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. 22-0900-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

AES OHIO'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY

The April 10, 2023 Stipulation and Recommendation ("Stipulation") in this case was signed by 19 parties, who represent a wide range of interests. Signatory Parties Ex. 1, pp. 40-42. The interests represented by the Signatory Parties include residential, commercial and industrial customers, municipalities, hospitals, competitive generation suppliers, and other market participants. *Id.*

The evidence demonstrates that the Stipulation will provide significant benefits to customers, including improved reliability. Staff Ex. 6, pp. 4-6 (Messenger); AES Ohio Ex. 1, pp. 7-10 (Schroder). And the Stipulation will provide those benefits while continuing to ensure that AES Ohio will have the lowest transmission and distribution rates in the state. *Id.* at pp. 18-19 (Schroder).

In its brief, OCC uses the "everything but the kitchen sink" approach to litigation, in which it makes every argument it can think of, regardless of whether the argument has any merit. As demonstrated below, none of OCC's arguments have any merit. The Commission should thus reject them and approve the Stipulation without modification.

II. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES

As demonstrated in AES Ohio's initial brief (pp. 2-4), the evidence overwhelmingly establishes that the Stipulation is the product of serious bargaining among capable, knowledgeable parties. Staff Ex. 6, pp. 3-5 (Messenger); AES Ohio Ex. 1, pp. 4-7 (Schroder). Even OCC's own witnesses admitted that they do not contest that point. Tr. 307 (Fortney); Tr. 669 (Morgan).

OCC nevertheless asserts (pp. 15-17) that the Signatory Parties were not knowledgeable because they "were not aware that they were agreeing to pay over $160 million to AES Ohio under the terms of the settlement." The Commission should reject that argument for two reasons.

First, the Stipulation approved AES Ohio's application, except as modified by the Stipulation. Signatory Parties Ex. 1, p. 3. The Signatory Parties conducted extensive discovery regarding AES Ohio's application:

> "Q. Did the Signatory Parties have access to sufficient information to evaluate the Stipulation?
>
> A. Yes. In the course of discovery, AES Ohio responded to 14 sets of data requests from Staff (most of which contained multiple subparts) and 36 sets of data requests from intervenors. AES Ohio responded to 1043 interrogatories and 163 requests for production, and 36 requests for admissions. AES Ohio produced 6656 pages of documents in discovery (many of which were electronic spreadsheets produced in native format that were assigned only one Bates page number but would be very long if printed). Many of the parties requested everything that AES Ohio provided to the Staff and other parties, and received everything produced by AES Ohio."

AES Ohio Ex. 1, pp. 6-7 (Schroder).

Second, the Stipulation itself repeatedly identifies the costs (or cost caps) associated with particular items. Signatory Parties Ex. 1, pp. 7, 15-16, 20-22, 24, 32. The Signatory Parties were aware of the costs of the provisions because the Stipulation identified (and frequently capped) them.

Third, the evidence showed that the Signatory Parties had access to extensive additional information about the costs of the Stipulation:

"Q. Was the Stipulation the product of serious bargaining among capable, knowledgeable parties?

A. Yes. All of the intervening parties in the matters participated in the negotiations, and all but one of them support it or have agreed not to oppose it.

The settlement negotiations involved a diverse group of experienced parties. Fifteen bargaining sessions were held, at which AES Ohio explained the Stipulation, and all parties could make comments or ask questions. All parties that intervened in these proceedings were invited to participate in those sessions.

At the beginning or in advance of most of these sessions, AES Ohio circulated to the parties either a settlement term sheet or draft Stipulation. At each session, AES Ohio answered questions from the parties and asked for feedback on AES Ohio's proposed settlement terms. Staff and other parties made extensive changes to AES Ohio's proposals, and all Signatory Parties made compromises.

In addition, AES Ohio contacted every party to discuss their individual interests. AES Ohio had extensive conversations with individual parties, who offered significant comments and revisions to the draft Stipulation. All of the Signatory Parties were represented by attorneys, most if not all of whom have years of experience in regulatory matters before this Commission and who possess extensive information. All of the negotiations were at arm's length. Numerous hours were devoted to the negotiating process and to the exchange of language and information associated with the terms of the Stipulation."

AES Ohio Ex. 1, pp. 5-6 (Schroder). *Accord*: Tr. 576-88 (Messenger).

Among other things, Staff knew the bill impacts of the entire Stipulation on customers, and specifically "looked at every charge that would be made in this proceeding." Tr. 576-77.

The Signatory Parties thus had access to a very large amount of information about the Stipulation and its costs to customers, and the Commission should conclude that the first prong is satisfied.

III. THE STIPULATION BENEFITS CUSTOMERS

OCC asserts (pp. 17-20) that the Stipulation does not benefit customers. The principal defect in OCC's argument is that it fails to evaluate the Stipulation as a "package," as required by Commission precedent. *In re Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, *et al.*, Fifth Entry on Rehearing (June 16, 2021), ¶¶ 28-29; *In re Ohio Edison Co., et al.*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012), p. 26; *In re Columbus Southern Power Co.*, Case No. 09-0872-EL-FAC, *et al*., Order on Global Settlement Stipulation (Feb. 23, 2017), ¶ 101.

Specifically, there was extensive evidence regarding the many, wide-ranging benefits of the Stipulation. Staff Ex. 6, pp. 4-7 (Messenger); AES Ohio Ex. 1, pp. 7-19 (Schroder). At the hearing, OCC's own witnesses conceded that the Stipulation includes numerous provisions that benefit customers. Tr. 310-14 (Fortney); Tr. 654-55 (Morgan).

Critically, even after the Stipulation goes into effect (and new distribution rates are implemented), AES Ohio will have the lowest transmission and distribution rates in the state. AES Ohio Ex. 1, p. 18-19 (Schroder). The Stipulation thus provides tremendous benefits.

OCC entirely ignores those benefits, and focuses on a few provisions under which OCC would like to pay even less. Having ignored most of the benefits of the Stipulation, however, OCC cannot establish that the Stipulation fails to benefit customers as a "package."

Indeed, at the hearing, counsel for OCC conceded that OCC "would have been on the Stipulation" had the Stipulation included shadow billing. Tr. 343-44. It is thus clear that even OCC believes that the Stipulation provides significant benefits to customers.

In particular, OCC criticizes (p. 17) the Stipulation because it allows AES Ohio to recover $76 million of past costs through the RCR. However, OCC does not dispute that AES Ohio actually incurred those costs to provide benefits to customers. The evidence showed that AES Ohio needs to recover those costs so that it can continue to provide safe and reliable service to customers. AES Ohio Ex. 1, pp. 20-21. And as demonstrated below, Ohio law permits the recovery of those costs.

OCC (pp. 17-18) is also critical of the Distribution Investment Rider ("DIR") included in the Stipulation. However, the evidence showed that the DIR will position AES Ohio to make necessary investments in its infrastructure, which will improve its ability to provide reliable service. AES Ohio Ex. 1, pp. 7-8 (Schroder); AES Ohio Ex. 3, pp. 10-19 (Malinak). OCC's witness Morgan admitted that it was a good thing for AES Ohio to improve its reliability. Tr. 654-55.

The Commission should thus conclude that the Stipulation benefits customers.

IV. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE

A. The RCR is Lawful

As AES Ohio demonstrated in its initial brief (pp. 14-20), R.C. 4928.143(B)(2)(d) authorizes recovery of the OVEC, Decoupling and Prior RCR Amounts through the RCR. In particular, AES Ohio's brief demonstrated that:

1. There is no dispute that the RCR is a charge;

2. The RCR components satisfy the "relating to" prong; and

3. Recovery of the RCR would allow AES Ohio to provide stable service.

As AES Ohio also demonstrated in its initial brief (pp. 20-21), R.C. 4928.143(B)(2)(h) independently authorizes recovery of Decoupling and Prior RCR Amounts through the RCR. In particular, AES Ohio's brief demonstrated that:

1. Those costs are distribution related;

2. Recovery of those costs would be single-issue ratemaking; and

3. Recovery of the Decoupling Amounts would be "revenue decoupling."

OCC makes a number of arguments (pp. 20-67) that recovery of the RCR Amounts would not be lawful. As demonstrated below, the Commission should reject each of those arguments.

1. The Consumer Education and Retail Settlement System Costs Were Not Transition Costs

OCC has filed a motion asking the Commission to take administrative notice of "Part F" of AES Ohio's amended transition plan application from Case No. 99-1687-EL-ETP. In its brief, OCC asserts (pp. 21-22) that Part F established that deferred Consumer Education and Retail Settlement System costs from that case are transition costs, and that R.C. 4928.40(A) bars the recovery of those deferred assets.

As an initial matter, as demonstrated in the oppositions filed by of Staff and AES Ohio, the Commission should deny OCC's motion to take administrative notice because (among other reasons), it was filed after the record was closed.

As demonstrated below, even if the Commission were to take administrative notice, the Commission should reject OCC's argument for two reasons:

a. The deferred costs associated with Settlement System Implementation and Consumer Education are not transition costs.

b. Even if those costs were transition costs, the "notwithstanding" clauses in R.C. 4928.143(B) and (B)(2)(h) establish that they would be recoverable.

a. The Costs at Issue Are Not Transition Costs

Although AES Ohio may have labeled the costs as transition costs in a filing in the 1999 case, they do not actually meet the statutory definition of transition costs. Specifically, R.C. 4928.39 defines transition costs as costs that satisfy the following criteria:

> "(A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled an opportunity to recover the costs.
>
> Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section."

(Emphasis added.)

The Commission should conclude that the deferred costs associated with Settlement System Implementation and Consumer Education do not satisfy that definition for two reasons.

First, transition costs must be "directly assignable" to "retail electric generation service." R.C. 4928.39(B). The phrase "retail electric generation service" is not defined, but the phrase "retail electric service" is defined as:

> "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following 'service components': generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service."

R.C. 4928.01(A)(27) (emphasis added).

The phrase "retail electric generation service" as used in R.C. 4928.39(B) is thus the "generation" component of "retail electric service" as defined in R.C. 4928.01(A)(27).

Significantly, R.C. 4928.01(A)(27) identifies "generation" and "billing and collection" as separate components of "retail electric service." The Settlement System Implementation costs are costs that AES Ohio incurred to implement a system to reconcile the amount of energy that a CRES provider delivers to its customers with the amount of energy that its customer uses, so that AES Ohio could settle amounts owed to or by CRES providers. AES Ohio Ex. 9, p. 3; OCC Ex. 10, p. 6. Those costs are thus "directly assignable" to "billing and collection" service under R.C. 4928.01(A)(27), not "generation" service, and therefore are not transition costs under R.C. 4928.39(B).

As to Consumer Education costs, again, "'Retail electric service' means any service included in supplying . . . electricity to ultimate consumers" and includes "generation service." R.C. 4928.01(A)(27). Consumer Education costs do not involve supplying electricity to consumers, and thus are not "retail electric service" costs or "retail electric generation service"

costs. Those costs thus are not "directly assignable" to "retail electric generation service" and are not transition costs under R.C. 4928.39(B).

Second, R.C. 4928.31(A) required a transition plan to include:

> "(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;
>
> (4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;
>
> (5) A consumer education plan consistent with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code."

(Emphasis added.)

In defining transition costs, R.C. 4928.39 specifically provides that "employee assistance" costs are transition costs, but does not identify "technical implementation" costs or "consumer education" costs as transition costs. If the General Assembly had intended for technical implementation costs or consumer education costs to be transition costs, then it would have listed them in R.C. 4928.39, as the General Assembly did with employee assistance costs. Costs related to technical implementation and consumer education thus are not transition costs.

Here, the Settlement System Implementation costs would constitute "technical implementation" costs under R.C. 4928.31(A)(3), and the Consumer Education costs would

constitute "consumer education" costs under R.C. 4928.31(A)(5). Since those costs are not listed as transition costs under R.C. 4928.39, they are not transition costs, and recovery of those costs is not barred by R.C. 4928.40(A).

Significantly, OCC makes no effort in its brief to argue that those costs satisfy the statutory definition of "transition costs." The Commission should conclude that those costs are not transition costs and can lawfully be recovered under the Stipulation.

Indeed, the Commission approved the recovery of those costs in ESP III. *In re Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, *et al.*, Opinion & Order (Oct. 20, 2017), p. 12 (describing fact that RCR would recover Consumer Education Campaign and Retail Settlement System costs). Significantly, in that case, OCC did not assert that those costs were transition costs. As OCC's own brief establishes (pp. 63-65), OCC is now barred by the doctrines of collateral estoppel and res judicata from re-litigating that issue.

b. The "Notwithstanding" Clauses in the ESP Statute Bar OCC's Argument

Assuming for the sake of argument that the costs at issue were transition costs, OCC's arguments would be barred by the "notwithstanding" clauses in R.C. 4928.143(B) and 4928.143(B)(2)(h).

Specifically, as demonstrated in AES Ohio's initial brief (pp. 14-20), the evidence establishes that the Settlement System Implementation costs and Consumer Education costs can be recovered under R.C. 4928.143(B)(2)(d), since the RCR is a "charge"; the costs are deferred; and recovery of the costs would stabilize service. AES Ohio Ex. 1, pp. 19-21 (Schroder); Tr. 632, 650, 654-55 (Morgan). Those costs can also be recovered under R.C. 4928.143(B)(2)(h),

since they are related to distribution, and recovery of them would be single-issue ratemaking. AES Ohio Ex. 9, p. 3; AES Ohio Ex. 1, pp. 21-23 (Schroder); Tr. 656-58 (Morgan).

The Supreme Court of Ohio has held that the "notwithstanding" clause in R.C. 4928.143(B) establishes that costs that qualify for recovery under the ESP statute can be recovered even if those costs would otherwise constitute unrecoverable transition costs. *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶ 19 ("We read the 'notwithstanding' clause of R.C. 4928.143(B) as allowing an ESP to include items that R.C. Title 49 would otherwise prohibit. This provision expressly states that with certain listed exceptions, any contrary provision of R.C. Title 49 does not apply to an ESP."). *Accord*: R.C. 4928.143(B)(2)(h) (allowing certain provisions "notwithstanding any provision of Title XLIX of the Revised Code to the contrary.").

Therefore, even if the costs constituted transition costs (they do not), they would still be recoverable.

2. Deferred Costs Associated With Green Pricing, Generation Separation, and Bill Format Are Recoverable Under R.C. 4928.143(B)(2)(d) and (B)(2)(h)

OCC asserts (pp. 23-27) (without explanation) that AES Ohio has not demonstrated that the Prior RCR Costs associated with green pricing, generation separation and bill format are recoverable under R.C. 4928.143(B)(2). Not true. Those items are components of the Prior RCR Amounts, and AES Ohio demonstrated in its initial brief (pp. 14-21) that those costs are recoverable under R.C. 4928.143(B)(2)(d) and (B)(2)(h).

3. The Bill Format Deferral Can be Recovered Under R.C. 4928.143(B)(2)(d) or (B)(2)(h)

OCC argues (pp. 26-27) that the deferred bill format costs cannot be recovered. However, as demonstrated in AES Ohio's initial brief (pp. 15-19), those costs can be recovered under R.C. 4928.143(B)(2)(d) (the RCR is a charge; the costs relate to deferrals; the RCR will allow AES Ohio to provide stable service) and R.C. 4928.143(B)(2)(h) (the costs related to distribution service, and recovery would be single-issue ratemaking).

OCC asserts (pp. 26-27) that the costs should be charged to marketers, not customers. However, as OCC notes, the Commission has already rejected that argument. *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order (Mar. 26, 2014), ¶ 25.

OCC also argues (p. 26) that AES Ohio should collect those costs through a rate case. However, as demonstrated above, recovery in an ESP is lawful. Further, customers are better off if deferred balances are recovered through an ESP, since doing so eliminates the possibility of over recovery. Tr. 273-75 (Fortney).

4. The Net OVEC Costs Are Recoverable Under R.C. 4928.143(B)(2)(d)

As demonstrated in AES Ohio's initial brief (pp. 14-20), the net OVEC costs are recoverable through the RCR pursuant to R.C. 4928.143(B)(2)(d) because:

a. The RCR is a charge;

b. The net OVEC costs relate to a limitation on customer shopping, deferrals, and standby service; and

c. Recovery of the RCR would have the effect of stabilizing service.

OCC asserts (pp. 27-38) that recovery of the net OVEC costs is not authorized by the ESP statute because (according to OCC) the ESP statute prohibits the recovery of costs that were incurred outside of the approved ESP period. However, there is no requirement in subsection (B)(2)(d) that limits it to recovering costs that were incurred during the applicable ESP period.

Specifically, R.C. 4928.143(B)(2)(d) states:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> . . . .
>
> (2) 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;"

The General Assembly could have added a requirement to subsection (B)(2)(d) that it recover only costs incurred during the applicable ESP period, but it did not do so. The Commission should not write into the statute a requirement that does not exist.

In addition, the Supreme Court of Ohio has held that R.C. 4928.143(B)(2)(d) has three elements:

> "if a proposed item in an ESP meets the following three criteria, it is lawful: (1) it is a term, condition, or charge, (2) it relates to one of the limited set of listed items (e.g., limitations on customer

> shopping, bypassability, or carrying costs), and (3) it has the effect of stabilizing or providing certainty regarding retail electric service."

In re Application Seeking Approval of Ohio Power Co., 2018-Ohio-4698 at ¶ 26 (holding that subsection (B)(2)(d) authorized recovery of AEP's net OVEC costs).

OCC is asking the Commission to add a fourth element to the statute—that the costs to be recovered during an ESP must be incurred during that ESP. The Supreme Court did not list that as an element of the statute, and adding a fourth element to the statute would be inconsistent with Supreme Court precedent.

In addition, OCC's argument that an ESP can recover only those costs that were incurred during the ESP is inconsistent with the fact that R.C. 4928.143(B)(2)(d) allows the "recovery of such deferrals." OCC witness Morgan admitted that a deferral was an expense that would later be recoverable as a regulatory asset. Tr. 633. The fact that subsection (B)(2)(d) allows utilities to recover deferrals necessarily establishes that ESPs can recover costs that are incurred before the ESP.

Indeed, R.C. 4928.143(B)(2)(a) allows for the recovery of "the cost of fuel used to generate the electricity supplied under the offer." (Emphasis added.) Subsection (B)(2)(a) thus contains a requirement that the recovery of costs be limited to costs that were incurred during the ESP period. Subsection (B)(2)(d) does not contain similar language, which establishes that subsection (B)(2)(d) does not have a similar requirement.

OCC also cites (pp. 35-36) to several other statutes in an attempt to establish that an ESP can recover only costs that are incurred during that ESP. However, none of those other statutes purport to limit the costs that can be recovered under R.C. 4928.143(B)(2)(d). And even

if those other sections contained such a limit, R.C. 4928.143(B)(2) includes a "notwithstanding" clause that establishes that the limitation would be inapplicable. *In re Application Seeking Approval of Ohio Power Co.*, 2018-Ohio-4698 at ¶ 19.

OCC also argues (pp. 31-32) that the OVEC "costs" were incurred in the past, and they thus cannot operate as a "limitation on customer shopping" under subsection (B)(2)(d). However, subsection (B)(2)(d) does not require that that "costs" relate to "limitations on customer shopping." Instead, subsection (B)(2)(d) requires that the "charge" recovering those costs relates to "limitations on customer shopping." The Commission has held that a charge collecting net OVEC costs related to "limitations on customer shopping" if the charge was non-bypassable. *In re Application Seeking Approval of Ohio Power Co.'s Proposal,* Case No. 14-1693-EL-RDR, Opinion & Order (Mar. 31, 2016), p. 94. The Supreme Court affirmed that holding. *In re Application of Ohio Power Co.*, 2018-Ohio-4698 at ¶¶ 25-32. The RCR is non-bypassable (Signatory Parties Ex. 1, p. 14; AES Ohio Ex. 2, p. 5 (Donlon)) and recovery of the net OVEC costs through the RCR thus relates to "limitations on customer shopping." Further, even if recovery of the net OVEC costs did not relate to "limitations on customer shopping," the net OVEC costs would still satisfy the "relating to" prong in subsection (B)(2)(d) since a charge recovering those amounts would relate to recovery of deferrals and standby service. *See* AES Ohio's Initial Post-Hearing Brief, pp. 15-19.

5. Recovery of the Net OVEC Costs Would Not Constitute Retroactive Ratemaking

OCC argues (pp. 38-43) that the testimony of OCC witness Morgan that the Commission "can look to the future only" when setting rates establishes that recovering the net

OVEC costs would constitute retroactive ratemaking. The Commission should reject that argument for three reasons:

First, AES Ohio currently has a Commission-approved deferral of the net OVEC costs recorded on its FERC Form 1. *See* AES Ohio Initial Brief, pp. 15-17. Mr. Morgan admitted that recovery of such an asset is not retroactive ratemaking:

> "Q. . . . . You do not consider the recovery of deferral -- of a deferral to be retroactive ratemaking, correct?
>
> A. I do not consider an approved deferral, if it's a deferral that was authorized by the Commission -- I'm sorry, that was authorized by the Commission, if it was a Commission authorized deferral, it wouldn't -- it would not be a -- retroactive."

Tr. 634-35.

Second, OCC's argument that the Commission "can look to the future only" when setting rates would effectively prohibit the recovery of all deferrals, since a deferral is an expense that the utility has incurred and will seek to recover in the future. Tr. 633. R.C. 4928.01(A)(26), which defines "regulatory assets," addresses when a deferral can be recorded on a utility's books, which necessarily establishes that a deferral (which, again, is a past cost) can be recorded and subsequently recovered.

Third, as demonstrated in AES Ohio's initial brief (pp. 14-20), recovery of the net OVEC costs is lawful under R.C. 4928.143(B)(2)(d). And again, subsection (B)(2) includes a "notwithstanding" clause. Therefore, even if recovery of the net OVEC costs constituted retroactive ratemaking under R.C. 4905.30 and 4905.32 as OCC asserts, recovery of the net OVEC costs would still be lawful.

6. The Commission Should Reject OCC's Arguments That the Net OVEC Costs Are Not Deferred by AES Ohio

OCC argues (pp. 44-53) that recovery of the net OVEC costs is barred because AES Ohio does not have a Commission-approved deferral of those amounts on its books. The Commission should reject that argument for the following reasons:

First, OCC's claim that AES Ohio does not have a Commission-approved deferral of the net OVEC costs is not true. AES Ohio currently has those amounts deferred on its FERC Form 1. *See* AES Ohio Initial Post-Hearing Brief, pp. 15-17.

Second, the "relating to" element in R.C. 4928.143(B)(2)(d) is satisfied if a charge relates to (among other things), "limitations on customer shopping," "standby . . . service," or "recovery of such deferrals." Even if the net OVEC costs were not deferred (they are), the relating to element would still be satisfied because the net OVEC costs relate to "limitations on customer shopping" and "standby . . . service." *See* AES Ohio's Initial Post-Hearing Brief, pp. 15, 18-19.

OCC also makes the puzzling argument (pp. 47-48) that AES Ohio cannot recover the net OVEC costs because AES Ohio conservatively booked a reserve against that deferral. OCC apparently believes that costs can be recovered if the probability of recovery exceeds 75% (and are, therefore, deferrable under GAAP), but that recovery is prohibited if the probability of recovery falls below 75% and the costs thus were not deferred by the utility or a reserve is taken against the deferral. In other words, OCC believes that if the probability of recovery is less than 75%, then the costs could not be deferred, and the costs could not be recovered. OCC's argument would lead to the absurd result that if there is a 51% (or 60% or even 70%) chance that

a particular cost would be recovered in the future, then recovery is barred (*i.e.*, there is a 0% chance that the costs would be recovered in the future). That is obviously wrong.

Finally, OCC's argument (pp. 53-54) that AES Ohio should have written off the OVEC deferrals when ESP III was terminated makes no sense. AES Ohio was not recovering the OVEC deferrals under ESP III, so the termination of ESP III had no effect on AES Ohio's ability to defer those amounts.

7. Staff Conducted a Prudence Review

OCC asserts (pp. 54-58) that the Stipulation allows AES Ohio to collect OVEC costs without a prudence review. However, Staff witness Borer testified that Staff conducted a prudence review. Staff Ex. 1, p. 4 (Borer); Tr. 406-07. Indeed, the Stipulation removes $660,616 from the deferred net OVEC costs since those costs were found to be imprudent. Signatory Parties Ex. 1, p. 15; Tr. 160 (Schroder).

In support of its argument that Staff has not conducted a prudence review, OCC (pp. 55-56) relies upon the testimony of OCC witness Morgan and his discussion of five other Commission proceedings. However, at the hearing, Mr. Morgan was not able to identify anything that Staff should have done but failed to do to perform a prudence review. Tr. 659. He also admitted that he had not read the prudence reviews in the cases to which he cited. Tr. 661. His testimony thus falls well short of establishing that Staff did not conduct a prudence review.

OCC cites (p. 57) transcript pages 407-12 for the proposition that "Mr. Borer confirmed on cross-examination that Staff performed none of the components of a performance and operations prudence review." However, OCC has no evidence that establishes that the items it asked Mr. Borer about on those pages needed to be performed to conduct a prudence review.

Further, nothing prohibited OCC from conducting its own prudence review (OCC conducted extensive discovery in this case), and OCC has not identified any specific costs that it claims were imprudent. *See* Tr. 660 (Morgan).

8. The Commission's Order Terminating ESP III Does Not Bar Recovery of the Decoupling Amounts Through the RCR

As demonstrated in AES Ohio's initial brief (pp. 15-21), R.C. 4928.143(B)(2)(d) and (B)(2)(h) authorize the recovery of the Decoupling Amounts through the RCR. OCC argues (pp. 58-68) that AES Ohio should not be permitted to recover the Decoupling Amounts since AES Ohio was previously recovering those amounts in ESP III, and AES Ohio exercised its right under R.C. 4928.143(C)(1) to terminate ESP III in 2016 after the Commission modified ESP III. The Commission should reject OCC's argument for the following reasons.

First, this is an ESP case and the issue before the Commission is whether the ESP statute authorizes the recovery of the Decoupling Amounts. However, at no point in its argument does OCC cite to the ESP statute or argue that recovery of the Decoupling Amounts would violate the ESP statute.

OCC does not dispute that recovery of the Decoupling Amounts through the RCR would satisfy the three elements in R.C. 4928.143(B)(2)(d). Nor does OCC dispute that recovery of the Decoupling Amounts through the RCR would be lawful under R.C. 4928.143(B)(2)(h).

Since OCC does not dispute that recovery of the Decoupling Amounts would be lawful under the ESP statute, the Commission should reject its argument that recovery of Decoupling Amounts would be unlawful.

Second, the Commission's prior orders establish that recovery of the Decoupling Amounts through the RCR is reasonable and lawful. Specifically, the procedural history for the deferred Decoupling Amounts is identical to the procedural history for deferred Uncollectible Amounts that the Commission authorized AES Ohio to recover in AES Ohio's 2020 rate case. Specifically:

1. The ESP III Stipulation created riders authorizing the recovery of both the Decoupling Amounts and the Uncollectible Amounts. AES Ohio Ex. 12, pp. 14, 19.

2. The 2015 rate case authorized AES Ohio to defer amounts associated with both items. *In the Matter of the Application of The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR, Opinion & Order (Sept. 26, 2018), p. 28 (listing Decoupling deferral as element of Stipulation); *In the Matter of the Application of The Dayton Power and Light Co.*, Case No. 20-1651-EL-AIR, Opinion & Order (Dec. 14, 2022), ¶ 132 (discussing fact that 2015 rate case granted authority to defer uncollectible expenses).

3. The riders recovering both items were terminated when ESP III was terminated. *In re Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, *et al*., Second Finding & Order (Dec. 18, 2019), ¶ 36.

In AES Ohio's 2020 rate case, the Commission allowed AES Ohio to recover the deferred Uncollectible Amounts because "nothing in the 2015 Rate Case bound the Commission to approve the [Uncollectible] Rider in the ESP III case" and "nothing in ESP III required that the deferral authority in 2015 Rate Case cease to exist in the event that ESP III was terminated." *In the Matter of the Application of The Dayton Power and Light Co.*, Case No. 20-1651-EL-AIR, Opinion & Order (Dec. 14, 2022), ¶ 135. It is undisputed that those same points are true for the Decoupling Amounts. Tr. 649 (Morgan).

Recovery of the Decoupling Amounts is thus consistent with Commission precedent.

Third, the Commission has never held that AES Ohio could not recover the Decoupling Amounts. After AES Ohio terminated ESP III, the Commission held that AES Ohio could not recover those costs while it was operating under ESP I, but that order did not prohibit AES Ohio from recovering those costs at a later time. *In re Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, *et al*., Second Finding & Order (Dec. 18, 2019), ¶ 36. *Accord*: Tr. 356-57 (Borer) (termination of ESP III means that AES Ohio "lost the mechanism to recover [a particular cost] but not necessarily that ability to recover it").

Fourth, even if AES Ohio's decision to terminate ESP III pursuant to R.C. 4928.143(C)(1) somehow barred AES Ohio from recovering the Decoupling Amounts, recovery of the Decoupling Amounts would still be lawful since subsection (B)(2) includes a "notwithstanding" clause.

9. The Doctrines of Res Judicata and Collateral Estoppel Actually Bar OCC's Argument

OCC's reliance (pp. 63-65) on the doctrines of collateral estoppel and res judicata is plainly misplaced. As OCC acknowledges (p. 64), those doctrines "preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties."

The issue here is whether the ESP statute authorizes the recovery of the Decoupling Amounts. The Commission has never held that recovery of those amounts was unlawful. In fact, the Commission has authorized AES Ohio to recover Decoupling Amounts. *In the Matter of the Application of The Dayton Power and Light Co.,* Case No. 16-0395-EL-SSO, *et al*., Opinion & Order (Oct. 20, 2017), pp. 11-12, 59; *In the Matter of the Application of The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR, Opinion & Order (Sept. 26, 2018), pp. 27-29.

Therefore, the Commission should conclude that those doctrines prohibit OCC from challenging the recovery of the Decoupling Amounts in this case.

10. ASC 980-605 Does Not Bar the Recovery of the Decoupling Amounts

OCC argues (pp. 66-68) that generally accepted accounting principles contained in ASC 980-605 bar the recovery of the Decoupling Amounts. The Commission should reject that argument for the following reasons.

First, recovery of the Decoupling Amounts is lawful under R.C. 4928.143(B)(2)(d) and (B)(2)(h). Accounting principles cannot supersede statutory authority.

Second, ASC 980-605 addresses when a utility can record revenue on its GAAP books. Tr. 373-74 (Borer). That section has nothing to do with whether a utility can recover money from customers through a rider.

B. ESP IV Passes the ESP v. MRO Test

AES Ohio's initial brief (pp. 22-28) demonstrated that the ESP that would be established by the Stipulation in this case is "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142" on quantitative and qualitative bases, and it thus passes the ESP v. MRO test in R.C. 4928.143(C)(1). R.C. 4928.143(C)(1)

The Commission should reject OCC's arguments on that test, for the reasons identified below.

1. Accelerated Recovery Riders Are a "Wash" Under the ESP v. MRO Test

The Stipulation includes a number of riders that will allow AES Ohio to recover distribution costs on an accelerated basis. Signatory Parties Ex. 1, pp. 6-14, 17-18, 26. The Commission has held that the effect of that type of rider "should be considered substantially equal" in the ESP v. MRO test because a utility could recover those same costs through a distribution rate case if the utility was operating under an MRO:

> "regarding the distribution riders . . . the Commission has consistently found that, to the extent that Duke made capital investments, those investments would be recovered to an equal extent through either the riders or through distribution rates, provided that the property is used and useful in the provision of distribution service. Accordingly, Duke would recover the equivalent of the same costs, and, for purposes of the ESP versus MRO test, the costs of the distribution riders should be considered substantially equal."

In the Matter of the Application of Duke Energy Ohio, Inc., Case No. 17-32-EL-AIR, et al., Opinion and Order (Dec. 19, 2018), ¶ 289. *Accord*: *In the Matter of the Application of The Ohio Power Co.*, Case No. 16-1852-EL-SSO, *et al*., Opinion and Order (April 25, 2018), p. 123 ("Regarding the . . . distribution-related riders, the revenue requirements associated with the recovery of incremental distribution investments is considered to be the same whether recovered through the ESP or through a distribution rate case conducted in conjunction with an MRO. Accordingly, we do not consider such investments in our quantitative MRO/ESP analysis.").

The Supreme Court of Ohio has affirmed the Commission on that issue. *In re Ohio Edison Co*., 146 Ohio St.3d 222, 2016-0hio-3021, 54 N.E.3d 1218, ¶¶ 23-27 (appellant argued that recovery of distribution costs through riders "authorizes suppliers to recover certain investment costs, makes the ESP more costly for consumers than an MRO, which has no comparable investment-cost-recovery mechanism"; the Court rejected that argument and

affirmed the Commission's conclusion that "if an MRO were put in place, then suppliers would still be able to recover investment costs, in that case by way of a distribution-rate case. Over a sufficient time period, the commission concluded, the cost to consumers under the rider or a distribution-rate case would be a wash.").

Undeterred, OCC cites (pp. 5-7) the testimony of Bob Fortney for the proposition that the regulatory lag that would result from the recovery of those costs through distribution rates under an MRO is a benefit to customers, and that the delay in recovering those distribution costs establishes that recovery of them is "not a wash." However, Mr. Fortney admitted that when he was previously a member of the Commission's staff, he testified that those costs were a "wash" in the ESP v. MRO test. Tr. 276. He also admitted that in the long term, the costs would be equal under an ESP or an MRO (with a distribution rate case). Tr. 276-77.

The Commission should reject OCC's argument, since it is inconsistent with precedent from the Supreme Court, the Commission and Mr. Fortney's own prior testimony.

2. The OVEC Deferral Could be Recovered if AES Ohio Filed a Distribution Rate Case

OCC asserts (p. 8) that $38.6 million in deferred net OVEC costs are generation related and could not be recovered under an MRO or through a rate case, and that those costs are thus a cost that would exist under an ESP, but not under an MRO.

However, R.C. 4928.01(A)(26) defines the term "Regulatory assets," and the definition does not preclude a utility from recording regulatory assets that are generation related. Indeed, some of the items listed in that section as regulatory assets are generation related (*e.g.*,

nuclear decommission costs, fuel disposal costs, and fuel costs). Regulatory assets can thus be generation related, and would have to be recoverable if a utility was operating under an MRO.

Further, there is nothing in Chapter 4909 that would preclude the recovery of a generation-related regulatory asset in a rate case.

The net OVEC costs are thus a "wash" in the ESP v. MRO test.

Further, even if those costs would not be recoverable under an MRO (they would be), the evidence demonstrates that there are significant quantitative and qualitative benefits of the ESP that would not be available under an MRO. Staff Ex. 6, pp. 6-8 (Messenger); AES Ohio Ex. 3, pp. 5-23 (Malinak); Tr. 274-75 (Fortney). The Commission should conclude that the value of those benefits exceeds the $38.6 million OVEC costs.

3. The Hypothetical MRO Would be Effective at the Same Time as the ESP

OCC cites (pp. 9-10) to witness Fortney's testimony that an MRO in the ESP v. MRO test would be effective six months after the ESP would be effective. OCC asserts that the delay would create a $6 million benefit to customers by delaying the implementation of new distribution rates.

The defect in OCC's argument is that the Commission should compare the ESP to a hypothetical MRO that the Commission would have approved on the same day. *See* R.C. 4928.143(C)(1). Indeed, Mr. Fortney admitted that point was true at his deposition, and was impeached at the hearing on that basis. Tr. 291-92.

4. AES Ohio Has Not Double Counted the Benefits of SmartGrid

OCC asserts (pp. 10-13) that AES Ohio has double counted the reliability benefits of SmartGrid, since those benefits were counted as benefits in AES Ohio's SmartGrid case. The defect in OCC's argument is that AES Ohio is continuing to make SmartGrid investments to improve reliability, and will recover those investments through the Infrastructure Investment Rider ("IIR"). AES Ohio Ex. 1, pp. 8-9 (Schroder). Under an MRO, the IIR would not be available, which would delay or eliminate the investments needed to achieve those reliability benefits. AES Ohio Ex. 3, pp. 18-19 (Malinak).

Those reliability benefits thus would not be available under an MRO (or would not be available as quickly) and should be considered in the ESP v. MRO test.

5. Increased Distribution Investment is Expected to Improve Reliability

OCC asserts (pp. 13-15) that there is no evidence that increased investment will lead to improved reliability.

However, AES Ohio witness Malinak performed an extensive analysis demonstrating that utilities with higher investments per megawatt hour had better reliability. AES Ohio Ex. 3, pp. 9-16. Mr. Malinak also explained that AES Ohio has invested less than five of the six Ohio utilities, and that as a result, it has the lowest reliability rating. *Id*.

OCC claims that Mr. Fortney's testimony refutes Mr. Malinak's conclusion. However, Mr. Fortney admitted that as compared to the six other Ohio utilities, AES Ohio spent the second lowest amount on reliability, and failed to achieve the Commission's reliability targets more than other Ohio utilities:

"Q. So AES Ohio is missing its reliability metrics more than every other Ohio utility and has been spending less on reliability than all but one Ohio utility, correct?

A. That's correct."

Tr. 287-88 (Fortney).

In addition, the Stipulation includes an agreement by AES Ohio to solicit input from Staff and the Signatory Parties regarding a work plan that will be designed to improve reliability. Signatory Parties Ex. 1, pp. 12-13. The Stipulation also lowers the DIR caps if AES Ohio fails to achieve specified reliability targets. *Id*. at 7-10. The Stipulation thus includes specific provisions that are designed to improve reliability.

The Commission should conclude that additional distribution investments by AES Ohio will lead to improved reliability.

V. THERE WERE NO PROCEDURAL ERRORS AT THE HEARING

A. The Rulings Excluding Settlement Communications Were Correct

OCC asserts (pp. 71-72) that the Attorney Examiner erred when he prohibited OCC from asking questions about settlement communications.

The Commission should reject that argument because the Attorney Examiner's ruling was consistent with O.A.C. 4901-1-26(E), which states:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not

> require exclusion when the evidence is offered for another valid purpose."

(Emphasis added.)

In the recent *Columbia Gas* case, the Commission held that settlement communications were not admissible. *In the Matter of the Application of Columbia Gas of Ohio, Inc.*, Case No. 21-637-GA-AIR, *et al*., Opinion and Order (Jan. 26, 2023), ¶¶ 129-30 ("the ruling of the attorney examiner precluding the cross-examination of witnesses regarding the content of settlement negotiations is entirely consistent with Commission precedent").

Indeed, at the hearing for *Columbia Gas*, counsel for OCC argued that settlement communications were not admissible. *In the Matter of the Application of Columbia Gas of Ohio, Inc.*, Case No. 21-637-GA-AIR, *et al*., Transcript (Nov. 21, 2022), p. 63 ("And now they are trying to probe into confidential settlement -- or privileged settlement discussions and that's improper."); *id*. at 72.

OCC asserts (pp. 73-74) that it is entitled to discovery regarding what information the Signatory Parties had regarding the costs of the Stipulation. OCC further asserts that its questioning was for "another valid purpose" under the Commission's rule since the "PUCO settlement standard requires settlements be negotiated by 'capable, knowledgeable parties.'" The Commission should reject that argument for two reasons.

First, OCC's argument is that it needs the settlement communications to prove that the Stipulation fails the Commission's three-part test. OCC is thus attempting to use the settlement communications to prove "invalidity" of the Stipulation, which is exactly the use prohibited by the rule.

Second, the Commission's rule prohibits using settlement communications to prove "invalidity of the dispute," but allows evidence to be admitted if it is "offered for another valid purpose." OAC 4901-1-26(E). Ohio Evid. R. 408 contains additional language that is not included in the Commission's rule that provides examples of other valid purposes: "This rule also does not require exclusion when the evidence is 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." OCC's intended use of settlement communications does not resemble any of those permissible uses, and thus is not a "valid purpose."

The Commission should thus conclude that the Attorney Examiner's evidentiary rulings were correct.

Further, even if the Attorney Examiner's rulings were not correct (they were), those rulings were a harmless error, since Staff witness Messenger answered numerous questions about what Staff knew in the settlement process. Tr. 577-78, 582, 584-86.

B. The Attorney Examiner Correctly Denied OCC's Motion to Subpoena Staff Witnesses

OCC argues (pp. 75-79) that the Attorney Examiner erred in denying OCC's motion to subpoena members of the Commission's Staff to appear at the hearing, but OCC entirely ignores the rational offered by the Attorney Examiner for denying the motion, which was that subpoenas to non-testifying experts are not permitted:

> "EXAMINER PRICE: . . . . In a real courtroom under the Civil Rules if a party has an expert witness, they do not intend to -- they retained for litigation but do not intend to present testimony, you cannot discovery vis-a-vis those experts; is that correct?

> MS. WILLIS: If it's a person that is not intended -- or is not intended to testify as a witness, that's correct.
>
> EXAMINER PRICE: And these are Staff experts. So you need to get your own expert and testify as to these matters. . . .
>
> At this time we will go head and deny the motion for subpoena for the Staff witnesses. The Bench finds that the motion is unreasonable and oppressive. No Staff Report has been filed, so the rule allowing parties to subpoena witnesses who participate in the Staff Report is inapplicable. Staff filed testimony regarding the area identified by the subpoena, and Staff filed testimony in support of the Stipulation vis-à-vis in that I don't believe at this point OCC has identified any reasonable purpose for subpoenaing additional Staff witnesses who under the Ohio Rules of Civil Procedure, which is at least persuasive authority, would not be permitted to be subpoenaed."

April 28, 2023 Prehearing Conference Tr., pp. 16-17.

Counsel for OCC admitted at the prehearing conference (Tr. 16) that discovery of non-testifying experts was not permitted, but OCC ignores that part of the Attorney Examiner's ruling in its post-hearing brief. The Commission should reject OCC's argument for that reason alone.

In addition, the statute upon which OCC relies for its argument—R.C. 4903.082—allows for "reasonable discovery." As OCC concedes in its brief (p. 77), it was not seeking discovery from Staff—OCC was seeking to compel Staff to testify at a hearing. R.C. 4902.082 is silent as to who can be compelled to testify at a hearing.

Indeed, OAC 4901.1-28(A) provides that Staff members who contribute to a Staff Report may be subpoenaed to testify at a hearing. The fact that the rule allows subpoenas to Staff if there is a Staff Report shows that subpoenas to Staff are not allowed when there is no Staff Report, as in this case.

In any event, even if there was an error (there was not), the error was harmless. OCC asserts (p. 78) that Staff member Turkenton participated in this case; but so did Staff witnesses Messenger, Borer, Benedict and Nicodemus, who were all available for OCC to cross at the hearing. OCC does not identify any questions that it wished to ask Ms. Turkenton that those other Staff members could not answer.

OCC also asserts (p. 78) that Staff members Turkenton and Litphratt participated in Case No. 20-140-EL-AAM, and that Mr. Lipthratt provided testimony in that case. However, Staff witness Borer also worked on that case, and OCC asked him questions about his work on that case, the Staff Report in that case, and Mr. Lipthratt's testimony in that case. Tr. 366-80. The Attorney Examiners took administrative notice of the Staff Report and relevant parts of Mr. Lipthratt's testimony from that case. Tr. 426, 428. OCC does not identify any questions that Mr, Borer could not answer that it believes could have been answered by Ms. Turkenton or Mr. Lipthratt.

The Commission should thus conclude that even if there was an error (there was not), it was harmless and within the scope of the discretion afforded Attorney Examiners. *In the Matter of the Application of Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016), p. 34 ("we find that it was well within the attorney examiner's discretion to find that the redirect testimony subject to the motion to strike was far beyond the scope of the cross-examination"); *In the Matter of Application of Duke Energy Ohio*, *Inc.*, Case No. 14-841-EL-SSO, *et al.*, Opinion and Order (Apr. 2, 2015), p. 12 ("Attorney examiners have discretion in determining, in keeping with the statute and the rules, whether information should be treated as confidential.").

VI. CONCLUSION

The Commission should approve the Stipulation in this case without modification.

Respectfully submitted,

/s/ Christopher C. Hollon
Christopher C. Hollon (0086480)
AES OHIO
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: christopher.hollon@aes.com

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Melissa L. Watt (0092305)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com
mwatt@ficlaw.com

Attorneys for AES Ohio

(willing to accept service via e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing AES Ohio's Reply Brief has been served via electronic mail upon the following counsel of record, this 5th day of June, 2023:

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com

Counsel for Ohio Energy Group

Stacie Cathcart, Esq.
Evan Betterton, Esq.
Michael Nugent, Esq.
Joseph Oliker, Esq.
IGS ENERGY
6100 Emerald Parkway
Dublin, OH 43016
Email: stacie.cathcart@igs.com
evan.betterton@igs.com
michael.nugent@igs.com
joe.oliker@igs.com

Counsel for IGS Energy

Werner Margard, Esq.
Shaun Lyons, Esq.
OFFICE OF THE OHIO ATTORNEY GENERAL
30 East Broad Street, 26th Floor
Columbus, OH 43215
Email: werner.margard@ohioago.gov
shaun.lyons@ohioago.gov

Counsel for Staff of the Commission

Kimberly W. Bojko, Esq.
(Counsel of Record)
Jonathan B. Wygonski, Esq.
Emma Y. Easley, Esq.
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: bojko@carpenterlipps.com
wygonski@carpenterlipps.com
easley@carpenterlipps.com

Counsel for the Ohio Manufacturers' Association Energy Group

Stephanie M. Chmiel, Esq.
Mary Csarny, Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Email: stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com

Counsel for University of Dayton

Drew B. Romig, Esq.
ARMADA POWER, LLC
230 West Street, Suite 150
Columbus, OH 43215
Email: dromig@armadapower.com

Counsel for Armada Power, LLC

Trent Dougherty, Esq.
HUBAY DOUGHERTY
1391 Grandview Avenue, #12460
Columbus, OH 43212
Email: trent@hubaydougherty.com

Counsel for the Citizens' Utility Board of Ohio

Karin Nordstrom, Esq.
Chris Tavenor, Esq.
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
Email: knordstrom@theOEC.org
ctavenor@theOEC.org

Counsel for the Ohio Environmental Council

David F. Proano, Esq.
(Counsel of Record)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114
Email: dproano@bakerlaw.com

Ali I. Haque, Esq.
Erika D. Prouty, Esq.
BAKER & HOSTETLER LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Email: ahaque@bakerlaw.com
eprouty@bakerlaw.com

Counsel for Ohio Energy Leadership Council

Robert Dove, Esq.
Nicholas S. Bobb, Esq.
KEGLER BROWN HILL + RITTER CO., L.P.A.
65 East State Street, Suite 1800
Columbus, OH 43215
Email: rdove@keglerbrown.com
nbobb@keglerbrown.com

Counsel for Ohio Partners for Affordable Energy

Angela Paul Whitfield, Esq.
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: paul@carpenterlipps.com

Counsel for The Kroger Co.

Gretchen L. Petrucci, Esq.
Michael J. Settineri, Esq.
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
Email: glpetrucci@vorys.com
mjsettineri@vorys.com

Counsel for Constellation Energy Generation, LLC and Constellation NewEnergy, Inc.

Maureen R. Willis, Esq.
John Finnigan, Esq.
Connor D. Semple, Esq.
OFFICE OF THE OHIO CONSUMERS' COUNSEL
65 East State Street, Suite 700
Columbus, OH 43215
Email: maureen.willis@occ.ohio.gov
john.finnigan@occ.ohio.gov
connor.semple@occ.ohio.gov

Counsel for the Ohio Consumers' Counsel

Carrie H. Grundmann, Esq.
SPILMAN THOMAS & BATTLE, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
Email: cgrundmann@spilmanlaw.com

Derrick Price Williamson, Esq.
Steven Wing-Kern Lee, Esq.
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com
slee@spilmanlaw.com

Alex Kronauer
WALMART INC.
2608 SE J Street
Bentonville, AR 72716
Email: alex.kronauer@walmart.com

Counsel for Walmart Inc.

Robert Dove, Esq.
KEGLER BROWN HILL + RITTER CO., L.P.A.
65 East State Street, Suite 1800
Columbus, OH 43215-4295
Email: rdove@keglerbrown.com

Leonard J. Bazelak, Esq.
CITY OF DAYTON
101 West Third Street
Dayton, OH 45401
Email: leonard.bazelak@daytonohio.gov

Counsel for The City of Dayton

Devin D. Parram, Esq.
Dylan F. Borchers. Esq.
Rachael N. Mains, Esq.
BRICKER GRAYDON LLP
100 South Third Street
Columbus, OH 43215-4291
Email: dparram@brickergraydon.com
dborchers@brickergraydon.com
rmains@brickergraydon.com

Counsel for The Ohio Hospital Association

Dylan F. Borchers, Esq.
Kara H. Herrnstein, Esq.
BRICKER GRAYDON LLP
100 South Third Street
Columbus, OH 43215-4291
Email: dborchers@brickergraydon.com
kherrnstein@brickergraydon.com

Counsel for ChargePoint, Inc.

Matthew R. Pritchard, Esq.
Bryce A. McKenney, Esq.
Avery L. Walke, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Email: mpritchard@mcneeslaw.com
bmckenney@mcneeslaw.com
awalke@mcneeslaw.com

Counsel for The Retail Energy Supply Association

Matthew W. Warnock, Esq.
BRICKER GRAYDON LLP
100 South Third Street
Columbus, OH 43215
Email: mwarnock@brickergraydon.com

Katie Johnson Treadway, Esq.
James Dunn, Esq.
ONE ENERGY ENTERPRISES INC.
Findlay, OH 45840
Email: ktreadway@oneenergyllc.com
jdunn@oneenergyllc.com

Counsel for One Energy Enterprises Inc.

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

4866-1125-3095.1

Summary: Reply AES Ohio's Reply Brief electronically filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company.