohio's share of past generation expenses associated with two coal plants (one in Indiana). OCC contends that these costs cannot be collected under AES Ohio's ESP IV; however, if the PUCO rejects this argument, then AES Ohio's collection of these costs under ESP IV would cause the ESP to fail the most favorable in the aggregate test.

These past generation charges for coal plant subsidies could not be collected through an MRO or, as the PUCO has interpreted it, an MRO plus a base distribution rate case. Under an MRO, charges collected from consumers are strictly limited to the cost of the standard service offer (the "least cost bid") and the competitive bidding process through which the standard service offer is set. Under R.C. 4928.143(C)(3), the competitive bidding costs are limited to "all costs incurred by the electric distribution

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[22] OCC Ex. 2 at 14, 24 (Fortney).

[23] Tr. II at 580-581 (Messenger).

[24] *See* Signatories Parties' Ex. 1 at 15. Added onto the $28, 269, 736, of deferred coal plant subsidy costs identified in the Settlement is $10.6 million of carrying charges that have been back dated to October 1, 2014 through October 31, 2017 and from December 19, 2019 to December 31, 2019. (Tr. I at 33, 35 (Donlon)).

utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding." There is no ability for a utility to collect past generation costs, in any form under an MRO.

Additionally, the coal plant subsidy charges to consumers could not be collected from consumers in a base distribution rate case. A distribution rate case allows for the collection of distribution costs. Generation costs cannot be collected from consumers in distribution rates.

Because Mr. Malinak and PUCO Staff Witness Messenger failed to consider this quantifiable cost in their more favorable in the aggregate test, they understated the cost to consumers of AES Ohio's electric security plan. They should have concluded that, on a quantitative basis, the MRO is more favorable in the aggregate to consumers than AES Ohio's electric security plan by at least $38 million.

4. There is a quantifiable cost to AES Ohio's electric security plan associated with the lead time in filing an MRO application, amounting to $6 million per month cost on the ESP side with no corresponding cost on the MRO side.

Another quantifiable cost to AES Ohio's electric security plan that was not considered by either the PUCO Staff or AES Ohio relates to the timing of an MRO. In this case, AES Ohio did not simultaneously file a request for an MRO when it filed its electric security plan application.

Under the unique situation in this case, with the PUCO enforcing a distribution rate freeze while AES Ohio is operating under ESP I,[25] each month that goes by avoids approximately $6 million of rate increases to AES Ohio consumers. So the filing of an MRO, not previously filed, would likely add months onto the time period for the PUCO to issue an order adopting an SSO.

Whether that time frame is six months, as surmised by OCC witness Fortney[26] or two months, there is an added monthly cost to consumers on the ESP side, not found on the MRO side. But this extra cost was not considered by either the PUCO Staff or AES Ohio. Because these costs were not included in either the PUCO Staff's or AES Ohio's analysis, the costs of AES Ohio's electric security plan were understated vis-à-vis an MRO.

5. AES Ohio overvalued the benefits associated with the ESP in its analysis when it counted the non-quantifiable benefits of SmartGrid as a benefit of the ESP. This was double-counting of benefits that the PUCO had already considered in Case No. 18-1875.

AES Ohio touted as non-quantifiable benefits of the ESP the fact that AES Ohio has a Smart Grid modernization program.[27] Mr. Malinak testified that the programs proposed under AES Ohio's ESP IV, including Smart Grid, would have "clear customer benefits."[28]' And Mr. Malinak went on to testify the Smart Grid rider is one of the non-quantifiable or difficult to quantify benefits of ESP IV as compared to an MRO, claiming the IIR "already has been found by the Commission to provide net positive benefits to

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[25] *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, Opinion and Order at ¶221-224 (Dec. 14, 2022).

[26] OCC Ex. 2 at 26 (Fortney).

[27] AES Ohio Ex. 3 at 15, 18 (Malinak).

[28] AES Ohio Ex. 3 at 15.

customers."[29] Mr. Malinak also describes the accelerated recovery (under the SmartGrid rider) as a result that is "better for customers because they will receive the benefits (*e.g.,* higher reliability, higher quality services from Smart Grid) of these investments sooner under an MRO."[30]

Mr. Malinak's overall assessment of the unquantifiable or difficult to quantify benefits of ESP IV is that they "clearly exceed the benefits of an alternative MRO."[31] In fact his entire analysis hinges upon his valuation of non-quantifiable or difficult to quantify benefits that an ESP has but an MRO does not.[32] Mr. Malinak, otherwise concluded that there were no material differences when comparing the ESP to the MRO.[33] PUCO Staff Witness Messenger came to the same conclusion.[34]

But as discussed above, both the PUCO Staff and AES Ohio overlooked quantifiable benefits that the MRO has over AES Ohio's ESP IV. So that makes their evaluation of the non-quantifiable benefits even more critical to the conclusion they reach—that the ESP is more favorable in the aggregate than an MRO.

But as pointed out by OCC Witness Fortney, counting the benefits of the Smart Grid Rider (Rider IIR) as a non-quantifiable benefit of AES Ohio's ESP IV is not appropriate.[35] As Mr. Malinak acknowledged, the PUCO already approved the first phase

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[29] *Id.* at 18.

[30] *Id.* at 20.

[31] *Id.* at 22.

[32] OCC Ex. 2 at 7 (Fortney).

[33] AES Ohio Ex. 3 at 17 (Malinak).

[34] Tr. III at 580 (Messenger).

[35] OCC Ex. 2 at 31-32 (Fortney).

of AES Ohio's Smart Grid modernization plan in Case No. 18-1875-EL-GRD.[36] When Smart Grid Phase 1 was approved, the PUCO considered the benefits of the program as an ESP I benefit, continuing for four years, overlapping with the ESP term proposed in this proceeding. Recognition of that benefit as part of AES Ohio's ESP I led the PUCO to conclude that continuation of ESP I passed the more favorable in the aggregate test on a prospective basis.[37] And consideration of the Smart Grid benefits allowed the PUCO to approve the Settlement of the Smart Grid Case, along with the myriad of other cases consolidated with the Smart Grid case.[38]

OCC Witness Fortney testified that considering the Smart Grid non-quantifiable benefits again for purposes of evaluating AES Ohio's ESP IV in the more favorable in the aggregate test would be "double counting" that the PUCO has previously rejected.[39] And the same holds true for AES Ohio's existing riders which are merely proposed to be continued in AES Ohio's ESP IV plan.[40] Any benefits resulting from these same riders cannot be double-counted as a benefit of AES Ohio's ESP IV.[41]

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[36] AES Ohio Ex. 3 at 15, 18; *In the Matter of the Application of the Dayton Power and Light Company for Approval of its plan to Modernize its Distribution Grid*, Case No. 18-1875-EL-GRD, Opinion and Order (June 21, 2021).

[37] *Id.* at ¶58 (PUCO concluded that the continuing operation of ESP I is more favorable in the aggregate to an MRO, being "persuaded by, among other factors***AES OHIO's commitment to invest $267 million in SGP Phase I during the four-year period following approval of the Stipulation.")

[38] *Id.* at ¶50(PUCO concluding that "the major provisions of the settlement are overwhelmingly customer beneficial, including ***approving the modified SGP [Smart Grid Plan]."

[39] OCC Ex. 2 at 32, *citing In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 55 (July 18, 2012).

[40] OCC Ex. 2 at 32 (Fortney).

[41] *Id.*

The PUCO Staff and AES Ohio's analysis thus overstated the non-quantifiable benefits of AES Ohio's ESP IV when they double-counted the benefits of the Smart Grid to put them over the finish line in the more favorable in the aggregate test. Their analysis was flawed.

6. The PUCO Staff and AES Ohio rely heavily on non-quantifiable, hypothetical benefits associated with the distribution investment rider. Increased distribution investment does not guarantee that there will be benefits for consumers related to safety and reliability.

The PUCO Staff and AES Ohio place great emphasis on the hypothetical benefits to consumers that are expected to be produced when AES Ohio implements its new Distribution Investment Rider.[42] These benefits are the cornerstone to AES Ohio's and PUCO Staff's conclusion that the proposed ESP is more favorable than the MRO. Both the PUCO Staff and AES Ohio considered that no quantitative difference existed between the ESP and MRO, meaning that the non-quantifiable benefits are what makes the ESP more favorable under the statutory test.

Among other things, Mr. Malinak counts, the "higher quality service from more robust and timely investments" as a significant non-quantifiable benefit of ESP IV. Mr. Malinak notes that the Distribution Investment Rider (DIR) is expected to be used to collect the largest amount of costs among the riders included in AES Ohio's ESP IV. In fact, Mr. Malinak presents an analysis focused on distribution spending among Ohio utilities.[43] Mr. Malinak theorizes that electricity firms with higher levels of capital expenditure per megawatt hour tend to have better reliability. Mr. Malinak then draws

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[42] AES Ohio Ex. 3 at 15 (Malinak); PUCO Staff Ex. 6, response to Question 11 (Messenger).

[43] AES Ohio Ex. 3 at 10-16.

from his analysis to conclude that increased spending by AES Ohio on distribution will benefit consumers. [44]

But OCC Witness Fortney testified that Mr. Malinak's analysis has "little or no relevancy."[45] Each utility is different, Mr. Fortney testified. And Mr. Fortney found that "there does not seem to be any direct one-to-one connection between spending and safety and reliability."[46] For instance Mr. Fortney pointed out that Mr. Malinak's analysis shows that Toledo Edison, which spent the least on distribution, has met its reliability standards every year. And the two utilities that spent the most (Ohio Power and Duke) both had multiple times when they did not meet the reliability standards.[47] Mr. Malinak's analysis also shows that AES has spent higher amounts on distribution in recent years, but continues to not meet reliability standards.[48] Mr. Fortney concluded that "the level of spending does not ensure reliability and safety and that the non-quantitative benefits of an SSO assumed by Mr. Malinak should NOT be considered by the PUCO."[49]

Mr. Fortney testified that AES Ohio's electric security plan, as modified by the Settlement is more favorable **to AES Ohio** than an MRO. But, according to Mr. Fortney, the PUCO's directive is that the PUCO find the plan "must be more favorable **to the consumers** who are paying the rates under an ESP or MRO." Given that consumers are facing a $160 million increase for the electric security plan[50] it is difficult to conclude

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[44] AES Ohio Ex.3 at 10 (Malinak).

[45] OCC Ex. 2 at 29 (Fortney).

[46] OCC Ex. 2 at 30.

[47] *Id.*

[48] OCC Ex. 2 at 30 (Fortney).

[49] *Id.*

[50] OCC Ex. 8.

that the unproven, hypothetical benefits consumers receive from the plan –such as increases in reliability—merit the increased charges the Settlement foists upon them.

III. THE SETTLEMENT FAILS TO SATISFY THE PUCO'S THREE-PRONG SETTLEMENT STANDARD

A. The Settlement is not the product of serious bargaining among capable, knowledgeable parties.

Because of the evidentiary rulings made by the Examiner in this case, as discussed supra, there is no evidence to indicate whether the Signatory Parties knew how much their clients would pay to AES Ohio under the Settlement. If the Signatory Parties were not aware that they were agreeing to pay over $160 million to AES Ohio under the terms of the Settlement, then this is *prima facie* evidence that the Signatory Parties were not "knowledgeable" parties. Yet, that is part of the standard the PUCO requires settlements to meet –the settlement must be the product of serious bargaining among *knowledgeable* parties.

Additionally, despite the $160 million price tag of the Settlement, AES Ohio has "not attempted to quantify…benefits" "to each of the customer classes under the Stipulation."[51] And AES Ohio witness Sharon Schroder testified at hearing that AES Ohio quantified "some…but not all" benefits to consumers under the stipulation.[52] So the Signatory Parties may not have known the cost of the Settlement or the benefits of the Settlement on a quantifiable basis. And yet they signed it. For this reason, the PUCO should find parties were not "knowledgeable" of the Settlement, as a whole, and thus, the first prong of the PUCO's settlement standard is not met.

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[51] OCC Ex. 6.

[52] Tr. I at 88.

AES Ohio's apparent failure to quantify costs and benefits for Signatory Parties is not surprising given the disproportionate power utilities possess in negotiating electric security plan settlements. R.C. 4928.143(C)(2)(b) allows a utility to terminate an application for an ESP, even after the PUCO has approved it. Under that Ohio law, "If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer***."

In a 2008 FirstEnergy ESP case, Commissioner Cheryl Roberto recognized this unfortunate dynamic in a concurring/dissenting opinion where she described the unequal bargaining power the utility possesses in ESP negotiations:

> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.[53] The PUCO must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest—or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable.[54]

Commissioner Roberto concluded that a party's willingness to settle an electric security plan cannot be given the same weight that is accorded in other cases:

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[53] *In re Matter of the Application of Ohio Edison Co., the Cleveland Electric Illuminating Co., & the Toledo Edison Co. for Authority to Establish a Standard Service Offer*, Case No. 08-395-EL-SSO, Second Opinion & Order, Concurring in Part and Dissenting in Part Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[54] *Id.* at 25-26.

> In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[55]

Consistent with Commissioner Roberto's analysis, the PUCO should give little weight, if any, to the fact that numerous parties (all but OCC) signed the Settlement. The Signatory Parties may not have known the $160 million cost of the Settlement, nor known its quantifiable benefits. Adding to the mix is AES Ohio's disparate bargaining power. The PUCO should carefully review all terms and conditions of the Settlement and place greater emphasis on whether the Settlement can be shown to be in the public interest and not violate regulatory practices and principles. After doing such an analysis, the PUCO should conclude that the Settlement should be rejected.

B. The Settlement does not benefit consumers or the public interest.

AES Ohio's plan to charge consumers $160 million does not benefit consumers or the public interest. The Settlement primarily benefits AES Ohio, not consumers or the public. The Settlement benefits AES Ohio by allowing it to collect $76 million of past charges (through the Regulatory Compliance Rider), unrelated to its standard service offer to consumers over the next three years and in violation of Ohio statutes, past precedents and important regulatory principles and practices. These unfair and unjust charges for AES Ohio's past costs will provide no benefit to the consumers who pay them – they are merely costs that add to consumers' bills.

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[55] *Id.*

And the Settlement benefits AES Ohio by creating a Distribution Investment Rider that allows it to collect money faster from consumers for its investment in distribution plant. It is an investment that the utility is already required to make to continue to fulfill its duty to provide consumers with "necessary and adequate facilities" at just and reasonable rates under R.C. 4905.22. The PUCO, in AES Ohio's most recent distribution rate case, reminded AES Ohio of this obligation, notwithstanding its claims of "allegedly deleterious effects" a rate freeze would have on its ability to provide reliable service: "Furthermore, it bears repeating that AES Ohio is statutorily obligated to furnish necessary and adequate service. R.C. 4905.22."[56]

AES Ohio touts the Distribution Investment Rider as benefitting consumers because it will improve reliability.[57] AES Ohio Witness Malinak presents a detailed analysis on this issue where he compares AES Ohio's past spending on distribution with other Ohio utilities.[58] He concludes that AES Ohio has spent less on distribution investment than other utilities, which has caused it to fail to meet service reliability standards. He concludes that more spending by AES Ohio will mean better reliability for consumers.

Two things must be said. First, AES Ohio chose what it spent on distribution in the past. Consumers did not weigh in, nor were they asked to weigh into AES Ohio's decisions on distribution investment. So any responsibility for decreased reliability (via

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[56] *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, et al., Opinion and Order at ¶223 (Dec. 14, 2022).

[57] AES Ohio Ex. 3 at 13 (Malinak).

[58] AES Ohio Ex. 3 at 9-13.

less distribution spending) lies solely with AES Ohio. *Second, additional spending does not guarantee AES Ohio will provide consumers more reliable electric service*.

As OCC Witness Fortney testified, "…there does not seem to be any direct one-to-one connection between spending and safety and reliability."[59] For example, Toledo Edison, "which has spent the least" on grid and operations "met its SAIFI and CAIDI standards every year from 2017-2021."[60] By contrast, Ohio Power and Duke Energy, "both had multiple instances of NOT meeting [those] standards," despite having "spent the most" on grid and operations.[61] AES Ohio itself recently made large investments to improve reliability, including $267 million for Smart Grid technology.[62] Despite this spending hike, AES failed to meet its CAIDI standard in four of the last five years, in 2017, 2019, 2020, and 2021.[63] Clearly, as Mr. Fortney testified, a utility's "level of spending does not ensure reliability and safety…."[64] In other words, the "hypothetical"[65]benefits of AES Ohio's plan to collect $160 million from consumers should be discounted as a benefit of the Settlement.

What is certain is the Settlement's cost to consumers. Consumers repeatedly spoke out against the rate increase and the unmanageable burdens it would impose, if approved. AES Ohio consumer Kathleen Galt stated, "I'm now on a fixed income and

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[59] OCC Ex. 2 at 30 (Fortney).

[60] *Id.* CAIDI refers to Customer Average interruption Duration Index.

[61] *Id.*

[62] *Id.*; *Transmission and Distribution Inspection, Maintenance, Repair and Replacement Programs Pursuant to Section 4901:1-10-27, Ohio Administrative Code, Regarding Electric Companies*, Case No. 18-1837-EL- ESS, Opinion and Order at 11 (Dec. 17, 2018).

[63] OCC Ex 2. at Ex. RBF – 1.

[64] *Id.*

[65] OCC Ex. 2 at 8 (Fortney).

I'm having a really difficult time paying my utility bills. I have never turned to the state or federal government for a dime in my life…but I am now considering turning to HEAP or PIPP to help me with my electric bill."[66] Another AES Ohio consumer, Karl Biermann, testified that after previous AES Ohio rate hikes, "my family and I largely turned off the air conditioning [during the] summer and allowed temperatures in our home to reach the low 80s. This winter, we've set the thermostat to 61 or 62 degrees and sometimes wear jackets and layers inside our home."[67]

And AES Ohio's additional charges come at a particularly difficult time for consumers, as Mr. Fortney testified. The "current economic conditions caused by Covid, inflation and rising fuel costs" make it hard for consumers to keep up with AES Ohio's new charges.[68] The benefits of AES Ohio's plans are questionable, but its costs for consumers are certain and great.

The Settlement does not benefit consumers or the public interest. The Settlement imposes on consumers $160 million in charges during a period of unique economic hardship. And the purported benefits of the Settlement – more reliable service – are uncertain, as grid spending does not always improve reliability. Since the Settlement is against the public interest, the PUCO should reject it.

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[66] Local Public Hearing Tr. (Feb. 10, 2023) at 15-16.

[67] *Id.* at 7-8.

[68] OCC Ex. 2 at 18.

C. The Settlement violates important regulatory practices and principles.

1. Charging consumers for prior deferrals violates numerous important regulatory practices and principles.

As part of the Settlement, the Signatory Parties agreed that AES Ohio can collect $6.5 million in prior charges ("Prior RCR"), some incurred almost twenty-five years ago! Two of the regulatory assets that make up the "Prior RCR" deferrals (consumer education campaign and retail settlement system) pertain to costs previously authorized by the PUCO as "transition costs." Because the period for collecting these costs from consumers ended on December 31, 2010, the costs are precluded by law from being collected in AES Ohio's electric security plan.

The remaining assets that make up the "Prior RCR" deferrals (green pricing program, generation separation regulatory assets, and bill format redesign) have not been shown to be permissible provisions under a utility's electric security plan, and thus under Ohio Supreme Court precedent[69] are not allowed to be collected from consumers. Allowing these "Prior RCR" deferrals under the Settlement, thus violates regulatory practices and principles.

2. Consumer Education and Retail Settlement System deferrals are previously authorized transition costs that cannot be collected from consumers after December 31, 2010. Allowing such transition costs to be collected from consumers under AES Ohio's electric security plan violates R.C. 4928.141, and thus violates regulatory practices and principles.

AES Ohio witness Sharon Schroeder testified at hearing that the "consumer education" and "settlement system implementation" cost deferrals ($2,333,216.32)

[69] *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788.

sought to be collected in the Settlement were created in Case No. 99-1687-EL-ETP.[70] Ms. Schroder testified that the consumer education campaign was a requirement under S.B. 3 that electric utilities were required to implement to explain options to consumers regarding the selection of an electric generation supplier.[71] And the retail settlement system was also a requirement under S.B. 3 whereby a utility, prior to joining a retail transmission organization, needed to settle energy on an hourly basis with CRES providers.[72]

In its September 21, 2000 Order approving AES Ohio's electric transition plan, the PUCO approved these accounting deferrals as "transition costs" to be collected from consumers, characterizing them as "$28.6 million in accounting related expenses."[73] Under R.C. 4928.40(A), deferred expenses (recognized as regulatory assets) that are authorized by the PUCO as transition costs, must be collected from consumers no later than December 31, 2010. In other words, AES Ohio is 13 years late in its request to collect these charges from its consumers. And R.C. 4928.141 precludes a utility from including in its standard service offer "any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan."

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[70] OCC Ex. 9; Tr. I at 139-141 (Schroder).

[71] Tr. I at 140-141; OCC Ex. 9, 10.

[72] *Id.* at 141.

[73] *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000), Opinion and Order at 27 (Sept. 21, 2000). OCC has sought administrative notice of AES Ohio's Amended Application, Part F, to receive transition revenues, filed in Case No. 99-1687-EL-ETP on April 20, 2000.That application ties the "accounting related expenses" to among other assets, the consumer education campaign and the retail settlement system deferrals.

Consequently, the Settlement provision allowing collection of these previously authorized deferred transition costs violates the law, and is thus, contrary to important regulatory practices and principles, failing the third prong of the PUCO's settlement test. The PUCO should reject the Settlement, or at the very least, amend the Settlement to exclude these previously authorized transition costs from being collected from consumers.

3. Deferrals related to green pricing, generation separation and bill format redesign cannot be collected from consumers unless these provisions fall into one of the categories listed following R.C. 4928.143(B)(2). *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788. AES Ohio has failed to bear the burden of proving the deferrals are a permissible provision under R.C. 4928.143(B)(2).

Although a utility has considerable flexibility under an electric security plan to charge consumers for many different charges, there are some limits. One of those limits was established by the Ohio Supreme Court, in response to OCC's appeal of environmental investment carrying charges. In 2011, the Ohio Supreme Court stepped in to corral charges to consumers under an electric security plan, holding that R.C. 4928.143(B)(2) has limits --"if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[74]

Given the Supreme Court's holding, before utilities can charge consumers under an electric security plan, they must identify specifically which provision of law allows the charge to consumers. AES Ohio, has the burden of proof in this electric security plan proceeding. It failed to meet this burden by not identifying the specific authority for the "Prior RCR charges" to consumers. This is a violation of important regulatory practices

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[74] *In re Application of Columbus Southern Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

and principles embodied in R.C. 4928.143(B)(2) and contrary to the Ohio Supreme Court holding in *In re Application of Columbus Southern Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

4. Green Pricing deferrals are not a permissible provision of R.C. 4928.143(B)(2) and thus, including these provisions in AES Ohio's ESP violates regulatory practices and principles.

Part of the previously deferred expenses sought to be collected from consumers under the Settlement as "Prior RCR" were for AES Ohio's green pricing program.[75] The green pricing program deferrals relate to the remaining balance of implementation costs for the program that were not recovered by the time the program ended in December 2011.[76]

AES Ohio Witness. Schroder testified that although deferrals may be permitted under subsection (B)(2)(d), the deferrals must also specifically fit into one of the categories listed there: limitations on customer shopping, bypassability, standby, back-up, or supplemental power service, or default service.[77] Additionally, as Ms. Schroder testified, the deferral must stabilize rates.[78] AES Ohio has failed to show that the previously incurred green pricing program costs comply with the statute. AES Ohio bears the burden of doing so.[79]

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[75] OCC Ex. 9; OCC Ex. 10.

[76] Tr. I at 145 (Schroder).

[77] Tr. I at 153-154 (Schroder).

[78] *Id.*

[79] R.C. 4928.143(C)(1).

5. Generation separation deferrals are not a permissible provision of R.C. 4928.143(B)(2) and thus, including these provisions in AES Ohio's ESP violates regulatory practices and principles.

The generation separation deferrals relate to generation separation (unbundling) costs ($3,804,294) previously incurred from AES Ohio's divesting its generation. AES Ohio described these costs as "all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes and related costs AES Ohio incurred to transfer its generation assets."[80] These costs, though permitted by the PUCO to be deferred, were supposed to be "subject to Staff review to determine if they are reasonable and prudently incurred."[81]

AES Ohio witness Schroder testified that although deferrals may be permitted under subsection (B)(2)(d), the deferrals must also specifically fit into one of the categories listed there: limitations on customer shopping, bypassability, standby, back-up, or supplemental power service, or default service.[82] Additionally, as Ms. Schroder testified, the deferral must stabilize rates.[83]

AES Ohio presented no evidence to show that these costs are permitted provisions under R.C. 4928.143(B). AES Ohio did not present evidence as to how these charges stabilize rates. Nor has AES Ohio shown that these costs have been reviewed by the PUCO Staff to determine if they are reasonable and prudently incurred, despite the

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[80] *See In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Cas No. 13-2420-EL-UNC, Finding and Order at ¶28 (Sept. 17, 2014).

[81] *Id.* at ¶29. In fact, on rehearing, the PUCO ruled that the prudency and recoverability of these costs were to be "reviewed in an audit pursuant to AES OHIO's next distribution rate case." Entry on Rehearing, at ¶9 ((Dec. 17, 2014). To OCC's understanding, that PUCO directive was never followed.

[82] Tr. I at 153-154 (Schroder)..

[83] *Id.*

PUCO directive to do so. Because AES Ohio failed to show that the generation separation costs comply with the statute and previous PUCO orders, and it bears the burden of doing so,[84] including such charges to consumers violates important regulatory practices and principles.

6. Bill format redesign deferrals ($177,977) are not a permissible provision of R.C. 4928.143(B)(2) and thus, including these provisions in AES Ohio's ESP violates regulatory practices and principles.

The bill format redesign deferred costs to be collected from consumer were created in response to a PUCO directive to utilities to modify their bills to include logos for marketers.[85] The deferred costs represent AES Ohio's costs to implement these bill modifications. While the PUCO Staff recommended that the PUCO authorize electric distribution utilities to charge all active marketers for these costs, [86] the PUCO declined to adopt its Staff's recommendation, noting that "although the cost causer [marketers] is normally assessed, the Commission believes that the bill format changes proposed by Staff and addressed in this Order are appropriate for recovery by an EDU in a distribution rate case. Accordingly, the EDUs may file applications for recovery of those costs in their next distribution rate case."[87]

Subsequently, AES Ohio sought to defer the costs associated with implementing a revised bill format.[88] When the PUCO approved AES Ohio's deferral request, it noted

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[84] R.C. 4928.143(C)(1).

[85] Tr. I at 145-146 (Schroder).

[86] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at ¶25 (Mar. 26, 2014).

[87] *Id.* at ¶26.

[88] *In the Matter of the Application of The Dayton Power and Light Company for Approval of a Revised Bill Format for Electric Service*, Case No. 14-2403-EL-UNC, Application (Nov. 21, 2014).

that "recovery of the deferral amount is not guaranteed, as the determination of reasonableness of the deferred amounts and the recovery thereof will be addressed in a future proceeding."[89] And now, in an electric security plan proceeding, AES Ohio seeks to collect these circa 2015 costs from consumers.

The PUCO should find that allowing collection of these old bill redesign costs violates important regulatory practices and principles for a number of reasons. First, as noted by the PUCO, collecting the costs from consumers instead of the cost causer – marketers, is contrary to the normal regulatory practices and principles. Second, AES Ohio was directed to seek recovery of the costs in a distribution rate proceeding. This is not a distribution rate proceeding. Third, AES Ohio failed to show that these costs are permitted under R.C. 4928.143(B). AES Ohio did not identify what category of deferrals these expenses relate to. Nor did AES Ohio present evidence as to how these charges stabilize rates. Because AES Ohio failed to show that the bill format redesign deferrals comply with the statute and previous PUCO orders, and AES Ohio bears the burden of doing so,[90] these charges to consumers violate regulatory practices and principles.

7. The Settlement violates the ESP statutes (R.C. 4928.141 and 4928.143) by allowing AES Ohio to collect for past generation costs related to its ownership share of two coal plants, incurred during prior ESPs, which would not have the effect of stabilizing or providing certainty regarding retail electric service during ESP IV.

a. What the coal plant subsidy costs are – the OVEC deferral consists of past fuel costs incurred but not collected during AES Ohio's ESP I and ESP II.

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[89] *In the Matter of the Application of The Dayton Power and Light Company for Approval of a Revised Bill Format for Electric Service*, Case No. 14-2403-EL-UNC, Finding and Order at ¶13 (Dec. 16, 2015).

[90] R.C. 4928.143(C)(1).

The "OVEC deferral" consists of past fuel costs from AES Ohio's ownership share of two coal plants (one in Indiana) which were incurred but not collected during prior ESP's.[91] The costs were incurred during two time periods: October 1, 2014 through October 31, 2017 and December 19, 2019 through December 31, 2019.[92]

Throughout the October 1, 2014 through October 31, 2017 time period, either AES Ohio's ESP I or AES Ohio's ESP II was in effect. The PUCO approved AES Ohio's ESP II on September 4, 2013.[93] The Supreme Court of Ohio reversed the PUCO's approval of AES Ohio's ESP II on June 20, 2016.[94] On remand, the PUCO issued an August 26, 2016 Order modifying AES Ohio's ESP II per the Supreme Court's ruling and then granted AES Ohio's motion to withdraw from its ESP II, thus terminating it.[95] After AES Ohio's ESP II was terminated, the PUCO granted AES Ohio's application to revert to ESP I.[96] AES Ohio's ESP I remained in effect until the PUCO approved AES Ohio's third ESP, effective November 1, 2017.[97]

The PUCO's approval of AES Ohio's ESP III included a reconciliation rider which allowed AES Ohio to collect coal plant subsidies from consumers beginning on

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[91] AES Ohio Ex. 2 at 5 (Donlon).

[92] *Id.*

[93] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order (Sept. 4, 2013).

[94] *In re Application of Dayton Power & Light Co*., 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

[95] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Finding and Order (Aug. 26, 2016).

[96] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Third Entry on Rehearing (Dec. 14, 2016).

[97] *In the Matter of the Application of The Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Second Finding and Order (Oct. 20, 2017).

November 1, 2019.[98] However, AES Ohio withdrew from ESP III on December 18, 2019.[99] The OVEC deferral in the present case therefore also includes past fuel costs from December 19, 2019 through December 31, 2019. Effective January 1, 2020, AES Ohio has been collecting coal plant subsidies from consumers through the legacy generation rider.[100]

AES Ohio did not fully collect its coal plant costs under ESP I and ESP II because it reached a settlement agreement whereby it agreed to phase in a competitive bid process. That competitive bid process did not include a mechanism for AES Ohio to collect the coal plant subsidies.[101] AES Ohio explained this in an internal accounting memo:

> Until 2014, all the energy bought was considered retail and both energy and demand charges were fully recovered through DP&L's fuel rider. As part of our implementation of DP&L's 2013 Electric Security Plan ("ESP") order, we began excluding a non-retail portion of the demand charge from DP&L's fuel adjustment clause ("FAC") and expensing it.[102]

To sum up this important point, the coal plant subsidy deferral in the present case covers AES Ohio’s share of past coal plant fuel costs which were *incurred* but not collected from consumers during October 1, 2014 through October 31, 2017 and

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[98] *Id.*; *see also, In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Entry (Jan. 29, 2020).

[99] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

[100] R.C. 4928.148.

[101] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 12 (Sept. 4, 2013) (the competitive bid process was to be phased in using the following increments: 10%, 40%, 70% and 100%).

[102] OCC Ex. 3 at 17, Attachment LM-3 at 1 (Morgan).

December 19, 2019 through December 31, 2019, when either ESP I or ESP II was in effect.[103]

b. What the coal plant subsidy costs are not – the ESP statute allows the limited collection of generation costs and the past coal plant subsidies do not qualify for collection under the ESP statute.

Under the ESP statute (R.C. 4928.143), the PUCO is authorized to approve the collection of generation costs only under limited circumstances. AES Ohio's share of coal plant costs do not qualify for collection from consumers under any of these limited circumstances.

i. The coal plant subsidies are not part of AES Ohio's obligation to provide a standard service offer including a "firm supply of electric generation service" under R.C. 4928.141.

Under R.C. 4928.141, utilities must provide "a standard service offer of all competitive retail electric services necessary to maintain electric service to consumers, including a firm supply of electric generation service." AES Ohio's share of past costs of coal plant fuel are not part the "firm supply of generation service" offered as part of the standard service offer to be established for consumers over the next three years in ESP IV. These past costs relate to the standard service offer supplied to AES Ohio consumers during prior electric security plans -- ESP I and II.

[103] *Id.*

ii. AES Ohio's share of past coal plant fuel costs are not related to cost of fuel or purchased power "used to generate the electricity supplied under the offer" under R.C. 4928.143(B)(2)(a).

Under R.C. 4928.143(B)(2)(a), utilities can collect costs for "the cost of fuel used to generate the electricity *supplied under the offer*; the cost of purchased power *supplied under the offer*, including the cost of energy and capacity, and including purchased power acquired from an affiliate."[104]

AES Ohio's share of past coal plant fuel costs do not qualify for collection under R.C. 4928.43(B)(2). The electricity from the OVEC plants, which is the source of the deferral, is not associated with "electricity supplied under the offer" in this proceeding. The standard offer in this proceeding is to be provided to AES Ohio consumers over the next three years of the electric security plan, 2023-2026.

iii. The OVEC deferral costs are not costs incurred during the utility's electric security plan and thus do not function as a "limitation on customer shopping" or a hedge under 4928.143(B)(2)(d).

While the PUCO has approved coal plant subsidies in other utilities' electric security plans, it has never approved as part of an ESP past coal plant subsidies which were incurred during a prior ESP. For instance, when the PUCO approved AEP's share of coal plant subsidies under R.C. 4928.143(B)(2)(d), the PUCO based its finding that the coal plant subsidies in that case would: (1) appear as a credit or charge on consumers' bills; (2) act as a financial limitation on customer shopping for retail electric generation service during the current ESP; and (3) have the effect of stabilizing or providing

[104] R.C. 4928.143(B)(2)(a) (emphasis added).

certainty regarding retail electric service.[105] In that case, the PUCO found the output from the OVEC plants during the term of the then-current ESP was sold into PJM and the difference between the coal plant subsidy costs and the PJM market prices was reflected as a credit or charge on consumers' bills during the then-current ESP.[106]

But here, the deferred coal plant subsidy costs are distinguishable from the coal plant costs in the AEP case. AES Ohio's coal plant subsidies were incurred during prior electric security plans, not during the upcoming ESP IV term. That matters because the coal plant subsidy charge in the AEP case arguably functioned as a hedge related to the proposed ESP in that case. Here, any functioning as a hedge would have been in the past, and not as part of the proposed standard service offer to be offered in ESP IV. In fact, AES Ohio, despite the AEP precedent, never once claimed that the coal plant subsidy charge was a "limitation on shopping" under R.C. 4928.143(B)(2)(d).

c. The OVEC deferral costs are not included under the reconciliation rider approved in ESP III; nor are they legacy generation costs that may be collected from consumers under R.C. 4928.148.

In AES Ohio's ESP III, the PUCO approved a reconciliation rider which allowed it to collect coal plant subsidy costs from consumers.[107] ESP III became effective on November 1, 2017 and remained in effect until AES Ohio withdrew from it on December

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[105] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR at 93-94 (Mar. 31, 2016).

[106] *Id.*

[107] *In the Matter of the Application of The Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Second Finding and Order (Oct. 20, 2017).

18, 2019.[108] The reconciliation rider does not allow AES Ohio to collect the OVEC deferral costs at issue here, however, because the OVEC deferral costs were incurred either before (October 1, 2014 through October 31, 2017) or after (December 19, 2019 through December 31, 2019). The reconciliation rider simply was not in effect when these OVEC costs were created.

Neither were the OVEC deferral costs eligible for collection as "legacy generation costs." Legacy generation costs can only be collected under R.C. 4928.148 if the costs were incurred on or after January 1, 2020.[109]

d. Allowing AES Ohio to collect past generation costs during ESP IV, where the generation services were provided during prior ESPs, would violate the ESP statute and regulatory principles and practices.

i. The ESP statute does not allow the collection of past generation charges, unrelated to the utility's current standard service offer to consumers.

The PUCO may approve an item in an ESP only if a statute specifically states that the items may be included as a provision of an ESP. The leading case on point is *In re Application of Columbus S. Power Co.*[110] In that case, the PUCO allowed AEP to collect carrying costs on environmental capital improvements under R.C. 4928.143(B)(2)(d).[111] The statute does not specifically list carrying costs as an item which can be collected under an ESP.[112] The issue arose from the language of R.C. 4928.143(B)(2) that an ESP

[108] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

[109] R.C. 4928.143.

[110] 128 Ohio St.3d 512, 2011-Ohio-1788.

[111] *Id.* at ¶¶ 31-35.

[112] *Id.*

may provide for or include, "without limitation, any of the following…"[113] AEP and the PUCO argued that the "without limitation" meant that the items listed in the statute were merely examples of the types of costs which could be collected in an ESP.[114] OCC argued that the statutory language meant that an ESP could only include the items specifically listed in the statute.[115]

The Supreme Court adopted OCC's statutory interpretation.[116] In accepting OCC's statutory interpretation, the Supreme Court established this rule for construing R.C. 4928.143(B)(2):

> By its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So, if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute.[117]

The OVEC cost deferral in the present case can be approved only if it is consistent with the Supreme Court's ruling in *Columbus Southern Power.* The Supreme Court's ruling provides that the PUCO can only approve ESP items which are expressly described in the ESP statutes.

The ESP statutes describe certain generation-related costs which can be included in an ESP. In every case, however, the allowable generation-related costs *must relate to the current ESP standard service offer.* A review of the ESP statutes plainly shows that

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at ¶ 32.

allowable generation-related costs *must relate to the current ESP standard service offer.*

The applicable ESP statutes state:

> <u>Statutory provision</u>
> R.C. 4928.141 establishes a standard service offer as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."
>
> > <u>Statutory requirement</u>
> > – the generation cost must be required in order to supply essential electric services to consumers during the current standard service offer.
>
> <u>Statutory provision</u>
> R.C. 4928.143(B)(1) states: "An electric security plan shall include provisions relating to the supply and pricing of electric generation service."
>
> > <u>Statutory requirement</u>
> > – the generation cost must be required for the supply of electric generation service to consumers during the current standard service offer
>
> <u>Statutory provision</u>
> R.C. 4928.143(B)(2) states: "The plan may provide for or include, without limitation, any of the following:
>
> (a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the *electricity supplied under the offer*; the cost of purchased power *supplied under the offer*, including the cost of energy and capacity***"
>
> > <u>Statutory requirement</u>
> > – the fuel cost or purchased power cost must relate to the electricity supplied during the current standard service offer
>
> <u>Statutory provision</u>
> R.C. 4928.143(B)(2) states: "The plan may provide for or include, without limitation, any of the following:
>
> ***
>
> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, *as would have* the effect of stabilizing or providing certainty regarding retail electric service;"

Statutory requirement
– the fuel cost or purchased power cost must relate to standby, back-up, or supplemental power service, default service supplied during the current standard service offer.

These statutes clearly express that fuel and/or purchased power (like the coal plant subsidy costs being sought in the present case) must relate to the *electricity supplied under the current standard service offer,* not past fuel or purchased power costs incurred during a prior standard service offer.

OCC Witness Morgan explained how the OVEC deferral is not an allowable charge under the ESP statutes because the OVEC deferral relates to generation service provided under prior ESP's.[118] Mr. Morgan testified that R.C. 4928.143(B)(2)(d) allows a utility to collect generation charges only in limited circumstances which require that the generation costs be incurred during the time period covered by the utility's proposed ESP.[119] The time period to be covered by AES Ohio's ESP IV is the three-year time period beginning on July 1, 2023.[120]

Mr. Morgan's conclusion is consistent with the terms of the statute and consistent with S.B.3 and S.B. 221. The restructuring legislation prescribed limits on an electric utility's ability to charge consumers for utility-supplied generation. Instead, generation had to be supplied by the competitive market.

S.B. 3, supplemented by S.B. 221, aimed to facilitate and encourage power plant competition in the electric market to provide consumers with the benefits of lower prices, greater innovation, and reliable service. Under S.B.3, competition replaced government

[118] OCC Ex. 3 at 15-16 (Morgan).

[119] *Id.*

[120] Application at 5 (Sept. 26, 2022).

regulation for the provision of retail generation service (under R.C. 4928.03). Retail generation service (and charges to consumers for retail generation service) must be provided through the competitive market.

S.B. 3 contained many provisions to assure that competition could succeed (for consumers' benefit) by establishing a level playing field for all players: Unbundling services (R.C. 4928.35); providing for corporate separation and divestment of generation (R.C. 4928.17); instituting state policies promoting competition and prohibiting subsidies (R.C. 4928.02); and allowing transition plans providing limited support for utilities in moving to competitive generation. (R.C. 4928.31-.40).

These provisions were largely unchanged in S.B. 221 when it was adopted in 2008. The underlying theme of Ohio law has not changed: retail electric generation charges to customers must be established through the wholesale competitive market without the heavy hand of government regulation. Under Ohio law, the risks and rewards of owning and operating power plants were transferred away from retail consumers. Instead, in Ohio's competitive market, merchant generators assume such risks.

The PUCO has recognized that utilities have limited opportunities under Ohio law to collect generation charges under an electric security plan. For instance, it denied AEP's request to collect generation charges from consumers associated with AEP's proposal to construct a new power plant. The PUCO ruled that generation projects or surcharges authorized under 4928.143(B)(2) must be based "on a demonstration of need under the integrated resource planning process and be narrowly tailored to advance the policy provisions contained in Section 4928.02***"[121] The PUCO also ruled that while R.C. 4928.143(b)(2) allows the PUCO to order construction of new generating facilities, "such new generation or capacity projects will only be authorized when the generation needs cannot be met through the competitive market."[122]

Additionally, allowing AES Ohio to use an electric security plan to collect past generation charges incurred during prior periods would violate basic principles of cost causation and intergenerational equity. These principles require that costs be allocated fairly across time periods to the consumers who caused or benefited from such costs.[123] The consumers served under AES Ohio's ESP I and ESP II would theoretically have benefited from any supposed financial hedge provided by the coal plants. But AES Ohio's current consumers did not cause the costs, would not benefit from the costs, and yet would pay for those costs even though years later they may not even be the same consumers.

e. The Settlement violates important regulatory principles and practices because it allows AES Ohio to collect coal plant subsidy costs and carrying costs from consumers in violation of the prohibition against retroactive ratemaking.

The Settlement violates the ban against retroactive ratemaking, an important regulatory principle and practice, in three fundamental ways. First, when AES Ohio initially sought to defer the collection of the coal plant subsidy charges from consumers (in December 2015) it reached back to include charges predating its December 2015

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[121] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer,* Case No. 11-346-EL-SSO, Opinion and Order at 39-40 (Dec. 14, 2011).

[122] *Id.* at 39.

[123] NARUC, Depreciation Expense: A Primer for Utility Regulators at 11 (May 2021).

deferral– charges dating back to a year earlier—October 2014. That is both unreasonable and unlawful.

Second, the Settlement allows AES Ohio to collect past charges in future rates. Under the Settlement consumers will be paying for the balance of the coal plant subsidy charges as it retroactively existed on July 31, 2022. But when AES Ohio filed its application in this case on September 26, 2022 the OVEC deferral balance either did not exist on its books at that time or, if it did, it had a zero balance.[124]

Third, the Settlement allows AES Ohio to collect about $10.6 million in carrying costs on the OVEC deferral dating retroactively to 2014. But AES Ohio *never recorded* carrying costs in its books for the OVEC deferral and the PUCO never approved the collection of carrying costs on the OVEC deferral.[125]

OCC Witness Morgan explained the important regulatory principle and practice against retroactive ratemaking as follows:

> Under the rule against retroactive ratemaking, when a commission engages in ratemaking, it can look to the future only. Specifically, the rule requires that when determining each of the terms of the revenue requirement formula, when calculating the amount of revenue to be collected under proposed rates, or when allocating rates between classes or within a class, the commission cannot adjust for past losses or gains to either the utility, consumers, or particular classes of consumers. Even though a commission may use a historical test year to calculate each component of the revenue requirement formula, the rule requires that the commission adjust those data with a view toward the utility's experience in the coming year.[126]

[124] OCC Ex. 19 at 53.

[125] Tr. I at 33-35 (Donlon).

[126] OCC Ex. 3 at 33 (Morgan).

Moreover, retroactive ratemaking is prohibited under the U.S. and the Ohio Constitutions. Article I, Section 10 of the U.S. Constitution provides: "No State shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts…." Article II, Section 28 of the Ohio Constitution provides "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contract…."

Retroactive ratemaking also violates R.C. 4905.30 and 4905.32. Under R.C. 4905.30, a utility shall file with the PUCO schedules of all rates and rules applying to services: "a public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them." R.C. 4905.32 prohibits a utility from charging or collecting any rate that is different than the rate specified in its filed rate schedule: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time."

These sections of the Revised Code make it clear that utilities may only collect rates that have been approved by the PUCO and are on file at the PUCO. For AES Ohio this means that its then-existing generation rates which were in effect during ESP I and II are the only lawful rates AES Ohio was allowed to charge for that time period.

This prohibition on retroactive ratemaking has been recognized through a number of Ohio Supreme Court decisions, but perhaps the most famous, and the decision synonymous with retroactive ratemaking, is *Keco Industries Inc. v. Cincinnati &*

Suburban Bell Tel. Co.[127] There, the plaintiff sought a refund of the difference between rates originally set by the PUCO (May 28, 1953) and the reduced rates approved, on remand (June 4, 1954), after the Ohio Supreme Court reversed the PUCO. The Ohio Supreme Court ruled that it cannot order refunds or credits to utility customers for past rates approved by the PUCO, even where those later rates are later found to be excessive.[128]

The Court found a statutory basis for this effect in R.C. 4903.12, 4903.16, and 4905.32, as these provisions taken together "clearly show[]that it was the intention of the General Assembly to provide that utility rates are solely a matter for consideration by the Public Utilities Commission and the Supreme Court. The utility must collect the rates set by the commission, unless someone by affirmative act secures a stay of such order."[129]

In *Keco*, the Court noted its wholehearted endorsement of the trial court's findings, discussing the equities between the utility and consumer under Ohio law:

> It may seem inequitable to permit the defendant to retain the difference in rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the Commission on June 4, 1954 [after remand], but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has

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[127] *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co*. (1957), 166 Ohio St. 254, 257, 141 N.E.2d 465.

[128] *Id.*

[129] *Id*. at 257, 141 N.E.2d 465 at 468.

> attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.[130]

In keeping the equities in balance, the Supreme Court denied the appellant's request for a refund of excessive rates paid during the remand proceedings before the Commission where the appellant sought to reduce the rates the Court had struck down. The Court recognized that its holding was balanced by a countervailing provision—that utilities "may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped."[131]

The Supreme Court also discussed the retroactive ratemaking doctrine in *In re Application of Columbus S. Power Co.*[132] In that case, the PUCO granted AEP a $63 million higher increase for its ESP plan than AEP was entitled to receive. The PUCO appeared to make up for the fact that the PUCO did not issue its order until March 2009, some two months after it had planned, as the Supreme Court noted below:

> AEP had sought a rate increase effective January 2009, but the commission did not issue an order until mid-March. Thus, from January through March, AEP collected less revenue than it would have if the application had been approved before January 1. In response to this delay in rate relief, the commission set AEP's rates at a level "intended to permit the companies to recover 12 months of revenue over a 9-month period." The additional increase totaled $63 million. This was retroactive ratemaking.[133]

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[130] *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. at 259-260.

[131] The Court in *Lucas County v. Public Util. Comm*., (1997), 80 Ohio St.3d 344, 348 cited to *Keco*, including its holding that utilities may not charge increased rates during proceedings before the commission seeking the same. The Court concluded "[i]n short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory theme."

[132] 128 Ohio St.3d 512, 2011-Ohio-1788.

[133] 2011-Ohio-1788 at ¶¶ 9-10.

Relying on *Keco,* the Supreme Court ruled that the PUCO violated the doctrine against retroactive ratemaking. The Supreme Court explained that utility rates are prospective in nature and must be based on the conditions which exist at the time of the PUCO's order. The Supreme Court stated: "By approving rates that recouped losses due to past regulatory delay, the commission violated this court's case law on retroactive ratemaking."

The Settlement in the present case violates this principle against retroactive ratemaking in several respects. The Settlement violates this important regulatory principle and practice against retroactive ratemaking by allowing AES Ohio:

- To retroactively collect on coal plant subsidies from consumers in future rates, with charges dating back as far as to October 1, 2014,

- To retroactively collect the OVEC deferral as it existed on AES Ohio's books as of July 31, 2022, even though AES Ohio later wrote down the balance to zero and apparently removed the deferral from its books.

- To retroactively collect from consumers rates for $10.6 million in carrying costs on the OVEC coal plant subsidy for periods dating back to 2014-2017 and 2019, even though AES Ohio never recorded carrying costs on its books.

The Settlement violates important regulatory principles and practices by allowing AES Ohio to collect past coal subsidies and carrying costs in violation of the prohibition against retroactive ratemaking.

f. The Settlement violates important regulatory principles and practices because it allows AES Ohio to collect coal plant subsidies from consumers without obtaining PUCO approval for recording a deferral on its books.

The Settlement allows AES Ohio to collect the coal plant subsidy charges from consumers even though AES Ohio never obtained PUCO approval to defer the coal plant subsidy charges on its books. The coal plant subsidy charges were a monthly operating expense charged by OVEC to AES Ohio for its share of two coal plants. AES Ohio normally recorded these charges as a monthly charge to net purchased power cost. Without PUCO authorization, AES Ohio recorded this monthly operating expense as a deferral. This violates the important regulatory principle and practice that a utility must obtain PUCO approval to amend its accounting practices to record a deferral.

Ohio law authorizes the PUCO to establish a system of accounts for utilities.[134] The PUCO has prescribed that electric utilities must follow generally accepted accounting principles and the Uniform System of Accounts.[135] Utilities are required to follow these accounting principles unless the PUCO "after hearing had upon its own motion or upon complaint, prescribe[s] by order the accounts in which particular outlays and receipts shall be entered, charged, or credited."[136]

The PUCO's case numbering protocol includes "AAM" cases, which is an application to change accounting methods. A utility seeking approval to change its accounting methods under R.C. 4905.13 to record a deferral will file an "AAM" application for authority to do so. In reviewing the history of the coal plant subsidy

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[134] R.C. 4905.13.

[135] *Id. See also* O.A.C. 4901:1-37-04(B).

[136] R.C. 4905.13.

deferral, OCC Witness Morgan noted that AES Ohio violated the important regulatory principle and practice of obtaining PUCO approval to record the monthly coal plant subsidy charges as a deferral.[137]

AES Ohio argued that it obtained PUCO approval to record the OVEC deferral when the PUCO issued its Finding and Order in the generation separation case.[138] But, AES Ohio's argument is inconsistent with the facts. First, AES Ohio overlooks the fact that it filed an Amended Supplemental Application in the generation separation case, where it asked approval to defer coal plant subsidy costs "beginning at a date determined in another Commission proceeding."[139] Second, AES Ohio ignores the fact that its own internal accounting records show that it did not believe the PUCO's Finding and Order in the generation separation case was adequate authority to record a deferral.

OCC Witness Morgan explained this in his testimony:

> The PUCO approved AES Ohio's plan to divest its generation plants, allowing it to retain its interest in the OVEC coal plants, in a Finding and Order on September 17, 2014. But as explained in an internal AES Ohio accounting memo prepared by AES Ohio Witness Donlon, (attached to my testimony) the Finding and Order was "silent about the cost deferral" and AES Ohio could only conclude that approval was "implied." In fact, based on the lack of specificity in the PUCO's Finding and Order, AES Ohio did not conclude that recovery of the deferred cost was probable and continued for a period of 15 months to expense the demand charges from the coal plant that were not recoverable through its fuel adjustment clause.[140]

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[137] OCC Ex. 3 at 9-10 (Morgan).

[138] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets,* Case No. 13-2420-EL-UNC, Finding and Order (Sept. 17, 2014).

[139] *Id.,* Amended Supplemental Application at 14 (May 23, 2014).

[140] OCC Ex. 3 at 17 (Morgan).

When AES Ohio finally recorded the deferral in December 2015, it did so based on PUCO rulings in cases involving AEP and FirstEnergy, not based on any ruling in an AES Ohio case.[141] One critical distinction between these other cases and AES Ohio's case is that the other utilities sought to defer coal plant subsidy costs during the same ESP period when the coal plant subsidy costs would be incurred,[142] By contrast, AES Ohio ended up recording a deferral and now seeks to collect the costs in a later ESP period, not the same ESP period as when the costs were incurred.

AES Ohio sought to collect the 2014-2017 coal plant subsidy costs in the ESP III case, but as OCC Witness Morgan stated:

> As explained in AES Ohio's internal accounting memo, AES Ohio sought to collect the continuing coal plant subsidy charges in its ESP III filing. But in the settlement reached in that case, it withdrew its request to defer the costs for later collection from consumers because the bill impacts on consumers would have been too high.[143]

The PUCO should reject the Settlement because it violates important regulatory principles and practices by allowing AES Ohio to collect the deferred coal plant subsidy without obtaining PUCO approval for recording a deferral on its books.

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[141] OCC Ex. 3at 17, Attachment LM-3 at 2 (Morgan).

[142] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order (Mar. 31, 2016).

[143] OCC Ex. 3 at 20 (Morgan).

g. The Settlement violates R.C. 4905.13, Ohio Supreme Court precedent and important regulatory principles and practices under Accounting Standards Codification 980. Under the Settlement, AES Ohio would be allowed to both establish a deferral and collect for the OVEC deferral in the same proceeding. And AES Ohio would be able to collect for the coal plant subsidy deferral even though AES Ohio's internal management wrote the deferral off on its books.

The Settlement allows AES Ohio to collect on the coal plant subsidy deferral dating back to October 1, 2014.[144] But AES Ohio never obtained PUCO approval for the deferral, as discussed above.

Even if AES Ohio had authority to record the OVEC deferral without PUCO approval (which it did not), the Settlement violates R.C. 4905.13, Ohio Supreme Court precedent and important regulatory policies and practices under ASC 980. Under the Settlement AES Ohio would be permitted to both establish a deferral and collect for the OVEC deferral in the same proceeding. And AES Ohio would be permitted to collect for the OVEC deferral even though AES Ohio's internal management wrote the deferral off its books.

As discussed earlier, R.C. 4905.13 grants the PUCO authority to establish a system of accounts for utilities.[145] Using this authority under R.C. 4905.13, the PUCO has prescribed that electric utilities must follow generally accepted accounting principles and the Uniform System of Accounts.[146] Utilities are required to follow these accounting principles unless the PUCO "after hearing had upon its own motion or upon complaint,

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[144] Signatory Parties Ex. 1 at 15.

[145] R.C. 4905.13.

[146] *Id. See also* O.A.C. 4901:1-37-04(B).

prescribe[s] by order the accounts in which particular outlays and receipts shall be entered, charged, or credited."[147]

The Ohio Supreme Court has repeatedly stated that the PUCO's accounting authority is separate from its ratemaking authority, and the Supreme Court "generally will not interfere with the accounting practices set by the commission."[148] However, the Supreme Court has consistently ruled that it will uphold the commission's accounting orders only "when the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding."[149] The Settlement violates this Supreme Court precedent because it provides for the PUCO both to approve the OVEC deferral and to approve collection in the same proceeding, without any opportunity for review in a later proceeding.

The Settlement also violates R.C. 4905.13 because it would allow AES Ohio to collect on the OVEC deferral even though AES Ohio's internal management concluded that there was not a 75% or greater likelihood that AES Ohio would collect the coal plant subsidy costs. This 75% or greater threshold is established by the Financial Accounting Standards Board's Accounting Standards Codification ("ASC") 980. This is an important regulatory principle and practice, and AES Ohio must follow this accounting standard under R.C. 4905.13 and O.A.C. 4901:1-37-04(B).

Beginning in December 2015, AES Ohio retroactively recorded $10,461,162.82 for the OVEC deferral for the time period from October 1, 2014, through December

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[147] R.C. 4905.13.

[148] *Consumers' Counsel v. Pub. Util. Comm.,* 32 Ohio St.3d 263, 271, 513 N.E.2d 243 (1987).

[149] *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164 at ¶ 19, *citing Consumers' Counsel v. Pub. Util. Comm.* (1992), 63 Ohio St.3d 522, 524, 589 N.E.2d 1267 and *Dayton Power & Light Co*., 4 Ohio St.3d at 104, 4 OBR 341, 447 N.E.2d 733 (1983).

2015.[150] By AES Ohio's own admission, there was not a 75% or greater likelihood during that time that AES Ohio would collect these coal plant subsidy costs. By allowing AES Ohio to collect this $10.4 million, the Settlement violates R.C. 4905.13, and the important regulatory accounting principles contained in ASC 980.

OCC Witness Morgan testified that ASC 980 governs the PUCO's review of deferrals and he also explained the "75% or greater likelihood of collection" requirement which must be met under ASC 980 before a deferral can be established.[151] AES Ohio's internal accounting memo, which analyzed the history of the OVEC deferral, also acknowledged this 75% or greater likelihood of collection standard, and acknowledged that this standard was not met until December 2015.[152] In its Review and Recommendation in Case No. 20-140-EL-AAM, the PUCO Staff relied on ASC 980 in reviewing AES Ohio's request for approval to record an accounting deferral.[153]

In fact, the entire OVEC deferral violates the important regulatory principles and practices of ASC 980 because, during the third quarter of 2022, AES Ohio reduced the amount of the OVEC to zero and charged the expense to purchased power expense. This totally eliminated the OVEC deferral from its books. AES Ohio's rationale for eliminating the OVEC deferral was that it did not meet the "75% or greater likelihood of collection" test, as AES Ohio discussed in its internal accounting memo:

> As part of the routine quarterly review in the third quarter of 2022, AES Ohio management assessed the likelihood of recovery of the OVEC deferral. Management still believes AES Ohio has legal and regulatory authority for the

[150] OCC Ex. 15 at 10.

[151] OCC Ex. 3 at 8-10 and 18-20 (Morgan).

[152] OCC Ex. 3 at 17, Attachment LM-3 at 2 (Morgan).

[153] OCC Ex. 3 at Attachment LM-5 at 3 (Morgan).

> deferral and is seeking recovery in ESP IV. However, with the filing of ESP IV, management believes the current perceptions surrounding the OVEC plants unrelated to AES Ohio's deferral will make recovery under ESP IV challenging and results in the likelihood of recovery falling below probable in accordance with ASC 980.[154]

The internal accounting memo goes on to note that the Company created a "reserve" against the OVEC deferral.[155] The internal accounting memo was prepared on November 1, 2022, and subsequent filings indicate that, rather than establishing a reserve, the balance of the OVEC deferral was reduced to zero and the OVEC deferral was completely removed from its books.

AES Ohio's Form 10-K states:

> <u>Unrecovered OVEC charges</u> include the portion of charges from OVEC that were not recovered through AES Ohio's Fuel Rider from October 2014 through October 2017. Additionally, it includes net OVEC costs from December 19, 2019 through December 31, 2019. Beginning on November 1, 2017, through December 18, 2019, current OVEC costs were being recovered through AES Ohio's reconciliation rider which was authorized as part of the ESP 3. AES Ohio has requested recovery of these costs through a proposed rider in ESP 4. *During the third quarter of 2022, AES Ohio recorded a $28.9 million reduction to this regulatory asset as a charge to Net purchased power cost in the Condensed Consolidated Statements of Operations in accordance with the provisions of ASC 980.*[156]

The FERC FORM No. 1 states:

> <u>Unrecovered OVEC charges</u> includes the portion of charges from OVEC that were not recovered through AES Ohio's Fuel Rider from October 2014 through October 2017. Additionally, it includes net OVEC costs from December 19, 2019 through December 31, 2019. Beginning on

[154] OCC Ex. 3at 17, Attachment LM-3 at 2-3 (Morgan).

[155] *Id.*

[156] OCC Ex. 3 at Attachment LM-4 at 113 (emphasis added) (Morgan).

> November 1, 2017 through December 18, 2019, current OVEC costs were being recovered through AES Ohio's reconciliation rider which was authorized as part of the ESP 3. AES Ohio has requested recovery of these costs through a proposed rider in ESP 4. *During the third quarter of 2022, AES Ohio recorded a $28.9 million reduction to this regulatory asset as a charge to Net purchased power cost in the Condensed Consolidated Statements of Operations in accordance with the provisions of ASC 980.* AES Ohio signed a stipulation on April 10, 2023, with all parties but one in ESP 4, which included the authorization to collect these revenues through the Revenue Compliance Rider (RCR). The hearing is set for May 2, 2023. *AES Ohio does not plan to record the regulatory asset until approval of the stipulation by the PUCO.*[157]

The Form 10-K was prepared on February 27, 2023.[158] The FERC Form 1 was prepared on April 18, 2023.[159] To the extent the earlier prepared November 1, 2022 internal accounting memo speaks of creating a reserve for the OVEC deferral, it does not comport with the later prepared Form 10-K and FERC Form 1, which indicate the OVEC deferral was written down to zero and removed from AES Ohio's books.

As noted above, the FERC Form 1 states: *AES Ohio does not plan to record the regulatory asset until approval of the stipulation by the PUCO.*[160] But the PUCO cannot approve a deferral for the OVEC amount because AES Ohio did not even ask the PUCO to do so. The only deferral authority AES Ohio requested in this case was deferral authority for any over- or under-recovery of its riders, as part of the normal reconciliation process. AES Ohio Witness Donlon explained this as follows:

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[157] OCC Ex. 19 at 53.

[158] *Id.* at 218-220.

[159] OCC Ex. 19 at 1.

[160] OCC Ex. 19 at 53.

> **Q. Is AES Ohio requesting any new deferral authority?**
>
> A. Yes. AES Ohio is requesting deferral authority of the over/under recovery of all riders authorized by the Commission as part of the normal true-up process and timing/regulatory lag.[161]

AES Ohio wrote off the OVEC deferral and removed it from its books. AES Ohio's FERC Form 1 states that AES Ohio will not record the OVEC deferral until the PUCO approves the Settlement. However, AES Ohio did not ask the PUCO to approve the OVEC deferral in this case. The PUCO cannot approve the OVEC deferral where AES Ohio has not requested it. In addition, the PUCO cannot approve the deferral and authorize AES Ohio to collect the deferral in the same proceeding.

The Settlement purports to authorize AES Ohio to collect the OVEC deferral balance as of July 31, 2022.[162] As discussed in the next section, however, AES Ohio cannot do this because it violates the important regulatory principle and practice which prohibits retroactive ratemaking. And AES Ohio cannot collect on the OVEC deferral balance as of the date of this case because the balance was zero or the account was entirely eliminated. In AES Ohio's own words, as stated in the internal accounting memo, the SEC Form 10-K and the FERC Form 1, the OVEC deferral did not meet the 75% or greater likelihood of collection test under ASC 980. The Settlement therefore violates R.C. 4905.13, O.A.C. 4901:1-37-04(B), Supreme Court precedent and ASC 980. It allows AES Ohio to both establish a deferral and collect on the deferral in the same proceeding, and to collect on a deferral which AES Ohio knowingly and voluntarily charged down to zero or eliminated from its books.

[161] AES Ohio Ex. 2 at 8 (Donlon).

[162] Signatory Parties Ex. 1 at 15.

h. **Even if the OVEC deferral was properly recorded on AES Ohio's books (which it was not), AES Ohio should have charged off the OVEC deferral when it withdrew from ESP III in December 2019.**

As noted above, AES Ohio's Form 10-K and FERC Form 1 stated that the OVEC deferral was reduced to zero during the third quarter of 2022. The FERC Form 1 states that the OVEC deferral was not only reduced to zero but that the account was completely eliminated from its books. Both filings indicate that, when the OVEC deferral was reduced to zero during the third quarter of 2022 for failure to comply with ASC 980, the cost was charged to purchased power expense.[163]

In fact, this is the proper accounting treatment which AES Ohio should have followed when it withdrew from ESP III in December 2019. OCC Witness Morgan testified that AES Ohio sought to collect the 2014-2017 coal plant subsidy costs in the ESP III case, but ultimately chose not to do so because the consumer impacts were too high:

> As explained in AES Ohio's internal accounting memo, AES Ohio sought to collect the continuing coal plant subsidy charges in its ESP III filing. But in the settlement reached in that case, it withdrew its request to defer the costs for later collection from consumers because the bill impacts on consumers would have been too high.[164]

As Mr. Morgan testified, it should have been clear to AES Ohio at this point that the OVEC deferral has a less than 75% likelihood of collection as required under ASC 980.[165] Mr. Morgan stated that, at this point, the proper accounting treatment would have been to reduce the OVEC deferral to zero and charge the cost to net purchased power

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[163] OCC Ex. 3 at Attachment LM-4 at 113 (Morgan); OCC Ex. 19 at 53.

[164] OCC Ex. 3 at 20 (Morgan).

[165] OCC Ex. 3 at 21-22 (Morgan).

expense, which it ultimately did during the third quarter of 2022.[166] By allowing AES Ohio to collect the OVEC deferral, the Settlement violates important regulatory principles and practices, which required AES Ohio to write off the OVEC deferral when it withdrew from ESP III.

i. The Settlement violates important regulatory principles and practices because it allows AES Ohio to collect coal plant subsidies without a prudence review of the operation and performance of the plants during the time period the costs were incurred.

AES Ohio wants to charge consumers for 2014-2017 coal plant subsidy costs without a PUCO review of whether the OVEC plants were prudently operated. The OVEC plants lost about $600 million during this time period. The PUCO has never performed a performance and operations prudence review of the OVEC plants for this time period. The PUCO's failure to perform a performance and operations prudence review violates important regulatory principles and practices.

As of July 31, 2022, AES Ohio had a deferral of $28,269,736 on its books for the OVEC deferral.[167] The deferral covers three years in 2014-2017 and a few days in 2019.[168] The $28.9 million loss is for AES Ohio's 4.9% ownership share, so the total OVEC losses for 2014-2017 were about $600 million. Consumer protection demands that power plants losing about $600 million in three years undergo a rigorous PUCO performance and operations prudence review.

The PUCO has a long-standing principle and practice of subjecting coal plant subsidy costs to the strict scrutiny of a performance and operations prudence review

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[166] *Id.*

[167] Signatory Parties Ex. 1 at 15.

[168] *Id.*

because these plants are so old and costly. The PUCO's scrutiny of coal plant subsidy costs dates back to 2013, when AEP Ohio initially sought approval for the PPA Rider in 2013 as part of its third electric security plan.[169]

During this initial 2013 review of coal plant subsidy costs, the PUCO Staff took the wise position that coal plant subsidy costs should not be collected through an ESP because was contrary to the PUCO's goal of transitioning to a fully competitive market with market-based pricing.[170] The PUCO Staff wisely predicted that OVEC's costs could dramatically increase due to the need for capital expenditures resulting from new environmental regulations.[171] AEP Ohio argued that the PPA Rider could act as a financial hedge to volatile electricity prices, but the PUCO Staff correctly recommended a better approach would be to "ladder" the SSO auctions to stagger the auction purchases over time.[172] Time has shown that Staff's initial position was correct.

The PUCO ultimately authorized a placeholder rider, at an initial rate of zero, and required AEP Ohio to show in a future filing some justification for charging consumers under an actual power purchase agreement.[173] The PUCO established important regulatory policy and practice that companies seeking to collect coal plant subsidy costs must: (1) "provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;"[174] (2) demonstrate "how the

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[169] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 13-2385-EL-SSO, Application (Dec. 20, 2013).

[170] *Id.,* Opinion and Order at 12 (Feb. 25, 2015).

[171] *Id.* at 17.

[172] *Id.*

[173] *Id.*

[174] ESP III Order at 25.

generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;"[175] and (3) "include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers."[176] Then-PUCO Chairman Asim Haque also stated in a concurring opinion, "This [approval of mechanism to collect coal plant subsidy costs] should not be perceived as a blank check, and consumers should not be treated like a trust account."[177]

In subsequent cases, the PUCO has scrupulously followed this important regulatory policy and practice. When utilities apply to collect coal plant subsidy costs, the PUCO orders a rigorous performance and operations prudence review. As OCC Witness Morgan noted in his testimony, these demanding performance and operations prudence reviews were ordered in the following cases:[178]

- In Case No. 18-1003-EL-RDR, the PUCO issued an Entry dated June 13, 2018, directing the Staff to hire an auditor to review the prudence of the coal plant subsidy costs under review in that case.

- In Case No. 18-1004-EL-RDR, the PUCO issued an Entry dated June 13, 2018, directing the Staff to hire an auditor to review the prudence of the coal plant subsidy costs under review in that case.

- In Case No. 20-165-EL-RDR, the PUCO issued an Entry dated January 29, 2020, directing the Staff to hire an auditor to review the prudence of the coal plant subsidy costs under review in that case.

- In Case No. 20-167-EL-RDR, the PUCO issued an Entry dated February 13, 2020, directing the Staff to hire an auditor to review the prudence of the coal plant subsidy costs under review in that case.

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[175] *Id.*

[176] *Id.*

[177] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p.5 (Mar. 31, 2016).

[178] OCC Ex. 3 at 32 (Morgan).

- In Case No. 21-477-EL-RDR, the PUCO issued an Entry dated May 5, 2021 directing the Staff to hire an auditor to review the prudence of the coal plant subsidy costs under review in that case.

Each of these Entries contains an attached Request for Proposals describing the scope of the audit. In each case, the Requests for Proposals require a demanding review of how the plants were operated in terms of dispatch of power into the wholesale markets, coal supply practices, environmental compliance, outage history, etc.

Mr. Borer testified that the PUCO Staff performed a prudence review of the coal plant subsidy costs.[179] He stated that this prudence review consisted of reviewing over 1,000 pages of accounting entries and supporting invoices.[180] Mr. Morgan testified, however, that the prudence review described by Mr. Borer was not a rigorous performance and operations reviews as was required in the other subsequent OVEC cases noted above.[181] Mr. Morgan concluded that the Settlement violates an important regulatory policy and practice by not requiring the same type of rigorous performance and operations prudence review the PUCO has required in past cases. At hearing, Mr. Borer confirmed on cross-examination that Staff had performed none of the components of a performance and operations prudence review.[182]

The PUCO has required this type of performance and operations prudence review for each year that the coal plant subsidy costs are under review. The PUCO has not taken the approach that a prior prudence review will suffice. This is the PUCO's policy and practice. The OVEC plants lost about $600 million during 2014-2017, which is all the

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[179] Staff Ex. 1 at 4.

[180] *Id.*

[181] OCC Ex. 3 at 31-32 (Morgan).

[182] Tr. II at 407-412.

more reason for a rigorous performance and operations prudence review. This is a fundamental requirement for consumer protection, which the PUCO has followed in the other cases cited above. The Settlement fails to follow this important regulatory policy and practice; therefore, the PUCO should reject the Settlement. At the very least the PUCO should modify the Settlement to disallow the coal plant subsidy and carrying costs in its entirety.

8. By allowing AES Ohio to collect three-year-old decoupling revenues, the Settlement violates R.C. 4903.10 and R.C. 4905.13. This also violates the important legal doctrines of law of the case, collateral estoppel, and res judicata. This is also inconsistent with prior Supreme Court and PUCO precedent and important regulatory principles and practices.

a. By allowing AES Ohio to collect decoupling revenues prior to December 18, 2019, the Settlement violates R.C. 4903.10 and the law of the case doctrine.

The Settlement allows AES Ohio to collect $13,796,923 of deferred decoupling revenues.[183] The decoupling deferral balance consists of: (1) $742,733 of unrecovered 2018 revenues previously included in AES Ohio's former decoupling rider (authorized under ESP III) ; and (2) $13,054,188 of deferred decoupling revenues from January 1, 2019 through December 18, 2019, when AES Ohio withdrew from its ESP III.[184] The Settlement violates important regulatory practices and principles by allowing AES Ohio to collect deferred decoupling revenue from over three years ago.

As background, AES Ohio began collecting lost revenues through its Energy Efficiency Rider approved in Case No. 16-649-EL-POR.[185] The settlement in that case

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[183] Signatory Parties Ex. 1 at 15.

[184] Staff Ex. 1 at 5 (Borer).

[185] *In the Matter of the Application of The Dayton Power and Light for Approval of its Energy Efficiency Portfolio Plan,* Case No. 16-649-EL-POR, Stipulation and Recommendation (Dec. 13, 2016).

authorized AES Ohio to collect lost revenues incurred during 2016 and to "continue to recover lost distribution revenues going forward, until incorporated in a distribution decoupling rider."[186]

The PUCO approved AES Ohio's decoupling rider in the ESP III case.[187] The decoupling rider included the lost revenues approved in Case No. 16-649-EL-POR and the ongoing revenue which AES Ohio would lose due to reduced energy consumption from AES Ohio's energy efficiency programs.[188] The PUCO stated that it would decide the remaining details for the rider, such as cost allocation and rate design, in AES Ohio's then-pending distribution rate case (Case No. 15-1830-EL-AIR).[189] AES Ohio's decoupling rider remained in effect until December 18, 2019, when AES Ohio withdrew from ESP III and reverted to ESP I.[190] One month later, AES Ohio filed an application in Case No. 20-140-EL-AAM to create a deferral for the decoupling revenues from December 19, 2019 on a going-forward basis.[191]

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[186] *Id.* at 11.

[187] *In the Matter of the Application of The Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order (Oct. 20, 2017).

[188] *Id.*, Application at 9 (Feb. 22, 2016).

[189] *Id.,* Opinion and Order at 11-12 (Oct. 20, 2017).

[190] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

[191] *In the Matter of the Application of The Dayton Power and Light Company for Approval to Defer Distribution Decoupling Costs,* Case No. 20-140-EL-AAM, Application (Jan. 23, 2020); *Id.,* Staff Review and Recommendation at 2 (Apr. 29, 2020).

In sum, the decoupling revenues can be divided into the following three phases as shown below:

Table – Decoupling Deferral Revenues

Phase	Source	Amount
1	Lost revenue revenues approved in Case No. 16-649-EL-POR (Staff Ex. 1 - Testimony of Jonathan Borer at 5)	$742,733
2	Lost decoupling revenues prior to withdrawal from ESP III (Staff Ex. 1 - Testimony of Jonathan Borer at 5)	$13,054,188
3	Lost decoupling revenues after withdrawal from ESP III – Covered by application in Case No. 20-140-EL-AAM (AES OHIO Ex. 1- Testimony of Sharon Schroder at 16)	$51,000,000

All three categories of these involve lost revenue. The PUCO authorized AES Ohio to collect the Phase 1 and Phase 2 lost revenues but only until December 18, 2019, when AES Ohio withdrew from ESP III.[192] After December 18, 2019, AES Ohio had no authority to defer or to collect any of these three categories of deferred decoupling revenues.

In the present Settlement, AES Ohio agreed to drop its request for the Phase 3 revenues (lost decoupling revenues after withdrawal from ESP III) and to withdraw its application in Case No. 20-140-EL-AAM.[193] The Settlement allows AES Ohio to collect

[192] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

[193] AES Ohio Ex. 1 at 16 (Schroder).

the Phase 1 and 2 lost revenues.[194] However, this violates the terms of the PUCO's December 19, 2019 Finding and Order approving AES Ohio's withdrawal from ESP III.

In that Finding and Order, the PUCO approved AES Ohio's withdrawal from ESP III and expressly ruled that AES Ohio could no longer charge consumers for *any* decoupling revenues because "ESP I did not include riders such as …the decoupling rider, the RCR, and the uncollectible rider, and that these riders should not be charged to consumers with the withdrawal of ESP III."[195] When it withdrew from ESP III, AES Ohio did not ask for nor did the PUCO grant any authority to continue deferring these decoupling revenues.[196]

Nor did the PUCO allow AES Ohio to collect from consumers the lost revenues ($13 million) it had accrued prior to withdrawing from ESP III. When AES withdrew from ESP III, it lost the right to collect the $13 million in lost revenues it had incurred during ESP III.

Under R.C. 4928.143(C)(2)(b), the PUCO must issue an order "as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer***until a subsequent offer is authorized." The law allows for only one exception "along with any expected increases or decreases in fuel costs from those contained in that offer." The law does not provide for continuing to collect prior ESP charges (from ESP III) while operating under a different ESP (ESP I). The PUCO recognized this when, in ruling on AES Ohio's notice of termination of ESP III, it ruled that AES Ohio could not

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[194] Signatory Parties Ex. 1 at 15.

[195] *Id.*

[196] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

continue the decoupling rider as it was "created in ESP III and should be eliminated."[197] Moreover, AES Ohio did not seek rehearing of the PUCO's December 19, 2019, Finding and Order in Case No. 08-1094-EL-SSO.

If AES Ohio had wanted to challenge the PUCO's ruling that it could no longer charge consumers for decoupling revenues when it withdrew from ESP III, then AES Ohio should have filed an application for rehearing under R.C. 4903.10. This statute allows a party to apply for rehearing of any matter decided in a case.[198] The law is well established that, when a party fails to seek rehearing of an adverse PUCO ruling, the party cannot resurrect the same claim in the guise of a new application in a different case.[199]

Having failed to seek rehearing of the PUCO's December 19, 2019, Finding and Order, AES Ohio cannot now challenge it. It cannot repackage the same claim for decoupling revenues in the present Settlement. By allowing AES Ohio to collect these decoupling revenues, the Settlement violates R.C. 4903.10 and the law of the case doctrine.

R.C. 4903.10 requires that applications for rehearing must be filed within 30 days of an adverse PUCO order.[200] The law of the case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."[201] Under

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[197] *Id*. at ¶36.

[198] R.C. 4903.10.

[199] *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 176 N.E.2d 416 (1961).

[200] R.C. 4903.10.

[201] *Nolan v. Nolan,* 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

this doctrine, the PUCO's December 19, 2019 Finding and Order barring AES Ohio from collecting decoupling revenues remains the law of the case and cannot be circumvented by the Settlement in this case.

The PUCO Staff Review and Recommendation in Case No. 20-140-EL-AAM confirms this point – that when AES Ohio withdrew from ESP III, it lost its authority to implement the decoupling rider:

> On November 26, 2019, DP&L filed a notice of withdrawal of its application of ESP III, and stated that it was exercising its statutory right to implement its ESP approved in Case No. 08-1094-EL-SSO (ESP I). On December 18, 2019, the Commission ruled that DP&L could no longer implement the [decoupling rider] because the authority for that rider was established in ESP III, and DP&L withdrew and terminated its application of ESP III.[202]

The Settlement therefore violates R.C. 4903.10 and the law of the case doctrine. The PUCO should reject the Settlement. At the very least the PUCO should modify the Settlement to preclude the collection of deferred decoupling revenues from consumers.

b. By allowing AES Ohio to collect decoupling revenues prior to December 18, 2019, the Settlement violates Ohio Supreme Court precedent in *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.2d 1060 which requires that the PUCO must respect its own precedents.

The PUCO's December 19, 2019 Finding and Order in Case No. 08-1095-EL-SSO prohibited AES Ohio from collecting any additional decoupling revenues.[203] By allowing AES Ohio to collect pre- December 18, 2019 decoupling revenues, the

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[202] *In the Matter of the Application of The Dayton Power and Light Company for Approval to Defer Distribution Decoupling Costs,* Case No. 20-140-EL-AAM, Staff Review and Recommendation at 2 (Apr. 29, 2020).

[203] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

Settlement violates Ohio Supreme Court precedent in *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.2d 1060 and earlier cases requiring that the PUCO must follow its own prior rulings.[204] The reason for this well-established Ohio Supreme Court precedent is that ensures predictability and consistency in the PUCO's rulings, which is fundamental in our judicial and administrative law systems, which are based on the doctrine of *stare decisis.*[205]

This doctrine does not prohibit the PUCO from ever changing a prior ruling. When the PUCO does change a prior ruling, however, it must explain why it is doing so.[206] In the present case, the Settlement allows AES Ohio to collect the pre-December 18, 2019 decoupling revenues and therefore effectively reverses the PUCO's December 19, 2019 Finding and Order in Case No. 08-1095-EL-SSO. No reason has been offered for why the PUCO should not follow its own ruling *i.e.,* the December 19, 2019 Finding and Order in Case No. 08-1095-EL-SSO. The Settlement therefore violates Ohio Supreme Court precedent in *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.2d 1060, which requires that the PUCO must respect its own precedents.

c. By allowing AES Ohio to collect decoupling revenues from consumers prior to December 18, 2019, the Settlement violates the PUCO's December 19, 2019 Finding and Order in Case No. 08-1095-EL-SSO and the important regulatory principles of collateral estoppel and res judicata.

As noted above, the PUCO's December 19, 2019, Finding and Order in Case No. 08-1095-EL-SSO barred AES Ohio from collecting any additional decoupling revenues

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[204] *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.2d 1060.

[205] *Id*; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.,* 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975).

[206] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 1038.

from consumers. By allowing AES Ohio to collect the pre-December 18, 2019, decoupling revenues, the Settlement violates the express terms of the December 19, 2018 Finding and Order. This Settlement therefore violates the well-established doctrines of collateral estoppel and res judicata.

The Ohio Supreme Court has explained the doctrines of collateral estoppel and res judicata as follows:

> In Ohio, the doctrine of res judicata includes both claim preclusion (historically known as estoppel by judgment) and issue preclusion (traditionally known as collateral estoppel). 'These doctrines 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.' Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature.[207]

The issue of whether AES Ohio can collect the pre-December 18, 2019, decoupling revenues was thoroughly litigated, thoroughly considered and conclusively decided by the PUCO in its December 19, 2019, Finding and Order in Case No. 08-1095-EL-SSO.[208] That case involved the same parties (OCC and AES Ohio) and was decided by the PUCO, which had competent jurisdiction over the issue. The present Settlement effectively allows AES Ohio to relitigate the issue by providing for it to collect on the pre-December 18, 2019, decoupling revenues. The PUCO does not allow a party to

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[207] *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶ 20, 40 N.E.2d 1060 (citations omitted).

[208] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

relitigate an issue decided in a prior ESP case.[209] The Settlement therefore violates the very important doctrines of collateral estoppel and res judicata.

d. By allowing AES Ohio to collect decoupling revenues from prior to December 18, 2019, the Settlement violates R.C. 4905.13 and important regulatory accounting principles.

The Settlement also violates R.C. 4905.13, prior PUCO precedent and important regulatory accounting principles by allowing AES Ohio to collect on the pre-December 18, 2019, decoupling revenues.

Revised Code Section 4905.13 authorizes the PUCO to "establish a system of accounts to be kept by public utilities … and may prescribe the manner in which such accounts shall be kept."[210] The PUCO requires electric utilities to maintain their books "in accordance with generally accepted accounting principles and an applicable uniform system of accounts, books, records, and accounts." [211] OCC Witness Morgan explained that these generally accepted accounting principles include ASC 980-605, which places limits on deferring revenue as a regulatory asset under an alternative revenue program.[212]

Mr. Morgan further explained that the PUCO Staff relied on ASC 980-605 as one of the reasons for recommending against AES Ohio's request in Case No. 20-140-EL-AAM for approval to defer the post-December 19, 2019 decoupling revenues.[213] The

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[209] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, Opinion and Order at 37 (Feb. 13, 2014).

[210] R.C. 4905.13.

[211] O.A.C. 4901:1-37-04(B).

[212] OCC Ex. 3 at 38 (Morgan).

[213] *Id.*

PUCO Staff's Review and Recommendation in that case support Mr. Morgan's conclusion as follows:

> Further supporting that determination, the Financial Accounting Standards Board (FASB) has issued a standard applicable to alternative revenue programs and the associated regulatory deferral involving revenues. Accounting Standards Codification (ASC) 980-605 defines two categories of revenue programs, one of which adjusts billings for the effects of weather abnormalities or broad external factors or to compensate the utility for demand-side management initiatives (for example, no-growth plans and similar conservation efforts). 5
>
> Staff considers the decoupling revenue to be this type of alternative revenue program. The purpose of the program is to make the company whole from a revenue perspective by entitling the utility to incremental billings intended to compensate it for lost sales volume resulting from its pursuit of energy efficiency goals or driven by weather volatility.
>
> Per ASC 980-605, the regulated utility shall recognize the additional revenues if all of the following conditions are met:
>
> • The program is established by an order from the utility's regulatory commission that allows for automatic adjustment of future rates. Verification of the adjustment to future rates by the regulator would not preclude the adjustment from being considered automatic.
>
> • The amount of additional revenues for the period is objectively determinable and is probable of recovery.
>
> • The additional revenues will be collected within 24 months following the end of the annual period in which they are recognized
>
> Given that Staff has determined the Company's Application represents a request to defer revenues rather than costs, Staff finds the Company's Application as currently proposed does not sufficiently address the criteria prescribed in ASC 980-605 that are necessary to enable the

> Company to establish a regulatory asset involving revenues.[214]

Applying the same ASC 980-605 principles to this case, it is clear that AES Ohio's request to collect the pre-December 18, 2019, decoupling revenues must fail. Under the second prong of the test quoted above, the pre-December 18, 2019, decoupling revenues were not "probable of recovery" due to the PUCO's December 19, 2019 Finding and Order in Case No. 08-1095-EL-AAM, which prohibited AES Ohio from collecting any additional decoupling revenues. Under the third prong of the test quoted above, AES Ohio was unable to collect the pre-December 18, 2019, decoupling revenues within 24 months.

By allowing AES Ohio to collect decoupling revenues prior to December 18, 2019, the Settlement violates R.C. 4905.13 and important regulatory accounting principles under ASC 980-605 as well as the PUCO Staff's position in Case No. 20-140-EL-AAM.

9. By failing to provide a stand-alone SSO auction for residential consumers, the Settlement is unjust and unreasonable.

The Settlement is also unjust and unreasonable because it fails to provide a stand-alone SSO auction for residential consumers. OCC Witness Wilson and Constellation Witness Indukuri testified that a stand-alone auction for residential consumers could mitigate recent price increases.[215] The Settlement's failure to provide a stand-alone SSO auction for residential consumers is unjust and unreasonable.

[214] *Id.* at 3.

[215] OCC Ex. 1 at 3-9 (Wilson); Constellation Ex. 4 at 9-23 (Indukuri).

Mr. Wilson is an economist with over 35 years of experience consulting on electric power and natural gas market issues, including restructuring, competition and wholesale market design issues.[216] He has testified in many cases before the PUCO on these issues.[217] He was retained to provide analysis and recommendations as to whether it would be more efficient and lead to better outcomes if the SSO competitive bidding process would lead to more efficient outcomes by holding a stand-alone auction for residential consumers (and possibly small commercial consumers too).[218] In preparing his analysis and recommendations, he studied AES Ohio's application, the history of SSO auctions in Ohio, the default supply auctions in other states and discussions among stakeholders and the PUCO on these issues.[219]

Mr. Wilson acknowledged that the PUCO opened Case No. 17-957-EL-UNC to address possible changes to the SSO process, but in his view, the scope of that case was too narrow and did not address whether it would be reasonable to hold a stand-alone SSO auction for residential consumers.[220] He also acknowledged that the PUCO has directed the Ohio electric utilities to add minimum stay language to their tariffs.[221]

Mr. Wilson opined that a stand-alone auction for residential (and possibly small commercial) consumers would likely lead to lower costs and more efficient outcomes. He explained that residential consumers are less likely to switch into and out of SSO service,

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[216] OCC Ex. 1 at 1 (Wilson).

[217] *Id.* at 2-3.

[218] *Id.* at 4.

[219] *Id.*

[220] *Id.* at 5.

[221] *Id.*

which reduces the risk premium for wholesale market suppliers.[222] The testimony of Constellation Eitness Mr. Indukuri was of the same general tenor.[223]

In sum, Mr. Wilson and Mr. Indukuri presented analysis and recommendations in favor of a stand-alone SSO auction for residential consumers. They both testified that this would reduce bidders' risk premiums and could lead to lower prices. Based on the evidence, it would be just and reasonable to modify the competitive bidding process to hold a stand-alone auction for residential consumers.

OCC applauds the PUCO for the dockets it has opened to investigate possible changes to certain aspects of the SSO auction, such as minimum stay provisions for the electric utilities' tariffs. But from a legal standpoint, any change to the competitive bid process itself should occur in the context of an ESP case.[224] Assuming the PUCO approves AES Ohio's ESP without changing the competitive bidding process, then it would be another three years before the PUCO could address the issue again, in the context of AES Ohio's next ESP. Under these circumstances, the just and reasonable result would be to approve a residential-only auction for AES Ohio.

IV. DURING THE HEARING THERE WERE PROCEDURAL ERRORS THAT HARMED THE ABILITY OF OCC TO PRESENT EVIDENCE ON THE RECORD. THE RULINGS SHOULD BE REVERSED UNDER OHIO ADM. CODE 4901-1-15(F).

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of Attorney Examiner's ruling by "discussing the matter as a distinct issue in its initial brief . . . ." OCC seeks reversal of the rulings described below.

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[222] *Id.* at 6.

[223] Constellation Ex. 4 at 9-23 (Indukuri).

[224] *See* R.C. 4928.141 through R.C. 4928.144.

A. The Attorney Examiner misapplied the "settlement privilege" and wrongfully prevented OCC from cross-examining AES Ohio witness Schroder and PUCO Staff witness Messenger on whether the signatory parties were knowledgeable about the cost of the Settlement. This hindered OCC's challenge to the Settlement as not meeting the first prong of the settlement criteria.

At hearing, OCC attempted to cross examine two witnesses (AES Ohio witness Schroder, PUCO Staff witness Messenger) on whether the Settlement meets the first prong of the settlement criteria –Is the Settlement a product of serious bargaining among capable, knowledgeable parties? Both of these witnesses were offered by the Signatory Parties as witnesses supporting the Settlement. Both testified that the Settlement complies with the PUCO three-part test. No other Signatory Parties testified on the PUCO's three prong test.[225]

Specifically, when cross examining Ms. Schroder, OCC inquired into whether AES Ohio had informed parties before signing the Settlement that consumers would pay at least $160 million to AES over three years.[226] In this regard OCC asked Ms. Schroder whether the information contained in OCC Exhibit 8 (showing the total cost of the settlement to be $160 million) was ever conveyed to the signatory parties.[227] Attorney Examiner Price sustained AES Ohio's objection to the question, and ruled that OCC counsel could not cross-examine Ms. Schroder on "what the substance of the settlement communications were."[228] Attorney Examiner Price referenced a recent ruling he made in the Columbia rate case where OCC counsel (Ms. O'Brien) "had a very stirring and quite

[225] Staff Ex. 6 at question 5 (Messenger); AES Ohio Ex. 1 at 3-4.

[226] Tr. I at 131, Tr. III at 575.

[227] Tr. I at 127.

[228] Tr. I at 130.

persuasive argument about the breadth of the settlement privilege." And Attorney Examiner Price explained "[i]f I were to rule in your favor here, I would be going totally against the ruling she asked for in that case."[229] During further discussion, Attorney Examiner Price noted that OCC had the opportunity to put on a witness to testify as to whether the parties are knowledgeable.[230] When OCC Counsel tried to ask further questions of Ms. Schroder, more objections came from AES Ohio's Counsel:

> Q. (Ms. Willis) "As part of the explanation of the Stipulation, did the Company explain that the cost of the Stipulation by their—by their calculations would be $160 million for the period of the ESP term?
>
> Mr. Sharkey: "Objection, your Honor, calls for settlement communication."

Attorney Examiner Price sustained that objection.[231]

Similarly, during OCC's cross of Staff Witness Messenger, OCC sought to question Ms. Messenger as to whether, prior to signing the Settlement, the PUCO Staff had the information about the cost of the Settlement, as conveyed on OCC Ex. 8 ($160 million cost over three years).[232] This question was met with objections from Counsel for AES Ohio, Staff, Walmart, OMAEG, and Ohio Energy Group.[233] Again, Attorney Examiner Price sustained the objections ruling that "[g]etting into the actual substance of settlement negotiations is improper. And it just is. It's privileged information."[234] Attorney Examiner Price also reiterated the ruling in the Columbia rate case that "upheld

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[229] Tr. I at 128.

[230] Tr. I at 129-130.

[231] Tr. I at 131.

[232] Tr. III at 564.

[233] Tr. III at 564-571.

[234] Tr. III at 574.

the exclusion of questions related to settlement privilege."[235] Attorney Examiner Price ruled the question "improper."[236]

Attorney Examiner Price's ruling contradicts Ohio law, the Ohio Administrative Code, and PUCO precedent. It should be overturned.

O.A.C. 4901-1-26(E)(1) states that settlement communications are "not admissible to prove liability for or invalidity of the dispute." But the rule creates an exclusion: "This rule also does not require exclusion when the evidence is offered for another valid purpose." Similarly, Ohio Evid.R. 408 provides that settlement communication "is not admissible to prove liability for or invalidity," It offers an exclusion as well allowing settlement communications to be admissible if "offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

The so-called "settlement privilege,"[237] articulated in O.A.C. 4901-1-26(E)(1) and Evid.R. 408, does not preclude OCC's cross-examination. OCC was not attempting to prove liability; rather, OCC was testing whether parties were knowledgeable about the $160 million cost of the Settlement. This is a question the PUCO must answer when considering the reasonableness of the Settlement. It is the first prong of the PUCO's settlement standard. The PUCO settlement standard requires settlements be negotiated by "capable, knowledgeable parties." As such, OCC's questions about signatory parties'

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[235] Tr. III at 574.

[236] Tr. III at 575.

[237] The Ohio Supreme Court has been skeptical of the so called settlement privilege claim. *See* *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213 ¶ 92. (Noting that "(t)he court in *Goodyear* crafted a new settlement privilege under Fed.R.Evid. 501 that protects settlement communications from third-party discovery. There is no broad consensus of support, in federal courts or in other states, for such a privilege." *Id.* at ¶ 90.)

knowledge of the settlement's $160 million cost were highly relevant to this proceeding. OCC's questioning was for a valid purpose, as permitted under O.A.C. 4901-1-26(E) and Evid.R. 408 and not for the prohibited purpose of proving liability or the invalidity of the dispute.

Moreover, Attorney Examiner Price's ruling was, contrary to his assertions otherwise,[238] distinguishable from his ruling in Columbia's recent rate case. In the Columbia case, a non-signatory party asked a witness whether a particular settlement conversation – from which that party was excluded – caused a specific provision to be added to the stipulation.[239] In other words Counsel was inquiring into the discrete bargaining that resulted in provisions being either in or out of the Settlement.

In this case, by contrast, OCC asked witnesses Schroder and Messenger whether the Company made parties aware of a fact – the Settlement's $160 million cost. These questions had nothing to do with settlement discussion about *what provisions to include or exclude* in the stipulation, as was true in Case No. 21-637-GA-AIR. The ruling in that case, because of the disparate facts, does not bind the Attorney Examiner to rule in the same manner.

In fact, precedent exists to the contrary. For instance, in an AEP ESP hearing,[240] Attorney Examiner Parrot allowed OMAEG's counsel to question an AEP Ohio Witness on whether a certain document (the Global Settlement document) was provided to the

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[238] Tr. III at 575.

[239] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 21-637-GA-AIR, Tr. at 51-52.

[240] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Tr. XIX at 4812-4819.

parties prior to the settlement being executed. OMAEG's Counsel noted that her questioning was relevant and "goes to whether the three-prong test is satisfied, and the parties knew all the details of a global settlement prior to signing that global settlement."[241] Attorney Examiner Parrot properly permitted the questioning.

Similarly, in this case, OCC's questioning was directed to whether the parties were knowledgeable about the impact of the settlement on their clients. This goes to the very heart of the PUCO's test of the reasonableness of settlement agreements. Settlements must be shown to be the result of serious bargaining by capable, knowledgeable parties. By precluding OCC's questions, the Attorney Examiner is interfering with OCC's right to have its day in court. The PUCO should reverse the Attorney Examiner's ruling.

B. Attorney Examiner Price denied OCC's motion to subpoena PUCO Staff members and OCC's motion to subpoena PUCO Staff documents. Yet, there is no Ohio law that precludes parties from conducting discovery on the PUCO Staff. Rather Ohio law broadly allows all parties and intervenors "ample rights of discovery." The Attorney Examiner's ruling was unreasonable and unlawful.

OCC moved[242] that the PUCO issue a subpoena compelling PUCO Staff members Tamara Turkenton, David Lipthratt, and a PUCO-Staff designated person to attend the hearing and bring certain documents to the hearing. The PUCO Staff opposed OCC's motion.[243]

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[241] Tr. XIX at 412.

[242] OCC Motion for Subpoena Duces Tecum (Apr. 21, 2023).

[243] Memorandum Contra to the Motion For Subpoenas for Public Utilities Commission Staff to Attend and Testify at the Adjudicatory Hearing (Apr. 25, 2023).

At the prehearing conference, Attorney Examiner Price denied OCC's Motion.[244] Mr. Price ruled that OCC's motion is "unreasonable and oppressive."[245] He advised OCC to get its own expert to testify on the matters. Attorney Examiner Price ruled that since no Staff Report was filed, the PUCO rules[246] allowing subpoenas to Staff members contributing to the Staff Report are not applicable. He further ruled that OCC has not identified "any reasonable purpose for subpoenaing additional Staff witnesses" and opined that such witnesses would not be able to be subpoenaed under Ohio Rules of Civil Procedure.[247] Mr. Price also denied OCC's Motion to subpoena documents as "this is just an attempt to avoid the rule prohibiting discovery of Staff; and therefore, the motion – that aspect of the motion will be denied."[248]

Attorney Examiner Price erred in denying OCC's Motion for subpoenas and request for documents. His ruling is contrary to Ohio law, R.C. 4903.082. That law states that "[a]ll parties and intervenors shall be granted ample rights of discovery." There is no exception in the law that exempts the PUCO Staff from discovery. Rather, the policy of no discovery as it pertains to the PUCO Staff is established by rule (O.A.C. 4901-1-16(I), clearly subordinate to the statute. Administrative agencies, like the PUCO, "may make only subordinate rules."[249] "The purpose of administrative rulemaking is to facilitate an

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[244] Prehearing Conference Tr. 17 (Apr. 28, 2023).

[245] *Id.* at 16.

[246] O.A.C. 4901-1-28(E).

[247] Prehearing Conference Tr. at 17.

[248] *Id.*

[249] *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567, 697 N.E.2d 198 (1998).

administrative agency's carrying out the policy declared by the General Assembly. Determination of public policy remains with the General Assembly.[250]

Further, there are PUCO rules to the contrary allowing any party to seek a subpoena to "command the person to whom it is directed to attend and give testimony at the time and place specified therein."[251] The rule also allows a subpoena "to command such person to produce books, papers, documents, or other tangible things described therein."[252] There is no exception to that rule.

Notably, the rule prohibiting discovery on the PUCO Staff (O.A.C. 4901-1-16(I)), that Attorney Price relied on, *does not even apply to subpoenas*. Specifically, the discovery prohibition of O.A.C. 4901-1-16(I), states "[r]ules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff." *The subpoena rules are contained in O.A.C. 4901-1-25, not "4901-1-16 to 4901-1-24."*

Additionally, Attorney Examiner Price's ruling is at odds with other PUCO rulings where the PUCO has ruled that parties may subpoena PUCO Staff to testify at hearings.[253] OCC's Motion for subpoenas should have been granted especially in this case where the PUCO Staff has taken on heightened status as a "Signatory Party" to the Settlement. In denying OCC's Motion for subpoenas, the Attorney Examiner's ruling denied OCC due process.

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[250] *Id.*

[251] O.A.C. 4901-1-25(A).

[252] O.A.C. 4901-1-25.

[253] *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code,* Pub. Util. Comm., No. 06-685-AU-ORD, 2006 Ohio PUC LEXIS 746, *79-80 (Dec. 6, 2006) (denying proposed change to O.A.C. 4901-1-28 because "Staff may be subpoenaed to testify at a hearing, but not for a deposition."); *see also In re Black Fork Wind Energy, L.L.C.,* 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E. 3d 173, ¶19 (noting that the parties could have requested that seven staff members who contributed to a report testify at a Power Siting Board hearing).

Granting OCC's Motion for subpoenas would have created a more thorough evidentiary record in this case. OCC's subpoenas for PUCO Staff witnesses and documents were reasonable and not shown to be oppressive. It was reasonable to require the Staff, as a Signatory Party with extensive regulatory experience and involvement on these matters, to testify at the evidentiary hearing. It serves the due process rights of OCC on behalf of consumers. It serves justice, which the PUCO must administer.

The witnesses OCC sought to subpoena (Ms. Turkenton and Mr. Lipthratt) could have provided relevant information including whether the Settlement is in the public interest and whether it violates important regulatory practices and principles. Tamara Turkenton actively participated in this case and was familiar with the terms of the Settlement, including the Regulatory Compliance Rider. Her testimony would have furthered the PUCO's understanding of RCR charges. Both Ms. Turkenton and Mr. Lipthratt prepared the Staff Recommendation regarding AES Ohio's application to defer its distribution decoupling revenues in Case No. 20-0140-EL-AAM.[254] Mr. Lipthratt provided testimony on this topic in that proceeding.[255] The Settlement, signed by PUCO Staff, allows AES Ohio to charge its consumers for a portion of the deferred decoupling revenues. So, allowing for PUCO Staff testimony would have aided in creating a complete record and allowed the PUCO to better understand the regulatory practices and principles underlying the $13 million of decoupling deferrals (plus carrying charges) that consumers are being asked to pay for.

[254] *In the Matter of the Application for Approval to Defer Distribution Decoupling Costs*, Case No. 20-0140-EL-AAM, Staff Recommendation (Apr. 29, 2020).

[255] Case No. 20-0140-EL-AAM, Testimony of David M. Lipthratt (Mar. 19, 2021).

The documents OCC sought to subpoena were relevant and should have been produced. The documents requested pertained to communications made and discovery the PUCO Staff conducted in this case, limited to one aspect of the Settlement – the Regulatory Compliance Rider. OCC also sought documents related to Staff discovery in related cases where the Regulatory Compliance Rider charges were involved. And OCC sought documents pertaining to regulatory practices and principles for deferral accounting and carrying charges. All of these matters are highly relevant to the $73 million of charges to consumers under the Regulatory Compliance Rider.

The Attorney Examiner erred in not granting OCC's Motion for subpoena for the Staff witnesses to attend the evidentiary hearing and the Attorney Examiner's ruling not allowing discovery of the PUCO Staff members (via documents accompanying the subpoenas) violated R.C. 4903.082 and interfered with OCC's due process rights. The PUCO should overturn the Attorney Examiner's ruling.

V. CONCLUSION

The PUCO should reject the Settlement of this proceeding because it fails the statutory test that the electric security plan must be more favorable in the aggregate to consumers than a market offer. Instead of approving the Settlement, the PUCO should approve a market rate offer which would cost consumers less.

Additionally, the PUCO should find the Settlement does not meet the three-prong standard for evaluating and approving settlements. It is not the result of serious bargaining among *knowledgeable* parties. The Settlement is not in the public interest because it will cost consumers a whopping $160 million in three years. And the

Settlement violates important practices and principles –practices and principles that protect consumers. In the interest of justice, the PUCO should reject the Settlement.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Corrected Initial Brief by Office of the Ohio Consumers' Counsel was served upon the persons listed below by electronic transmission this 30th day of May 2023.

/s/ Maureen R. Willis
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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