

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
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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
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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

APPLICATION FOR REHEARING OF AES OHIO

The Commission correctly adopted and approved the Stipulation and Recommendation ("Stipulation") in this case upon finding that it was the product of serious bargaining among capable, knowledgeable parties; will benefit customers and the public interest, and does not violate any important regulatory principle or practice. Opinion and Order (Aug. 9, 2023) ("Order"). The Order authorized The Dayton Power and Light Company d/b/a AES Ohio to implement its fourth Electric Security Plan ("ESP 4").

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, AES Ohio seeks rehearing from that Order only on a narrow set of grounds that are intended to clarify the record and preserve alternative arguments for affirmance in any potential appeal. Specifically:

- (1) The Commission correctly stated (Order, p. 53) that in the Stipulation, AES Ohio agreed to cap "the equity component" of its capital structure in any distribution rate case filed during the term of ESP 4 at the level

approved in Case No. 20-1651-EL-AIR; however, in two other instances (Order, pp. 65 and 87), the Commission incorrectly stated that AES Ohio agreed to a cap on its "return on equity" in such cases.

- (2) The Commission correctly concluded that the Regulatory Compliance Rider ("RCR") related to deferrals or recovery of deferrals under R.C. 4928.143(B)(2)(d) and was thus lawful. On rehearing, the Commission should further conclude that the RCR relates to a limitation on customer shopping under R.C. 4928.143(B)(2)(d) and is lawful for that additional reason.
- (3) The Commission correctly concluded that recovery of the Decoupling Amounts through the RCR was lawful under R.C. 4928.143(B)(2)(d). On rehearing, the Commission should further conclude that recovery of the Decoupling Amounts was lawful under R.C. 4928.143(B)(2)(h).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
APPLICATION FOR REHEARING OF AES OHIO**

The Commission should affirm its adoption and approval of the Stipulation in this case, but grant rehearing on the limited issues, as described below, both to clarify its order and to preserve alternative arguments for affirmance in any potential appeal from its Order.

I. THE COMMISSION SHOULD CLARIFY THAT THE STIPULATION DOES NOT INCLUDE AN ROE CAP

In the Stipulation (§ XV), the Signatory Parties agreed that "[f]or any distribution rate case filed during the term of the ESP, the proposed equity component in AES Ohio's capital structure shall not exceed the capital structure approved in Case No. 20-1651-EL-AIR." *Accord:* Testimony of Sharon R. Schroder, p. 13.

The Commission correctly recognized this provision of the Stipulation in its Order (p. 40). However, in paragraphs 116 and 217 of its Order, the Commission stated that the Stipulation included "a cap, at the currently authorized amount, on the return on equity in AES Ohio's next distribution rate case." That statement is incorrect. Instead, the Stipulation only caps the equity component of AES Ohio's capital structure in any distribution rate cases filed during the term of ESP 4. Stipulation, § X.V.

AES Ohio asks the Commission to clarify on rehearing that its order does not impose a cap on the return on equity that AES Ohio can seek in a distribution rate case.

II. THE RCR IS LAWFUL FOR ADDITIONAL REASONS NOT IDENTIFIED BY THE COMMISSION

The Commission correctly concluded that the RCR is lawful. Order, ¶¶ 123-179. AES Ohio would not ordinarily seek rehearing as to why the Commission accepted the position of the Company in its Order.

However, a recent decision by the Supreme Court of Ohio has resulted in uncertainty regarding what parties must do to preserve alternative arguments supporting Commission decisions on appeal. Specifically, in a recent case, a utility made a variety of arguments to the Commission regarding why it passed a statutory test. *In re Determination of Existence of Significantly Excessive Earnings for 2017 under Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St.3d 651, 2020-Ohio-5450, 166 N.E.3d 1191, ¶ 39-48. The Commission expressly agreed with some of the arguments made by the utility, but did not address others. *Id.*

The Court rejected the rationale used by the Commission (*id.* at ¶¶ 22-28) and expressly refused to consider the utility's alternative arguments in support of the Commission's decision:

"Ohio Edison made this argument in the ESP case, but the commission did not rely on it when it excluded the DMR revenue. Even though the commission ruled in Ohio Edison's favor, the company continued to argue that it was proper to exclude the revenue on these additional grounds.

* * *

We have previously explained that our practice is not to uphold a commission's decision based on a justification asserted by a party on appeal that is different from the justification the commission provided in its order."

Id. at ¶¶ 41, 47 (citations omitted).

AES Ohio is thus seeking rehearing on the issue of whether there are additional reasons why the RCR is lawful to preserve those alternative arguments, so that AES Ohio may rely on such arguments to support the Order in any appeal to the Supreme Court of Ohio.

A. The RCR Relates to a Limitation on Customer Shopping

The RCR is a nonbypassable rider that will recover three distinct amounts:

- (1) Identified amounts associated with Ohio Valley Electric Corporation ("OVEC Amounts");
- (2) Identified amounts associated with decoupling ("Decoupling Amounts");
and
- (3) Identified amounts that were not fully recovered under AES Ohio's prior RCR ("Prior RCR Amounts").

Stipulation, § V.I.B.1.-3.

Pursuant to R.C. 4928.143(B)(2)(d), an ESP may include

"[I]f 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 Ohio Power Co., 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶ 16.

In its Order, the Commission concluded (¶ 161) that RCR "relates to 'deferrals, including the future recovery of such deferrals,' one of the limited set of items listed under R.C. 4928.143(B)(2)(b). On rehearing, AES Ohio asks the Commission to make an additional holding that the "relating to" prong of R.C. 4928.143(B)(2)(d) is also satisfied because the RCR is

nonbypassable, and thus relates to a limitation on customer shopping under Division (B)(2)(d) pursuant to precedent from the Supreme Court of Ohio.

Specifically, in *In re Application Seeking Approval of Ohio Power Co.*, 2018-Ohio-4698, the Commission had approved a rider "based on Ohio Power's agreement to purchase power from the Ohio Valley Electric Cooperative." *Id.*, ¶ 3. OCC argued to the Court that the rider did not satisfy the "relating to" prong of R.C. 4928.143(B)(2)(d) since the rider was not a limitation on customer shopping. *Id.*, ¶ 27. The Court rejected OCC's argument and held that the rider constituted a "limitation on customer shopping" and thus satisfied the "relating to" prong of Division (B)(2)(d). *Id.*, ¶¶ 29, 31.

On rehearing, the Commission should thus hold that the "relating to" prong in Division (B)(2)(d) is satisfied because the RCR is a limitation on customer shopping. Such a holding would apply to recovery of all amounts recovered under the RCR, since all are recovered through on a nonbypassable basis.

B. Recovery of the Decoupling Amounts Was Lawful Under R.C. 4928.143(B)(2)(h)

The Commission correctly concluded that recovery of the Decoupling Amounts was lawful. Order, ¶¶ 161, 175-79.

On rehearing, the Commission should further expressly hold that recovery of the Decoupling Amounts was lawful under R.C. 4928.143(B)(2)(h). Specifically, that division of the ESP statute allows the Commission to approve:

"Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any

other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric 21 distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system." (Emphasis added).

There is no dispute that the Decoupling Amounts relate to distribution service.

AES Ohio Ex. 2, pp. 5-6 (Donlon); AES Ohio Ex. 9, Ex. A, pp. 3-4.

Further, recovery of the Decoupling Amounts would be "single issue ratemaking" under Division (B)(2)(h). Tr. 657 (Morgan) (agreeing that single issue ratemaking means "that when setting rates, you take an item and single it out for special treatment").

In addition, recovery of the Decoupling Amounts would constitute "revenue decoupling" under Division (B)(2)(h). Tr. 361-62 (Borer); Tr. 655-56 (Morgan).

Finally, the evidence demonstrates that AES Ohio and its customer expectations regarding reliability are "aligned" and that AES Ohio is placing "sufficient emphasis" on reliability under subsection (B)(2)(h). Staff Ex. 7, pp. 3-6 (Nicodemus); AES Ohio Ex. 1, pp. 21-23 (Schroder).

The Commission should thus conclude that recovery of the Decoupling Amounts through the RCR would be lawful under R.C. 4928.143(B)(2)(h).

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