

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	
Dayton Power and Light Company d/b/a)	Case No. 22-900-EL-SSO
AES Ohio for Approval of Its Electric)	
Security Plan.)	

In the Matter of the Application of The)	
Dayton Power and Light Company d/b/a)	Case No. 22-0901-EL-ATA
AES Ohio for Approval of Revised)	
Tariffs.)	

In the Matter of the Application of The)	
Dayton Power and Light Company d/b/a)	
AES Ohio for Approval of Accounting)	Case No. 22-0902-EL-AAM
Authority Pursuant to Ohio Rev. Code §)	
4905.13.)	

**REPLY TO MEMORANDUM CONTRA OCC’S MOTION TO TAKE
ADMINISTRATIVE NOTICE
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

Thirteen years too late, AES Ohio seeks to collect from consumers \$2.3 million¹ in deferred costs related to consumer education and a retail settlement system. But the PUCO found these costs to be transition costs in its Opinion & Order approving AES Ohio’s electric transition plan in Case No. 99-1687-EL-ETP.² And R.C. 4928.40(A) requires deferred expenses that are authorized by the PUCO as transition costs to be collected from consumers no later than December 31, 2010. Further, R.C. 4928.141(A) precludes a utility from including in its standard service offer “any previously authorized

¹ OCC Ex. 9.

² Case No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000) at 40.

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." Because the PUCO already ruled that AES Ohio's consumer education and retail settlement system costs are transition costs, AES by law cannot collect those costs from its consumers. Yet the Settlement signed in this proceeding would make consumers pay those costs. Not right.

The Office of the Ohio Consumers' Counsel ("OCC") asked the PUCO to take administrative notice of AES Ohio's Amended Application, Part F, to receive transition revenues, filed on April 20, 2000 in Case No. 99-1687-EL-ETP. Under AES Ohio's PUCO-approved transition plan, AES Ohio was allowed to charge its consumers for transition costs that included \$28.6 million in "accounting related expenses."³ AES Ohio's Part F, Schedule TC-2 lists these accounting related expenses, including "Consumer Education Costs" and "Settlement System Implementation Costs."⁴ Taken in conjunction with the PUCO Order in Case No. 99-1687-EL-ETP, Part F, Schedule TC-2, specifically identifies as transition costs the deferrals DP&L now seeks to collect from consumers in this case. This renders it an "adjudicative fact" "not subject to reasonable dispute," making administrative notice of Part F in this proceeding appropriate under Evid.R. 201.

AES Ohio and PUCO Staff raise no rightful basis for denying OCC's motion for administrative notice. Both parties incorrectly assert that the PUCO cannot take

³ *Id.*

⁴ *Id.*, Application to Receive Transition Revenues (Revised), Summary of Transition Costs, Part F, File TC-2 (April 20, 2000).

administrative notice of Part F because the record in this case is closed.⁵ But, OCC established that consumer education and retail settlement system costs were transition costs during its cross-examination of AES Ohio witness Sharon Schroder.⁶ This gave parties adequate notice and opportunity to respond. But they chose not to.

Further, PUCO Staff and AES Ohio argue Part F is inappropriate for judicial notice because it is in dispute that the costs in question are transition costs.⁷ Res judicata and collateral estoppel preclude these arguments. The PUCO explicitly found otherwise in its Opinion and Order approving AES Ohio's electric transition plan in Case No. 99-1687-EL-ETP. For these reasons, the PUCO should take administrative notice of Part F.

II. ARGUMENT

- A. **AES Ohio and PUCO Staff's claim that the PUCO cannot take administrative notice of Part F because the record in this case is closed has no merit. OCC timely raised this issue during its cross-examination of Sharon Schroder, providing AES Ohio adequate opportunity to respond at hearing. Moreover, in its reply to OCC's pending motion, as well as in its briefs, it has the opportunity to respond.**

AES Ohio and PUCO Staff oppose OCC's request for administrative notice because the evidentiary hearing in this case has concluded.⁸ This position contradicts Ohio Supreme Court precedent.⁹ To qualify for administrative notice, evidence must be introduced at hearing **or otherwise brought to the knowledge of the interested parties**

⁵ AES Ohio's Memorandum Contra OCC's Motion for Administrative Notice ("AES Ohio Memo Contra") at 2, PUCO Staff's Memorandum Contra OCC's Motion for Administrative Notice ("PUCO Staff Memo Contra") at 3.

⁶ Tr. Vol. 1 at 139-141.

⁷ AES Ohio Memo Contra at 5, PUCO Staff Memo Contra at 3.

⁸ AES Ohio Memo Contra at 2, PUCO Staff Memo Contra at 3.

⁹ *Allen, DBA J&M Trucking, et al. v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184.

prior to decision with an opportunity to explain and rebut.¹⁰ OCC meets this standard for two reasons.

First, OCC *did* raise at hearing that deferrals AES Ohio seeks to collect from consumers in this case constitute transition costs. On cross-examination, AES Ohio witness Sharon Schroder confirmed that deferrals it now seeks to collect were created in DP&L's electric transition plan filing in Case No. 99-1687-EL-ETP¹¹:

Q. (Ms. Willis) "And you reference in your response" (to OCC Exhibit 9) "the Consumer Education Campaign regulatory asset. Do you see that?"

A. (Ms. Schroder) I see that one."

Q. "Was that the regulatory asset created under DP&L's Electric Transition Plan Settlement Agreement under Case No. 99-1687-EL-ETP?"

A. "Yes."

Q. "Now, there's also a Retail Settlement System regulatory asset created in Case No. 99-1687-EL-ETP, correct?"

A. Yes.

Q. And that was also created under DP&L's Electric Transition Plan Settlement Agreement under that case, correct?

A. I don't recall if it was a Settlement Agreement in that case, but it was created in that case."

OCC's cross-examination of Sharon Schroder provided AES Ohio an opportunity to explain and rebut OCC's contention that deferrals AES Ohio seeks to collect in this case are transition costs. AES Ohio instead confirmed OCC's position: deferred costs associated with consumer education and a retail settlement system were created under

¹⁰ *Id.*

¹¹ Tr. Vol. 1 at 139-141; OCC Exhibit 9.

DP&L's Electric Transition Plan in Case No. 99-1687-EL-ETP. And R.C. 4928.40(A) and R.C. 4928.141 provide AES Ohio notice that it can no longer charge consumers for transition costs. AES Ohio (and every other party) had adequate notice and opportunity to rebut OCC's opposition to AES Ohio's collection of consumer education and retail settlement system costs.

Moreover, OCC filed its motion to take administrative notice before the PUCO decided this case. Parties including AES Ohio and the PUCO Staff had ample notice of the issue. Parties had the opportunity to rebut OCC's position in response to this motion and will have further opportunities in their reply brief. OCC timely raised this issue.

B. Because the PUCO explicitly stated in its Case No. 99-1687-EL-ETP Opinion & Order that costs related to consumer education and the retail settlement system are transition costs, collateral estoppel and res judicata bar AES Ohio and PUCO Staff's arguments to the contrary.

PUCO Staff argues AES Ohio's Amended Application, Part F, to receive transition revenues does not make clear the costs in questions were transition costs under Ohio law.¹² Per PUCO Staff, this means the document does not qualify for judicial notice under Evid.R. 201 because there is "reasonable dispute" as to the "adjudicative facts" for which OCC offers it.¹³ Similarly, AES Ohio argues that the costs it seeks to collect are not transition costs because they are not "directly assignable" to "retail electric generation service," as R.C. 4928.39(B) requires, or specifically enumerated in R.C. 4928.39, as other collectable costs are.¹⁴ AES Ohio argues further that "notwithstanding clauses" in

¹² PUCO Staff Memo Contra at 3.

¹³ *Id.*

¹⁴ AES Ohio Memo Contra at 6.

R.C. 4928.143(B) and R.C. 4928.143(B)(2)(h) establish that a utility can collect costs that would otherwise be transition costs if they qualify under the ESP statute.¹⁵

PUCO Staff and AES Ohio are wrong. The consumer education and retail settlement system costs it seeks to collect from consumers in this case are transition costs. The September 21, 2000 Order in Case No. 99-1687-EL-ETP, approving AES Ohio's Electric Transition Plan, explicitly states:

Pursuant to Section 4928.39, Revised Code, the total allowable transition costs for DP&L, as agreed to and referenced in the Stipulation, are reasonable and include the recovery of \$699.2 million of CTC and RTC costs and an additional \$28.6 million in accounting related expenses.¹⁶

The "\$28.6 million in accounting related expenses" referenced in the 99-1687-EL-ETP Order are described in Part F, File TC-2 of AES Ohio's application to receive transition revenues. Under the heading "Accounting Order Recovery," DP&L lists "Consumer Education Costs" and "Settlement System Implementation Costs." These are the deferred costs AES Ohio seeks to collect in this case. There is no confusion about what "adjudicative fact" OCC wants in the record, nor is that fact in dispute.

AES Ohio's other arguments – based on novel interpretations of R.C. 4928.39(B), R.C. 4928.143(B) and R.C. 4928.143(B)(2)(h) – that the costs it seeks to collect are not transition costs – are precluded by collateral estoppel and res judicata. Collateral estoppel and res judicata preclude relitigation of causes of action, facts and issues of law that were adjudicated in a prior proceeding.¹⁷ Both doctrines apply to matters before the PUCO.¹⁸

¹⁵ *Id.* at 9.

¹⁶ Case No. 99-1687-EL-ETP, Opinion and Order (Sept. 21, 2000) at 40 (underlining added).

¹⁷ *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 475 N.E.2d 782 (1985); *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, 403 N.E. 996 (1980).

¹⁸ *Id.*

Since the PUCO determined in Case No. 99-1687-EL-ETP that “total allowable transition costs” “include” “\$28.6 million in accounting related expenses,” which Part F, File TC-2 identifies as consumer education and the retail settlement system costs, all PUCO Staff and AES Ohio arguments to the contrary in this proceeding are precluded. The PUCO should not allow AES Ohio and PUCO Staff to relitigate matters that have been settled for more than 20 years.

C. AES Ohio is just plain wrong that the “notwithstanding” provision of R.C. 4928.143(B) allows collection of previously authorized transition charges.

AES Ohio claims that the deferred costs, even if transition costs, would nonetheless be recoverable because of the “notwithstanding clauses” in the ESP statute.¹⁹ Notwithstanding that there is ONE notwithstanding clause (and not more than one), DP&L is wrong. DP&L cites to the 2018 Ohio Supreme Court Opinion, *In re Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, ¶ 19 to support its mistaken argument. While the Court did address the notwithstanding provision under R.C. 4928.143(B), it explicitly acknowledged the countervailing provision in R.C. 4928.141(A), providing that a standard service offer made through an ESP “shall exclude 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.”²⁰ Finding that section “inapplicable” because the transition charges were not “previously authorized allowances for transition costs,” the Court rejected OCC’s claim against the collection of transition

¹⁹ AES Ohio Opposition to Motion to Take Administrative Notice at 9 (May 25, 2023).

²⁰ *In re Ohio Edison Co.*, 2018-Ohio-4698, ¶ 22, 23

charge from consumers.²¹ But here, there are in fact previously authorized allowances for transition charges, making the Court’s ruling *in In re Ohio Power* not controlling.

When R.C. 4928.141(A) is applicable, as it is here, it clearly bars the transition charges AES Ohio seeks to collect from its consumers. The words in this subsection are specific, and clear. Previously authorized allowances for transition charges cannot be collected in an electric security plan once the period for collection is over. Under R.C. 4928.40, the period for DP&L to collect these previously authorized transition charges from consumers ended thirteen years ago.

To be sure, the notwithstanding provision of R.C. 4928.143(B) does not trump the prohibition on collecting previously authorized transition charges from consumers under R.C. 4928.141. In fact, the first twelve words of R.C. 4928.143 convey that: “For the purpose of complying with section 4928.141 of the Revised Code****” It would make no sense for R.C. 4928.143 to be internally inconsistent, yet that is how AES Ohio interprets the statute. AES Ohio would have the PUCO believe that the General Assembly knowingly contradicted itself by establishing a need to comply with R.C. 4928.141 (in subsection (A) of 4928.143) and yet in the very next subsection (4928.143(B), changed its mind about allowing transition costs

Instead, in keeping with the principle of *in pari materia*, the PUCO must interpret R.C. 4928.143(B) in relation to R.C. 4928.141(A) which is referenced in R.C. 4928.143 and addresses the same issues. Considering those statutes together and interpreting them harmoniously leads to the inescapable conclusion that the “notwithstanding” clause

²¹ *Id.* at ¶ 23.

cannot allow previously authorized transition charges to be collected from consumers in a utility's electric security plan.

III. CONCLUSION

The PUCO's Order in Case No. 99-1687-EL-ETP explicitly states that consumer education and retail settlement system costs are transition costs. This renders it an "adjudicative fact" "not subject to reasonable dispute," appropriate for judicial notice under Evid.R. 201. The judicial principles of res judicata and collateral estoppel preclude arguments to the contrary. The PUCO has spoken. The PUCO should take administrative notice of DP&L's Amended Application, Part F, to receive transition revenues, filed in Case No. 99-1687-EL-ETP.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis
Maureen R. Willis (0020847)
Legal Director
Counsel of Record
John Finnigan (0018689)
Connor D. Semple (0101102)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: Willis (614) 466-9567
Telephone: Finnigan (614) 466-9585
Telephone: Semple (614) 466-9565
maureen.willis@occ.ohio.gov
john.finnigan@occ.ohio.gov
connor.semples@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Memorandum Contra OCC's Motion to Take Administrative Notice was served on the persons stated below via electronic transmission, this 1st day of June 2023.

/s/ Maureen R. Willis

Maureen R. Willis

Legal Director

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

SERVICE LIST

werner.margard@ohioAGO.gov
ambrosia.wilson@ohioAGO.gov
shaun.lyons@ohioAGO.gov
kherrnstein@bricker.com
dparram@brickergraydon.com
dborchers@brickergraydon.com
rmains@brickergraydon.com
dproano@bakerlaw.com
ahaque@bakerlaw.com
eprouthy@bakerlaw.com
knordstrom@theOEC.org
ctavenor@theOEC.org
leonard.bazelak@daytonohio.gov
bojko@carpenterlipps.com
easley@carpenterlipps.com
mwarnock@bricker.com

Attorney Examiners:

Gregory.price@puco.ohio.gov
Patricia.schabo@puco.ohio.gov

christopher.hollon@aes.com
jsharkey@ficlaw.com
djireland@ficlaw.com
mwatt@ficlaw.com
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com
stacie.cathcart@igs.com
evan.betterton@igs.com
michael.nugent@igs.com
Joe.Oliker@igs.com
stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com
mpritchard@mcneeslaw.com
bmckenney@mcneeslaw.com
awalke@mcneeslaw.com
dromig@armadapower.com
mjsettineri@vorys.com
glpetrucci@vorys.com
paul@carpenterlipps.com
trent@hubaydougherty.com
rdove@keglerbrown.com
cgrundmann@spilmanlaw.com
dwilliamson@spilmanlaw.com

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

6/1/2023 4:11:46 PM

in

Case No(s). 22-0900-EL-SSO, 22-0901-EL-ATA, 22-0902-EL-AAM

Summary: Reply Reply to Memorandum Contra OCC's Motion to Take
Administrative Notice by Office of the Ohio Consumers' Counsel electronically filed
by Ms. Alana M. Noward on behalf of Willis, Maureen R..