**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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 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. 22-901-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. 22-902-EL-AAM |

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# APPLICATION FOR REHEARING
# BY
# OFFICE OF THE OHIO CONSUMERS' COUNSEL

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September 8, 2023

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**APPLICATION FOR REHEARING**
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The Office of the Ohio Consumers' Counsel ("OCC") files this Application to protect AES Ohio's nearly 500,000 residential consumers from paying additional coal plant subsidies, some nearly ten years old. The subsidies flow from AES Ohio's share of two coal plants, one in Indiana. These are the same coal plants that continue to receive utility consumer funding through what remains of tainted House Bill 6.

The PUCO's Opinion and Order approving the collection of past coal subsidies from consumers was unreasonable and unlawful and harms customers. OCC seeks rehearing in the following respects:

**ASSIGNMENT OF ERROR 1:** The PUCO erred in approving a Settlement which violates R.C. 4928.141, R.C. 4928.143 and R.C. 4905.22 by allowing AES Ohio to collect deferred OVEC costs incurred during *prior* electric security plans which would not stabilize rates or provide rate certainty *during the current* electric security plan.

A. The Supreme Court precedent establishes limitations on what can be charged to consumers under a utility's electric security plan.

B. Generation costs may be collected from consumers under an electric security plan, but the generation costs must be tied to current costs of providing consumers a standard service offer during the term of the electric security plan.

C. The PUCO is wrong that precedent in *Columbus Southern Power II* supports its collection of past coal plant subsidies.

D. The PUCO is wrong that collection of coal plant subsidies, approved as a limitation on shopping, supports collection of coal plant subsidy costs in the present case.

**ASSIGNMENT OF ERROR 2:** The PUCO erred by approving a Settlement which violates the rule against retroactive ratemaking, as provided by the U.S. and Ohio Constitutions, R.C. 4905.30 and R.C. 4905.32 and Supreme Court of Ohio precedent. The PUCO erred when it allowed AES Ohio to collect $10.6 million in carrying costs on the coal plant subsidy deferral even though AES Ohio never recorded the carrying costs as an expense on its books. The PUCO also erred, violating R.C. 4903.09, because the PUCO provided no reason for its decision to allow AES Ohio to collect $10.6 million in carrying costs without recording the carrying costs on its books.

A. The PUCO engaged in retroactive ratemaking when it approved future charges to consumer for past carrying charges dating back to 2014.

B. The PUCO erred when it failed to address OCC's arguments against carrying costs, in violation of Supreme Court precedent.

**ASSIGNMENT OF ERROR 3:** The PUCO erred by approving a settlement which violates R.C. 4903.09, important regulatory practices and principles and PUCO precedent, and is against the manifest weight of the evidence. The PUCO erred in approving collection of the coal plants subsidy deferrals without a prudency review.

**ASSIGNMENT OF ERROR 4:** The PUCO erred, violating R.C. 4928.40(A), R.C. 4928.141, and its Order in *DP&L's Transition Plan Case* (19-1687-EL-ETP) when it concluded that previously authorized transition costs could be collected from consumers under AES Ohio's Regulatory Compliance Rider.

A. The Consumer Education and Retail Settlement System deferrals were previously authorized by the PUCO as transition costs in Case No. 99-1687-EL ETP. Collection from consumers for those costs, by law, was required to end by December 31, 2010. Allowing such transition costs to be collected from consumers under AES Ohio's electric security plan

violates R.C. 4928.40(A) and 4928.141, thus violating regulatory practices and principles.

1. Under R.C. 4928.39, the accounting deferrals related to consumer education and settlement system implementation are a subset of transition charges that a utility must separately identify as regulatory assets.

2. The PUCO Order in the *DP&L Transition Plan case* approved consumer education and settlement system implementation accounting deferrals as transition charges.

3. Because the PUCO's Order in *DP&L's Transition Plan case* found that the consumer education and settlement system implementation deferrals are transition charges, the doctrines of collateral estoppel and res judicata and administrative finality prevent relitigating the issue and upending the PUCO's prior ruling.

**ASSIGNMENT OF ERROR 5:** The PUCO erred when it failed to take administrative notice of DP&L's own document showing that the accounting deferrals were part of the "transition costs" approved for collection in *DP&L's Transition Plan Case*.

A. Contrary to the PUCO finding otherwise, DP&L had the opportunity to explain and rebut its own evidence in the *DP&L Transition Plan case*, and the opportunity to respond to its own evidence in this case. Administrative notice should have been taken, consistent with Ohio Evid. R. 201.

B. AES Ohio would not have been prejudiced by taking administrative notice of its own schedule; rather the party prejudiced by the ruling was OCC.

The reasons for granting this Application for Rehearing are set forth in the attached memorandum in support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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## I. INTRODUCTION

AES Ohio wants to charge consumers $160 million over 3 years for its new electric security plan.[1] The plan includes a $28 million charge (plus an additional $10.6 million in carrying charges) for polluting, outdated OVEC coal plants.[2] Unfortunately for consumers, the PUCO approved the Settlement in its Opinion & Order.[3] The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its Opinion & Order, which harms consumers and is unjust and unreasonable.[4]

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[1] OCC Ex. 8.

[2] Settlement at 15.

[3] Opinion & Order (August 8, 2023).

[4] The Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992), considered whether a just and reasonable result was achieved with reference to the following criteria adopted by the PUCO in evaluating settlements: 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulation parties?; 2) Does

To protect consumers and the public interest, the PUCO should reconsider its Opinion & Order as described herein. Upon reconsideration, the PUCO should find that the Settlement should be modified, and it should remove charges to consumers for the coal plant subsidy and the carrying charges associated with the subsidy. Additionally, the PUCO should preclude AES Ohio from charging its consumers for $2.3 million in previously authorized transition charges.

## II. ASSIGNMENTS OF ERROR

**ASSIGNMENT OF ERROR 1: The PUCO erred in approving a Settlement which violates R.C. 4928.141, R.C. 4928.143 and R.C. 4905.22 by allowing AES Ohio to collect deferred OVEC costs incurred during *prior* electric security plans which would not stabilize rates or provide rate certainty *during the current* electric security plan.**

A utility is limited in what costs it may collect from consumers under an electric security plan.[5] But the PUCO approved a Settlement that allows AES Ohio to collect past coal subsidies that are not allowed, violating R.C. 4928.141 and 4928.143. The coal plant subsidy charges were incurred to serve AES Ohio's SSO consumers during prior electric security plans. They are not charges that are related in any way to providing consumers a standard service offer under the electric security plan approved in this case that will provide service to customers over the next three years.

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the settlement, as a package, benefit customers and the public interest?; and 3) Does the settlement violate any important regulatory principles or practices?

[5] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788. *See* Opinion & Order at ¶¶ 160-161 (hereinafter "*Columbus S. Power I*").

### A. The Supreme Court precedent establishes limitations on what can be charged to consumers under a utility's electric security plan.

The Supreme Court of Ohio ruled on the types of costs which can be collected in an ESP in *In re Application of Columbus S. Power Co. I*[6] *and II.* [7] Those cases concerned whether AEP could collect carrying costs on environmental spending under R.C. 4928.143(B)(2)(d).[8]

In *Columbus S. Power Co. I* the Court was interpreting and applying R.C. 4928.143(B)(2). That section states that an ESP may provide for or include, "without limitation, any of the following…"[9] AEP argued that this "without limitation" language merely listed non-exclusive examples of approved costs.[10] OCC, on the other hand, argued that this language was exclusive and only allowed the utility to collect the items specifically listed in the statute.[11]

The Supreme Court adopted OCC's statutory interpretation.[12] In so doing, 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.[13]

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[6] *In re Application of Columbus S. Power Co.,* 8 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 (hereinafter "*Columbus S. Power I*").

[7] 128 Ohio St.3d 512, 2011-Ohio-1788.

[8] *Id.* at ¶¶ 31-35.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at ¶ 32.

The Supreme Court remanded the case for the PUCO to decide whether AEP's claim for environmental carrying costs fell within any approved cost category listed in R.C. 4928.143(B)(2).[14] On remand, the PUCO ruled that AEP's environmental carrying costs were proper under R.C. 4928.143(B)(2)(d). The Supreme Court affirmed the PUCO's ruling in *Columbus Southern Power II,* after affirming that "carrying charges" are specifically identified as a permissible provision of an electric security plan and holding that such charges provide certainty to the utility and their customers regarding retail service.

### B. Generation costs may be collected from consumers under an electric security plan, but the generation costs must be tied to current costs of providing consumers a standard service offer during the term of the electric security plan.

Under R.C. 4928.141, the utility is tasked with providing "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 of the "firm supply of generation service" offered as part of the standard service offer to be established for consumers over the next three years under AES Ohio's 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.

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." 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

[14] *Id.* at ¶ 35.

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.

Under R.C. 4928.143(B)(2)(d), the PUCO has approved coal plant subsidies in other utilities' electric security plans, but it has never approved an ESP provision allowing past coal plant subsidies 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 found that the coal plant subsidies 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 certainty regarding retail electric service.[15] In that case, the PUCO found the power from the coal plants would be was sold into PJM during the electric security plan.

But here, the deferred coal plant subsidy costs are distinguishable from the coal plant subsidies 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 for consumers as it related to the proposed ESP. Here, any hedge would have functioned in the past, and not as part of the future standard service offer under AES Ohio's 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).

But the Regulatory Compliance Rider allows AES Ohio to collect deferred coal subsidies *from 2014-2017 plus the last two weeks of 2019.* Those are not costs related to

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

providing consumers a standard service offer during the term of the electric security plan at issue in this case. Those costs do not benefit AES Ohio's ESP IV consumers in any way, shape or form. During ESP IV, the OVEC plants won't be used to provide power for consumers – unlike the power plants in *Columbus S. Power I* and *II.* To the contrary, ESP IV consumers will receive power through a competitive bid process.

The OVEC costs might have benefitted consumers who received electricity from AES Ohio in 2014-2017 and late 2019. But there can be no benefit from these costs to consumers receiving electricity in 2023 and beyond. Only costs.

In sum, the PUCO erred, in violation of R.C. 4928.141 and 4928.143, by allowing AES Ohio to collect the deferred coal plant subsidies from 2014-2017 and late 2019. These were costs which were incurred during prior ESPs and which benefitted consumers under those past ESPs. And the coal plant subsidies do not stabilize rates or provide rate certainty during the current AES Ohio ESP.

### C. The PUCO is wrong that precedent in *Columbus Southern Power II* supports its collection of past coal plant subsidies.

The PUCO ruled that AES Ohio could collect the deferred coal subsidies because the Supreme Court of Ohio's ruling in *Columbus Southern Power II* established that past generation costs can be collected in a subsequent electric security plan.[16] It incorrectly applied *Columbus Southern Power II.*

The standard service offer ("SSO") in *Columbus Southern Power II* was quite different from the SSO in the present case. The *Columbus S. Power II* security plan was AEP's very first. When the Ohio utilities filed their initial security plans, the utilities used

[16] Opinion and Order at ¶ 162 (August 9, 2023).

their own generation plants (or affiliate-owned generation plants) to supply power for SSO consumers.[17]

In the *Columbus Southern Power* remand order, the PUCO reasoned that collecting environmental carrying costs allowed AEP to pay for the improvements needed to comply with new EPA regulations.[18] In turn, this enabled AEP to keep its plants running so the plants could be used to provide electricity for the SSO consumers paying the standard service offer during AEP's then-current ESP I. The PUCO explained:

> [T]he carrying charges recover the ongoing costs of environmental investments that were necessary to continue operation of the Companies' generation units and extend the useful lives of those facilities. Customers benefit from the lower cost power that they receive as a result.[19]

AES Ohio's deferred coal subsidy charges differ substantially from the environmental carrying costs approved in *Columbus Southern Power II.* AES Ohio incurred the deferred OVEC costs during two separate time periods: (1) October 1, 2014-October 31, 2017,[20] when AES Ohio was operating under ESP I and ESP II; and (2) during the last two weeks of 2019, starting when AES Ohio withdrew from ESP III on December 18, 2019.[21] The two-week period ended when R.C. 4928.148 – the Legacy Generation Rider approved under House Bill 6 – took effect.[22]

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[17] *See In the Matter of the Commission's Investigation of Ohio's Retail Electric Service,* Case No. 12-3151-EL-COI, Staff Report of Investigation at 14 (January 16, 2014) (showing the timeline for each Ohio electric distribution utility to switch to a competitive bid process for its SSO).

[18] *In re Columbus Southern Power,* Case No. 08-917-EL-SSO, Remand Order at 14-15 (October 3, 2011).

[19] *Id.* at 14, quoting AEP witness Nelson (emphasis added).

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

[21] *Id.*

[22] *Id.*

The environmental carrying costs in *Columbus Southern Power I* and *II* paid for AEP's power plants which supplied electricity to the SSO consumers during the period when its ESP was in effect. AEP used these costs to keep the plants running for the same consumers who paid for the carrying costs. In the present case, however, AES Ohio incurred the coal plant subsidies to serve consumers under ESP I and II. The PUCO's ruling improperly requires ESP IV consumers to pay these costs.

### D. The PUCO is wrong that collection of coal plant subsidies, approved as a limitation on shopping, supports collection of coal plant subsidy costs in the present case.

The PUCO ruled that AES Ohio could collect the deferred coal subsidies based on past Supreme Court and PUCO rulings which the costs to be collected as a "limitation on shopping."[23] The present case is distinguishable from past cases where a utility has been allowed to collect coal plant subsidies as part of an ESP.[24] Those cases (similar to the rulings in *Columbus Southern Power I* and *II*) involved coal plant subsidies that purportedly served as a hedge on price volatility during the term of the security plan.[25]

The leading case is *In re Application of Ohio Power Co.*[26] In that case, AEP was allowed to collect coal plant subsidies through a Power Purchase Agreement Rider ("PPA Rider"). The Supreme Court explained how the PPA Rider worked:

> As originally proposed, the PPA Rider was based on Ohio Power's agreement to purchase power from the Ohio Valley Electric Corporation ("OVEC"). The intended purpose of the rider was to provide a financial hedge against fluctuating prices in the wholesale power market in order to stabilize retail-customer rates.

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[23] Opinion and Order at ¶¶ 160-161 (August 9, 2023).

[24] *See, e.g., In re Application of Ohio Power Co.,* 155 Ohio St.3d 326, 2018-Ohio-4698.

[25] *Id.*

[26] 155 Ohio St.3d 326, 2018-Ohio-4698.

> The PPA Rider works as either a charge or a credit to Ohio Power's retail customers, depending on how OVEC's costs compare to the market rate. PJM Interconnection ("PJM") operates a competitive wholesale-electricity market where rates are set. If the revenue generated from sales to the PJM market is lower than the costs of the power, Ohio Power's customers would pay a surcharge to Ohio Power through the PPA Rider to make up the difference. But if the PJM market rates are higher than the power costs, customers would receive a credit through the PPA Rider. According to Ohio Power, OVEC's costs are relatively stable in comparison to the wholesale-power market and they rise and fall in a manner that is countercyclical to the market, thereby creating a hedge for ratepayers.[27]

Importantly, the coal plant subsidy costs incurred in *Ohio Power* were costs incurred *during the term of Ohio Power's ESP,* when the coal plants were purportedly acting as a financial hedge on the SSO price. The consumers paying for the coal plant subsidy costs were the same consumers who received the benefit from the financial hedge. Such is not the case here.

The PUCO also erred violating R.C. 4903.09 by not following past precedent and failing to provide any explanation for not doing so.[28] In past cases, the PUCO has approved collection of coal plant subsidies through an electric security plan to the extent that the costs are incurred while the electric security plan is in effect.[29] In the present case, however, the PUCO approved a Settlement that requires AES Ohio's ESP IV SSO consumers to pay power plant costs used to serve AES Ohio's ESP I and II SSO consumers. Most of the deferred OVEC costs were incurred during October 1, 2014-

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[27] *Id.* at ¶¶ 3-4.

[28] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm*., 124 Ohio St.3d 284,2009-Ohio-6764, 921 N.E.2d 1038, ¶ 1.

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

October 31, 2017.[30] These costs benefitted the AES Ohio consumers who received service at under ESP I and II. These costs will not benefit AES Ohio's ESP IV consumers.

During ESP I and II, AES Ohio used its own plants (including the OVEC plants) to provide SSO service. AES Ohio did not switch to a 100% competitively bid SSO process until after the PUCO approved its ESP III on October 20, 2017.[31] Requiring ESP IV consumers to pay for the cost of electricity used to serve ESP I and II consumers violates the matching principle and is therefore unjust and unreasonable.

The PUCO erred by approving a Settlement contrary to this past precedent without explaining any reason for failing to follow precedent, in violation of R.C. 4903.09.

**ASSIGNMENT OF ERROR 2**: **The PUCO erred by approving a Settlement which violates the rule against retroactive ratemaking, as provided by the U.S. and Ohio Constitutions, R.C. 4905.30 and R.C. 4905.32 and Supreme Court of Ohio precedent. The PUCO erred when it allowed AES Ohio to collect $10.6 million in carrying costs on the coal plant subsidy deferral even though AES Ohio never recorded the carrying costs as an expense on its books. The PUCO also erred, violating R.C. 4903.09, because the PUCO provided no reason for its decision to allow AES Ohio to collect $10.6 million in carrying costs without recording the carrying costs on its books.**

### A. The PUCO engaged in retroactive ratemaking when it approved future charges to consumer for past carrying charges dating back to 2014.

The PUCO erred by approving a Settlement which allows AES Ohio to collect about $10.6 million in carrying costs on the coal plant subsidies dating back to 2014. AES Ohio *never recorded carrying costs in its books* for the OVEC deferral and the

[30] *Id.*

[31] *In re AES Ohio ESP III,* Case No. 16-395-ES-SSO, Opinion and Order at 8 (October 20, 2017).

PUCO *never approved the collection of carrying costs on the OVEC deferral*.[32] Until now, after the fact. Retroactive ratemaking is defined as balancing a past rate with future rates.[33] That is what the PUCO approved in its order in this case.

This violates the prohibition against retroactive ratemaking as provided by the U.S. and Ohio Constitutions, R.C. 4905.30 and R.C. 4905.32 and Supreme Court of Ohio precedent. In addition, the PUCO's Opinion and Order do not address this argument. The PUCO therefore also erred by violating R.C. 4903.09, which requires the PUCO to provide adequate reasons to support its decisions.

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

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

[33] *Lucas Cty. Commrs. v. Public Util. Comm.*, 80 Ohio St.3d 344, 349.

> 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 without carrying charges are the only lawful rates AES Ohio was allowed to charge for that time period. It cannot adjust future rates for the fact that it did not collect carrying charges in past rates. That amounts to retroactive ratemaking, which is prohibited in Ohio.

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*.[34] 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.[35]

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

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

[35] *Id.*

> commission, unless someone by affirmative act secures a stay of such order.[36]

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 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.[37]

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."[38]

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

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

[38] 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."

The PUCO's ruling effectively requires consumers service under ESP IV to pay for coal plant subsidy costs which purportedly benefitted consumers who were served under AES Ohio's prior security plans (ESP I and II). The PUCO's ruling allows AES Ohio to collect these costs even though the costs weren't reflected in the tariffs in effect during ESP I and II.

The PUCO erred by approving a Settlement which allows AES Ohio to retroactively collect from consumers rates for $10.6 million in carrying costs on for periods dating back to 2014-2017 and 2019, even though AES Ohio *never recorded carrying costs on its books,* as AES Ohio witness Donlon explained:

> Q. The amount of the OVEC deferral, as presented in the Application, was about 28.9 million.
>
> A. Yeah, the Application I want to say was 28.7, but I could be off a bit. I would have to look.
>
> Q. The Stipulation provides for the Company to collect carrying costs on that amount?
>
> A. No. The Stipulation allows carrying cost at 4.4 of the stipulated OVEC amount, which excludes about $660 thousand.
>
> Q. And the OVEC deferral covers a time period of 2014 to 2017 plus a few days at the end of 2019; isn't that right?
>
> A. That's correct.
>
> Q. And when did the Company begin recording carrying costs on that amount?
>
> A. Recording -- the Company has not recorded carrying costs on our GAAP books.
>
> * * *

> Q. And in the review that you described, you could find no indication that the Company ever recorded carrying costs for this OVEC deferral?
>
> A. I don't believe we have so -- but I wasn't searching for that directly.
>
> Q. When -- when in your view will the Company begin to record carrying costs for the OVEC deferral?
>
> A. So in this case once -- per GAAP rules and the way the Company evaluates our deferrals, since it will become probable once an order comes out, and so with the order we would record the historic carrying costs. We wouldn't -- I'll stop there.
>
> Q. Have you calculated the approximate amount of the OVEC -- or of the carrying costs of the OVEC deferral?
>
> A. If the order comes out in like, say, August 1, it is roughly $10 million of carrying costs.[39]

### B. The PUCO erred when it failed to address OCC's arguments against carrying costs, in violation of Supreme Court precedent.

OCC's Initial Brief argued that this constitutes improper retroactive ratemaking.[40] Yet the PUCO's Opinion and Order is silent on this point and failed to address OCC's arguments. The PUCO erred by violating R.C. 4903.09 because the PUCO provided no reason for its decision to allow AES Ohio to collect $10.6 million in carrying costs on the OVEC deferral even though AES Ohio never recorded the carrying costs on its books.

The Supreme Court of Ohio has ruled that a party must establish the following three things to prevail on a claim that a PUCO ruling violates R.C. 4903.09:

(1) the PUCO initially failed to explain a material matter;

(2) the party brought that failure to the PUCO's attention through an application for rehearing; and

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

[40] OCC Corrected Initial Brief at 42 (May 30, 2023).

(3) the PUCO still failed to explain the matter in its decision on rehearing.[41]

OCC had complied with the first two requirements because $10.6 million is a material amount and OCC brought this to the PUCO's attention in OCC's Initial Brief and once again in this Application for Rehearing. So now the PUCO must explain why it decided to allow AES Ohio to collect $10.6 million in carrying costs on the OVEC deferral even though AES Ohio never recorded the carrying costs on its books. The PUCO's continued failure to address this argument violates R.C. 4903.09.

**ASSIGNMENT OF ERROR 3: The PUCO erred by approving a settlement which violates R.C. 4903.09, important regulatory practices and principles and PUCO precedent, and is against the manifest weight of the evidence. The PUCO erred in approving collection of the coal plants subsidy deferrals without a prudency review.**

As discussed earlier, R.C. 4903.09 requires the PUCO to provide adequate reasons to explain its rulings. PUCO precedent requires a thorough managerial and operational prudency review before approving OVEC costs.[42] The PUCO failed to do so here. The PUCO tried to explain its ruling by stating that a prudency review was done. The review in this case, however, was merely a financial review.

The PUCO failed to explain why it did not require a full managerial and operational prudency review for the OVEC costs, as the PUCO has regularly done in other cases involving OVEC costs.[43] The PUCO's failure to follow precedent without

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[41] *Columbus S. Power I,* 128 Ohio St.3d 512, 2011-Ohio-1788. *See* Opinion & Order at ¶ 71.

[42] *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company*, Case No. 18-1003-EL-RDR, Entry, Attachment: Request for Proposal No. RA18-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 5 (June 13, 2018); *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR, Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 5 (January 15, 2020); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc*., Case No. 20-167-EL-RDR, Entry, Attachment: Request for Proposal No. RA20-PPA-3: An Independent Audit of the Reconciliation Rider of Duke Energy Ohio at 5 (February 13, 2020).

[43] *Id.*

explanation was unlawful. As discussed earlier, the Supreme Court of Ohio has ruled that a party must establish the following three things to prevail on a claim that a PUCO ruling violates R.C. 4903.09:

(1) the PUCO initially failed to explain a material matter;

(2) the party brought that failure to the PUCO's attention through an application for rehearing; and

(3) the PUCO still failed to explain the matter in its decision on rehearing.[44]

In its normal managerial and operational prudency reviews of OVEC costs, the PUCO reviews the following areas of the utility's managerial and operational performance: PJM bidding practices, coal purchases, environmental compliance, O&M practices and capital expenditure spending.[45] For example, in Case No. 18-1004-EL-RDR, the PUCO required an audit into the bidding practices into the PJM markets, fuel and variable O&M expenses, capital expenses, environmental compliance practices, plant maintenance practices and power plant performance.[46]

In the present case, the PUCO explained its ruling by stating a prudency review was performed, which caused certain costs to be disallowed.[47] At hearing, PUCO Staff witness Jonathon Borer admitted that the PUCO Staff merely performed a financial audit and failed to do a prudency audit of any of the managerial and operational areas which the PUCO normally does when reviewing OVEC costs. Mr. Borer testified as follows:

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[44] *Columbus S. Power I,* 128 Ohio St.3d 512, 2011-Ohio-1788. *See* Opinion & Order at ¶ 71.

[45] *Id.*

[46] *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company*, Case No. 18-1003-EL-RDR, Entry, Attachment: Request for Proposal No. RA18-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 5-7 (June 13, 2018).

[47] Opinion and Order at ¶ 163 (August 9, 2023).

Q. (By Mr. Finnigan) Now in the present case, did the Commission issue any entry which defined the scope of the prudence review that you would do for the OVEC deferral?

A. No, not that I am aware of.

Q. In the present case did -- did anyone file a written report in the docket of the case which contained the findings from this prudence review for the OVEC deferrals?

A. No.

Q. In the course of the present case, or at any prior time, did Staff investigate OVEC's operations on an hourly basis during the 2014-2017 time period to determine whether OVEC could have purchased power on the open market at a lower cost than its cost to produce the power during that time?

A. Not that I am aware of.

Q. Okay. In the present case, or at any prior time, did Staff investigate whether AES Ohio's purchases of power from OVEC on an hour-by-hour basis during the 2014 to 2017 time period were less costly than purchases which AES Ohio could have made on the open market?

A. Not that I am aware of.

. . . .

Q. (By Mr. Finnigan) In the present case, at any time prior, did Staff investigate whether Ohio's purchases of power from OVEC, on an overall basis during the 2014 through 2017 time period, were less costly than power purchases it could have made on the open market?

A. I don't know.

Q. In the present case, or at any prior time, did Staff investigate what proportion of OVEC's coal supply contracts covering 2014 through 2017 purchased under long-term contracts versus short-
contracts?

A. I don't know.

Q. Are you -- are you familiar with the concept of laddering in the field of energy procurement?

A. No.

. . . .

Q. (By Mr. Finnigan) Okay. In the present case, or at any prior time, did Staff investigate whether OVEC used any laddering practices in its coal supply purchases?

A. I don't know.

Q. In the present case, or at any prior time, did Staff investigate the practices OVEC followed to determine whether the heat content of the coal it received was the same as the heat content in the coal that it contracted for?

A. I don't know.

Q. In the present case, or at any prior time, did Staff investigate the practices that OVEC followed during 2014 through 2017 to determine whether the sulfur content of the coal delivered to the power plants was of the same quality specified in the contracts?

A. I don't know.

Q. In the present case, or at any prior time, did Staff investigate whether OVEC procured its coal for 2014 through 2017 using competitive bidding processes?

A. I don't know.

Q. During the 2014 through 2017 time period, was the coal delivered to the OVEC plants by rail, barge, or both?

A. I don't know.

Q. During the -- strike that. Did Staff investigate, in the course of this case or any prior time, whether the prices paid by OVEC for transporting coal to the plants during 2014 through 2017 were reasonable in comparison to market prices?

A. I don't know.

> Q. Did Staff investigate whether OVEC used competitive bidding processes for transportation services during 2014 through 2017?
>
> A. I don't know.
>
> Q. In the present case, or at any prior time, did Staff investigate OVEC's environmental compliance activities during the 2014 through 2017 period to determine whether OVEC operated the plants in accordance with all applicable environment laws and regulations?
>
> A. I do not know.
>
> Q. In the present case, or at any prior time, did Staff investigate the practices that OVEC followed to obtain emission allowances for the plants during the 2014 through 2017 time period?
>
> A. I don't know.
>
> Q. Did OVEC use a competitive bidding process to obtain those emission allowances?
>
> A. I do not know.
>
> Q. In the present case, or any prior time, did OVEC -- or did Staff investigate whether there were any significant plant outages during the 2014 through 2017 period at the OVEC plants which may have been caused by OVEC's own poor operation and maintenance practices?
>
> A. I don't know.[48]

The PUCO's clear failure to perform a managerial and operational prudency audit of the OVEC cost is inconsistent with the prior PUCO rulings cited above. The Entries in those cases show that the PUCO did a thorough prudency audit of the managerial and operational prudency of the OVEC costs in those cases, involving areas such as PJM bidding practices, coal purchases, environmental compliance, O&M practices and capital

[48] Hearing Tr. (Vol. II) at 407-412.

expenditure spending. The PUCO's failure to do so here is inconsistent with prior precedent. The PUCO's departure from these rulings without any explanation violates R.C. 4903.09.[49]

The PUCO also violated R.C. 4903.09 by providing no explanation for why it deviated from prior precedent and placed the burden of proof on OCC to prove imprudence. The PUCO's ruling states: "Notwithstanding the ample discovery provided by AES Ohio in this case, OCC identifies no OVEC costs which OCC believes to be imprudent, and OCC witness Morgan cited no deficiencies in the Staff review other than the fact that Staff did not employ a third-party auditor."[50]

In cases involving affiliate transactions, there is no general presumption of prudence involving affiliate transactions.[51] In such cases, the utility has the burden of proof to establish that the affiliate transaction was prudent.[52] Moreover the utility has the burden of proof to establish that its charges are just and reasonable.[53]

OVEC is an affiliate of AES Ohio because AES Ohio owns 4.9% of OVEC.[54] O.A.C. 4901:1-37-01(A) defines "affiliates" as "companies that are related to each other due to common ownership or control." Ohio has a strong public policy against the abuse of affiliate transactions.[55] Given this affiliate relationship between AES Ohio and OVEC,

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[49] *Columbus S. Power I,* 128 Ohio St.3d 512, 2011-Ohio-1788.

[50] *Id.*

[51] *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.,* 409 S.W.2d 371, 378 (March 2013).

[52] *Id.*

[53] *In re Application of Suburban Natural Gas Co.,* 166 Ohio St.3d 176, 2021-Ohio-3224 at ¶ 40.

[54] Ohio Valley Electric Corporation and subsidiary Indiana-Kentucky Electric Corporation Annual Report - 2022 at 1.

[55] R.C. 4928.02(H), R.C. 4928.17 and O.A.C. Chapter 4901:1-37.

the PUCO violated R.C. 4903.09 by requiring, without explanation, why OCC has the burden of proof to establish that the OVEC costs were imprudent.

The Settlement allows AES Ohio to collect $28 million in deferred OVEC costs.[56] In an affiliate transaction with great potential for improper cross-subsidization, it was all the more important for the PUCO to follow normal precedent –by requiring a managerial and operational prudency review and by requiring AES Ohio to carry the burden of proof that the costs were prudent. The PUCO failed to follow normal precedent, without explanation. The PUCO therefore erred in violation of R.C. 4903.09.

**ASSIGNMENT OF ERROR 4: The PUCO erred, violating R.C. 4928.40(A), R.C. 4928.141, and its Order in *DP&L's Transition Plan Case* (19-1687-EL-ETP) when it concluded that previously authorized transition costs could be collected from consumers under AES Ohio's Regulatory Compliance Rider.**

**A. The Consumer Education and Retail Settlement System deferrals were previously authorized by the PUCO as transition costs in Case No. 99-1687-EL ETP. Collection from consumers for those costs, by law, was required to end by December 31, 2010. Allowing such transition costs to be collected from consumers under AES Ohio's electric security plan violates R.C. 4928.40(A) and 4928.141, thus violating 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) sought to be collected in the PUCO-approved Settlement were created in Case No. 99-1687-EL-ETP.[57] OCC pointed out that the Order in that case approved AES Ohio's electric transition plan and identified these accounting deferrals as "transition costs" to be collected from consumers, characterizing them as "$28.6 million in accounting related

[56] Stipulation and Recommendation at 15 (April 10, 2023).

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

expenses."[58] OCC sought to clarify the record by seeking administrative notice of DP&L's Amended Application, Part F, Schedule TC-2, which set forth DP&L's transition costs in the case. (*See* Attached). That schedule, submitted by DP&L as part of the record in the case, identifies as "transition costs" the deferrals DP&L is seeking to collect in this case, though the Regulatory Compliance Rider.

OCC advocated that 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 was 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."

OCC opposed the Settlement provision allowing AES Ohio to collect these previously authorized deferred transition costs from consumers. OCC explained that collecting these costs from consumers violates the law, and is thus, contrary to important regulatory practices and principles, failing the third prong of the PUCO's settlement test. OCC asked the PUCO to reject the Settlement, or at the very least, amend the Settlement to preclude AES Ohio from collecting these costs from consumers.

The PUCO found that collection of $2.3 million in accounting related expenses does not violate important regulatory practices and principles.[59] The PUCO disagreed

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[58] *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 (September 21, 2000), Opinion and Order at 27 (September 21, 2000) (*DP&L Transition Plan Case*).

[59] *AES Ohio ESP IV,* Opinion and Order at ¶ 164.

with OCC that the accounting related expenses are "transition costs."[60] The PUCO further concluded that the General Assembly "did not intend for retail settlement costs or the consumer education to be considered transition costs."[61] And the PUCO claimed that it "did not approve the accounting related expenses as 'transition costs.'"[62] The PUCO also found that the "Commission considered the approval of the deferral, for future recovery, of the accounting-related expenses as a request separate from the request for approval of transition costs."[63]

The PUCO has misconstrued the law and its prior Order. Its mistaken findings are not supported by the record, contrary to R.C. 4903.09. Rehearing should be granted, and the PUCO should modify or abrogate its order to preclude the collection of these past transition costs from consumers.

**1. Under R.C. 4928.39, the accounting deferrals related to consumer education and settlement system implementation are a subset of transition charges that a utility must separately identify as regulatory assets.**

Under R.C. 4928.39, when an electric utility seeks to collect transition revenues from consumers, the PUCO "by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of transition costs of the utility to be received as transition revenues***." And the PUCO is also required to "separately identify regulatory assets of the utility that are part of the total allowable amount of transition costs determined under Section 4928.40 of the Revised Code***." Under R.C. 4928.40, the

[60] *Id.* at ¶ 165-166.

[61] *Id*. at ¶ 167.

[62] *Id.* at ¶ 168.

[63] *Id*. at ¶ 169.

Legislature set limits on the collection period for transition charges being collected from consumers. DP&L was required to collect its transition charges by December 31, 2010.

DP&L sought to collect transition charges from consumers in Case No. 99-1687-EL-ETP (*DP&L Transition Plan Case*). That case was resolved by settlement, with the PUCO approving not only DP&L's transition plan, as amended, but also approving a near unanimous settlement.[64] Under the PUCO approved settlement, it was agreed that DP&L's transition plan filings, including the regulatory assets created under the plan, complied with R.C. 4928.39 and 4928.40:

> DP&L and the Signatory Parties agree that, unless modified by this settlement or required to update DP&L's tariffs for the results of this case, DP&L's transition plan filings, as amended and supplemented, should be approved and implemented. Further, the parties agree that, as part of the order in this case, the Commission should grant the necessary accounting authority for DP&L's regulatory books and records to allow the provision of this settlement to be implemented, and that all such regulatory assets created and recovered pursuant to this Stipulation are in compliance with the requirements of Sections 4928.39 and 4928.40, Revised Code.[65]

The PUCO in the *DP&L Transition Plan case* described DP&L's amended transition plan as containing $699 million in transition costs and a request for deferred recovery of an additional $28.6 million in accounting related expenses.[66] Included in the deferred accounting expenses, giving rise to the creation of regulatory assets, was $2.3 million sought to be collected from AES Ohio consumers in this case. AES Ohio even admits that it "may have labeled the costs [accounting deferrals] as transition costs in the

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[64] *DP&L Transition Plan case*, Opinion and Order at 40.

[65] *DP&L Transition Plan case*, Opinion and Order at 12.

[66] *Id.,* Opinion and Order at 27 (*see* heading entitled "section 4928.34(A)(12), Revised Code, Transition Issues, Revenues and Charges 1. Transition Revenues").

1999 case," though it now has conveniently adopted the view that "they do not actually meet the statutory definition of transition costs."[67]

The $28.6 million in accounting deferrals are the very "regulatory assets of the utility that are part of the total allowable amount of transition costs" described in R.C. 4928.39. By law they were to be separately identified, as DP&L did in its Amended Transition Plan submitted in the *DP&L Transition Plan case*.

The separate identification of the deferrals (which created a regulatory asset for DP&L) is not, as mistakenly asserted by the PUCO, evidence that "the Commission considered the approval of the deferral, for future recovery, of the accounting-related expenses as a request separate from the request for approval of transition costs."[68] Rather it is quite simply evidence that the amended transition plan complied with Ohio law (R.C. 4928.39) requiring regulatory assets that are an allowable part of transition costs (under R.C. 4928.40) be separately identified.

**2. The PUCO Order in the *DP&L Transition Plan case* approved consumer education and settlement system implementation accounting deferrals as transition charges.**

The PUCO is mistaken in its interpretation that the regulatory assets created as a result of the $28.6 million in accounting deferral are not transition costs. They are. The PUCO's reading of the Order in DP&L's Transition Plan case is in error.

As noted above, the PUCO approved the settlement with the language quoted above, referencing the creation of regulatory assets (deferred accounting expenses) and acknowledging that "all such regulatory assets created and recovered pursuant to this Stipulation are in compliance with the requirements of Sections 4928.39 and 4928.40,

[67] *AES Ohio ESP IV*, AES Ohio Opposition to Motion to Take Administrative Notice at 6 (May 25, 2023).

[68] *AES Ohio ESP IV*, Opinion and Order at ¶ 169.

Revised Code."[69] Those are the code sections that define "total allowable transition costs" and the ensuing establishment of a transition charge.

Additionally, paragraph 8, one of the crucial ordering paragraphs in the *DP&L Transition Plan case*, makes it all the more clear:

> 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.[70]

The PUCO's reading otherwise, where it focuses on a few lines in the PUCO's Opinion cannot withstand scrutiny. The PUCO is correct that the section of the Order it quoted does refer to DP&L's further request for additional accounting related expenses.[71] *But as explained above, under the law (R.C. 4928.39) the accounting deferrals are a subset of transition charges that a utility can collect from consumers*. And DP&L's separate request for the accounting related expenses accommodated the PUCO's obligation under R.C. 4928. 39 to "separately identify regulatory assets of the utility that are part of the total allowable amount of transition costs determined under Section 4928.40 of the Revised Code***."

### 3. Because the PUCO's Order in *DP&L's Transition Plan case* found that the consumer education and settlement system implementation deferrals are transition charges, the doctrines of collateral estoppel and res judicata and administrative finality prevent relitigating the issue and upending the PUCO's prior ruling.

The PUCO found that it "disagree[s] with OCC's characterization of these accounting-related expenses as 'transition costs,' the recovery of which is precluded by

[69] *DP&L Transition Plan case*, Opinion and Order at 12.

[70] *Id*., Opinion and Order at 40.

[71] *AES Ohio ESP IV*, Opinion and Order at ¶ 69

law."[72] It concluded that the costs are not "directly assignable or allocable to retail electric generation service" as required under R.C. 4928.39.[73] It further ruled that the General Assembly "did not intend for the retail settlement system expenses or the consumer education expenses to be considered transition costs" under the principle of statutory construction known as expressio unius est exclusio alterius.[74]

All very interesting new theories from the PUCO but the new findings cannot be used to collaterally attack the PUCO's prior order. That would be contrary to the doctrines of res judicata and collateral estoppel. The PUCO does itself a disservice when it undermines the finality of its prior Order in *DP&L's Transition Plan case*.

Res judicata and collateral estoppel "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." *In re Application of Ohio Power Co., 144 Ohio St.3d 1,* 2015-Ohio-2056 at ¶ 20 (*quoting Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). In this case, the question of whether the consumer education and settlement system charges were transition charges that could be collected from consumers was necessarily determined by the PUCO in the *DP&L Transition Plan case*. There the parties, including DP&L, were given the opportunity to litigate the issue. And parties had the opportunity to seek review of an adverse ruling. The PUCO addressed applications for rehearing in that case. DP&L had 60 days to file an appeal. It did not. Res judicata and collateral estoppel preclude DP&L

[72] *AES Ohio EP IV*, Opinion and Order at ¶ 165.

[73] *Id.* at ¶ 166.

[74] *Id.* at ¶ 167.

from relitigating the question of whether DP&L's consumer education and settlement system charges were transition charges.

And the need for administrative finality should act to preclude the PUCO from upending its prior decision in the *DP&L Transition Plan case.* As the PUCO itself has noted "[t]he Commission should respect our precedents in order to assure the predictability which is essential in administrative law."[75] The PUCO can revisit a particular decision but if it does change course, it must explain why, and the course of action must be lawful. *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm*., 124 Ohio St.3d 284,2009-Ohio-6764, 921 N.E.2d 1038, ¶ 1. Here the PUCO failed to explain how its prior order was in error. Rehearing should be granted.

**ASSIGNMENT OF ERROR 5: The PUCO erred when it failed to take administrative notice of DP&L's own document showing that the accounting deferrals were part of the "transition costs" approved for collection in *DP&L's Transition Plan Case.***

In its Opinion and Order the PUCO denied OCC's request for administrative notice of DP&L's Amended Application, Part F, Schedule TC-2.[76] (*See* attached). That document ("Summary of Transition Costs") conclusively shows that the consumer education costs and billing system costs were part of the transition costs DP&L requested (and received approval to charge customers for). The Schedule was filed by DP&L in April of 2000 and was part of DP&L's Amended Application that was approved by the PUCO.

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[75] *See, e.g., In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan,* Case No. 08-1094-EL-SSO, et al., Fifth Entry on Rehearing at ¶ 41 (June 16, 2021), citing to *Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 16 (quoting *Cleveland Elec. Illum. Co.,* 42 Ohio St.2d at 431, 330 N.E.2d 1).

[76] *AES Ohio ESP IV,* Opinion and Order at ¶ 47.

In denying OCC's request for administrative notice, the PUCO found that "AES Ohio has not had an opportunity to prepare for, explain, or rebut the evidence for which OCC seeks administrative notice."[77] And the PUCO noted that the evidentiary hearing had closed at the time OCC filed its request for administrative notice. The PUCO stated that OCC failed to move to reopen the proceedings and made no attempt to show that the evidence could not have been presented earlier in this proceeding.[78] The PUCO also found that OCC's cross examination of Witness Schroder did not adequately provide AES Ohio or others with the opportunity to prepare for, explain, or rebut the evidence.

The PUCO also found that AES would be prejudiced by the taking of administrative notice.[79] The PUCO noted that no witness has been made available to explain the nature and import of the documents, "thus, AES Ohio has had no opportunity to cross-examine a witness to dispute their explanation of the documents. AES has had no opportunity to present its own witness regarding the proper interpretation of Part F."[80] The PUCO concluded that "AES Ohio is directly impacted by this issue and that AES Ohio, which has had no opportunity to prepare for, explain or rebut this evidence, would be prejudiced by the taking of administrative notice, at this point in the proceeding."[81]

The PUCO erred in its finding. It should have allowed administrative notice to be taken of Part F, Schedule TC-2. AES Ohio had the opportunity to explain and rebut the evidence. In fact, it is in the best position to do so since it was DP&L's evidence! And the party prejudiced by the PUCO ruling is OCC, not DP&L.

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[77] *Id.*

[78] *Id*.

[79] *Id.* at ¶ 49.

[80] *Id.*

[81] *Id*.

### A. Contrary to the PUCO finding otherwise, DP&L had the opportunity to explain and rebut its own evidence in the *DP&L Transition Plan case*, and the opportunity to respond to its own evidence in this case. Administrative notice should have been taken, consistent with Ohio Evid. R. 201.

The guiding principle for administrative notice under Ohio Evid.R. 201(D) is that "[a] court shall take judicial notice if requested by a party and supplied with necessary information."[82] Rule 201(D) refers to such notice as "mandatory." OCC requested administrative notice and supplied the PUCO with the necessary information. Further Ohio Rule 201(F) provides that "[j]udicial notice may be taken at any stage of the proceeding." OCC requested notice before the briefing stage of the proceeding. Thus, in compliance with Ohio Rules of Evidence, administrative notice should have been taken.

In the order denying administrative notice the PUCO stated that "the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995) citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d at 186, 532 N.E.2d 1307."[83] But, as the Ohio Supreme Court noted, when considering administrative notice, each case must be resolved on its facts.[84]

Here the facts establish that the evidence is not new—its old. And the evidence was produced by DP&L, filed at the PUCO, and relied upon by the PUCO in ruling on and accepting DP&L's transition plan. DP&L most certainly had knowledge of, and an adequate opportunity to explain and rebut the evidence then when it produced the

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[82] Evid.R. 201(D).

[83] *AES Ohio ESP IV*, Opinion and Order at ¶ 46.

[84] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d at 8.

evidence to support its transition plan. *The evidence asked to be administratively noticed was produced by DP&L!*

And AES Ohio had, and took, the opportunity in this case to respond to the evidence OCC sought to admit through administrative notice. DP&L (and Staff) filed a memorandum in opposition to OCC's motion for administrative notice. DP&L asserted in its memo its arguments about why the costs in question are not transition costs.[85] And AES Ohio addressed the issues in its Reply Brief.[86] Other parties also addressed the transition cost issue in their reply briefs, including the PUCO Staff. The PUCO's finding that parties were deprived of an opportunity to respond to the evidence was mistaken and factually unsupported, violating R.C. 4903.09.

The Ohio Supreme Court has held that the PUCO may take administrative notice of the record in an earlier proceeding, subject to review on a case-by-case basis. The Court has ruled that "parties to the prior proceeding presumably have knowledge of, and an adequate opportunity to explain and rebut, the evidence…"[87] The PUCO itself has recognized the appropriateness of administrative notice where parties had specific opportunities to explain and rebut evidence in a prior proceeding: "Further, we note that RESA and IGS, as parties to the 2015 GCR Case, were provided an opportunity, in that case, to present testimony and exhibits at the hearing addressing the m/p audit report,

[85] *AES Ohio ESP IV*, AES Ohio Memo Contra at 6-10 (May 25, 2023).

[86] *AES Ohio ESP IV,* AES Reply Brief at 6-10 (June 5, 2023).

[87] *Allen v. Pub. Util. Comm*., 40 Ohio St.3d 184, 185-186, 532 N.E.2d 1307 (1988). *See, e.g.,* PUCO holdings acknowledging this precedent: *In the Matter of the Application of Duke Energy, Inc. for Approval to Modify Rider FBS, Rider FBS, Rider FRAS, and Rider GTS*, 2016 Ohio PUC LEXIS 928, *17.

cross-examine the m/p auditor, submit post-hearing briefs, and otherwise fully respond to the m/p audit report."[88]

Consistent with this Ohio Supreme Court and PUCO precedent, Ohio Rule of Evidence 201 and based on the specific facts in this case, the PUCO should have taken administrative notice. Reliance on precedent urged by the PUCO Staff (*Forest Hills Util. Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 1, 3, 313 N.E.2d 801 (1974)) is mistaken. The facts are distinguishable.

In *Forest Hills* the PUCO performed an analysis of its own orders in cases where the utility was not a party. The analysis was then incorporated into a commission order where the utility was not afforded the opportunity to question staff witnesses that performed the analysis. Denying the motion to take administrative notice in *Forest Hills* was appropriate. But not so here.

The facts do matter. The facts here control and they are not supportive of the PUCO's mistaken finding that DP&L had no opportunity to explain and rebut its own exhibit. Because DP&L had the opportunity in its transition plan case and in this case to explain and rebut its own exhibit, the PUCO's finding otherwise was in error and unsupported by the record, violating R.C. 4903.09.[89] The PUCO abused its discretion in not granting OCC administrative notice of the compelling evidence from DP&L's Transition Plan Case. Rehearing should be granted.

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[88] *In the Matter of the Application of Duke Energy, Inc. for Approval to Modify Rider FBS, Rider FBS, Rider FRAS, and Rider GTS*, 2016 Ohio PUC LEXIS 928, *17. *See also, In the Matter of the FirstEnergy Utilities for Authority to Provide for a Standard Service Offer,* Case No. 12-1230-EL-SSO, Opinion and Order at 19-21 (July 18, 2012).

[89] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166, 666 N.E.2d 1372.

### B. AES Ohio would not have been prejudiced by taking administrative notice of its own schedule; rather the party prejudiced by the ruling was OCC.

As noted above, the Supreme Court of Ohio has held that administrative notice is proper where the complaining party knew of the administrative notice, had sufficient opportunities to explain and rebut the evidence, but chose not to do so.[90] Because AES Ohio was given the opportunity to explain and rebut its own prior exhibit from its transition plan filing, there was no prejudice or impact upon it that should bar the taking of administrative notice. Where the real prejudice lies is with OCC.

By denying OCC's motion for administrative notice, the PUCO deprives OCC of the opportunity to provide evidence to show how the PUCO-approved Settlement in this proceeding violates regulatory practices and principles, violating the controlling settlement standard. That is real prejudice.

## III. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its Opinion & Order, which, as written, will harm consumers. Granting rehearing as requested by OCC is necessary to ensure that AES Ohio consumers are not subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will be forced to pay tens of millions in subsidies for deregulated, old, inefficient and polluting coal-fired power plants. And consumers will have to pay for transition charges that should have been collected 13 years earlier. The PUCO should protect consumers by modifying its August 8, 2023 Opinion & Order, as requested by OCC.

[90] *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 532 N.E.2d 1307.

Respectfully submitted,

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*/s/ Maureen R. Willis*
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 8th day of September 2023.

*/s/ Maureen R. Willis*
Maureen R. Willis
Acting Legal Director

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

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# The Dayton Power and Light Company
## Case No. 99-1687-EL-ETP (REVISED)
## Summary of Transition Costs

FILE: TC-2
TAB: TC-2 Page 1 of 1
WORKPAPER REFERENCE: None WITNESS RESPONSIBLE: R.D. Reid

| Line | | | | | |
|---|---|---|---|---|---|
| 1 | | | | | |
| 2 | | Regulatory Transition Costs | | | |
| 3 | | Regulatory Assets | $ | 213,059,075 | ^1 |
| 4 | | | | | |
| 5 | | Customer Transition Costs | | | |
| 6 | | Generation Transition Costs | $ | 441,672,683 | ^1 |
| 7 | | | | | |
| 8 | | Employee Assistance Costs | $ | 11,463,371 | ^1 |
| 9 | | | | | |
| 10 | | Tax Timing Overlap Costs | $ | 32,957,264 | ^1 |
| 11 | | | | | |
| 12 | | Accounting Order Recovery | | | |
| 13 | | Consumer Education Costs | $ | 3,600,960 | |
| 14 | | | | | |
| 15 | | Billing System Modification Costs | $ | 20,000,000 | ^2 |
| 16 | | | | | |
| 17 | | Settlement System Implementation Costs | $ | 5,000,000 | ^2 |
| 18 | | | | | |
| 19 | | Total Transition Costs | $ | 727,753,353 | |
| 20 | | | | | |
| 21 | | | | | |
| 22 | Notes: | | | | |
| 23 | ^1 | Stated on a Revenue Requirements Basis | | | |
| 24 | ^2 | Preliminary Estimates | | | |
| 25 | | | | | |
| 26 | | | | | |

Summary: App for Rehearing Application for Rehearing by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R..