

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
THE SIGNIFICANTLY EXCESSIVE  
EARNINGS TEST UNDER R.C. 4928.143(F)  
AND OHIO ADM.CODE 4901:1-35-10 FOR  
THE DAYTON POWER AND LIGHT  
COMPANY D/B/A AES OHIO.

CASE NO. 21-588-EL-UNC

IN THE MATTER OF THE APPLICATION OF  
THE SIGNIFICANTLY EXCESSIVE  
EARNINGS TEST UNDER R.C. 4928.143(F)  
AND OHIO ADM.CODE 4901:1-35-10 FOR  
THE DAYTON POWER AND LIGHT  
COMPANY D/B/A AES OHIO.

CASE NO. 22-514-EL-UNC

IN THE MATTER OF THE APPLICATION OF  
THE SIGNIFICANTLY EXCESSIVE  
EARNINGS TEST UNDER R.C. 4928.143(F)  
AND OHIO ADM.CODE 4901:1-35-10 FOR  
THE DAYTON POWER AND LIGHT  
COMPANY D/B/A AES OHIO.

CASE NO. 23-543-EL-UNC

### OPINION AND ORDER

Entered in the Journal on November 30, 2023

#### I. SUMMARY

{¶ 1} The Commission finds that the stipulation regarding the significantly excessive earnings test meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted. Accordingly, the Commission finds that The Dayton Power and Light Company d/b/a AES Ohio did not have significantly excessive earnings in 2020, 2021, or 2022.

## II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio or the Company) is an electric distribution utility as defined in R.C. 4928.01(A)(6). As such, AES Ohio is subject to the jurisdiction of this Commission.

{¶ 3} Pursuant to R.C. 4928.141, electric utilities are required to provide consumers with a standard service offer, consisting of either a market-rate offer or an electric security plan (ESP). Further, R.C. 4928.143(F) requires the Commission to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. The Commission issued a Finding and Order in *In re Significantly Excessive Earnings Test*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010), which established the policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

{¶ 4} On May 17, 2021, in Case No. 21-588-EL-UNC, AES Ohio filed an application for the administration of the SEET, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10, for 2020 (2020 SEET application).

{¶ 5} On May 27, 2021, the Ohio Consumers' Counsel (OCC) filed a motion to intervene in the proceeding for the Company's 2020 SEET application.

{¶ 6} On May 16, 2022, in Case No. 22-514-EL-UNC, AES Ohio filed an application for the administration of the SEET for 2021 (2021 SEET application).

{¶ 7} On June 9, 2022, OCC filed a motion to intervene in the proceeding for the Company's 2021 SEET application.

{¶ 8} By Entry dated April 18, 2023, the attorney examiner determined that Case Nos. 21-588-EL-UNC and 22-514-EL-UNC should be consolidated for the purposes of hearing and issued a procedural schedule by which the evidentiary hearing was scheduled for August 1, 2023. The Entry also granted OCC's pending motions to intervene.

{¶ 9} On May 12, 2023, Ohio Energy Leadership Council (OELC) filed a motion to intervene in Case Nos. 21-588-EL-UNC and 22-514-EL-UNC.

{¶ 10} On May 19, 2023, AES Ohio filed an unopposed motion for a continuance of the hearing date and associated deadlines for filing witness testimony due to unavailability of counsel. The attorney examiner granted the motion by Entry dated May 22, 2023, and amended the procedural schedule such that the evidentiary hearing was scheduled to commence on September 12, 2023.

{¶ 11} Meanwhile, on May 15, 2023, in Case No. 23-543-EL-UNC, AES Ohio filed an application for the administration of the SEET for 2022 (2022 SEET application). The Company also filed a motion for a protective order with the 2022 SEET application seeking to exempt from public disclosure certain information relating to estimated future capital expenditures.<sup>1</sup>

{¶ 12} On August 18, 2023, OELC filed a motion to intervene in the proceeding for AES Ohio's 2022 SEET application.

{¶ 13} On August 22, 2023, AES Ohio filed a stipulation and recommendation (Stipulation) executed by AES Ohio, Staff, and OELC (Signatory Parties). The Signatory Parties represent that the Stipulation resolves all issues raised in the three cases discussed above. On the same day, AES Ohio filed a motion to consolidate all proceedings for the purposes of hearing and consideration of the Stipulation.

{¶ 14} By Entry issued August 30, 2023, the attorney examiner granted the Company's motion to consolidate all three cases as well as OELC's motions to intervene.

{¶ 15} At the September 12, 2023 hearing, AES Ohio introduced into evidence the Stipulation (Signatory Parties Ex. 1) and the direct testimony of Patrick J. Donlon in support

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<sup>1</sup> No party filed a memorandum contra AES Ohio's motion for a protective order.

of the Stipulation (AES Ohio Ex. 1). Both exhibits were admitted into the record (Tr. at 9-10). AES Ohio also presented Mr. Donlon for cross-examination; no party had questions for the witness (Tr. at 8-10).

### III. STIPULATION OF THE PARTIES

{¶ 16} The Stipulation filed on August 22, 2023, purports to resolve all outstanding issues in these cases. The Stipulation states that AES Ohio has calculated its per-books return on equity for the year ending on December 31, 2020, to be 8.9 percent. For the year ending on December 31, 2021, the return on equity was 7.1 percent and for the year ending December 31, 2022, it was 2.6 percent. The other Signatory Parties conducted their own review of AES Ohio's earnings and, while they do not agree on each other's review or analyses and will not be bound by the same, all agree that AES Ohio did not have significantly excessive earnings under R.C. 4928.143(F) in 2020, 2021, or 2022. (Signatory Parties Ex. 1 at 2-3.)

### IV. DISCUSSION

#### A. *Consideration of the Stipulation*

{¶ 17} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues in the proceeding which it is offered.

{¶ 18} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re W. Res. Tel. Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and*

*Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 19} Patrick Donlon, Director of Regulatory Accounting and Services for AES Ohio, testified in support of the agreement in this case. Mr. Donlon testified that the Stipulation is a product of serious bargaining among capable, knowledgeable parties. Negotiations were held over two bargaining sessions, with further bargaining occurring via electronic communications, and all parties were invited to participate. Mr. Donlon explained that proposals by Staff and OELC resulted in changes to the Stipulation, and all parties made compromises (AES Ohio Ex. 1 at 3-4). Upon review, we find that the first prong of the test is met.

{¶ 20} With regard to the second prong, Mr. Donlon stated that the Stipulation benefits AES Ohio customers and the public interest by providing a reasonable and efficient

resolution of the three SEET cases in a manner that is both efficient and cost-effective for all parties (AES Ohio Ex. 1 at 4). The Commission agrees and finds that the Stipulation also satisfies the second prong of the test.

{¶ 21} Regarding the third and final prong, Mr. Donlon testified that the Stipulation promotes various regulatory principles and policies of the state of Ohio as set forth in R.C. 4928.02 and is consistent with Commission rules (AES Ohio Ex. 1 at 5). The Commission finds no evidence that the Stipulation violates any important regulatory principle or practice. Accordingly, the Stipulation meets the third criterion.

{¶ 22} Accordingly, the Commission finds that the Stipulation meets the criteria used by the Commission to evaluate such agreements, is reasonable, and should be adopted. In doing so, we determine that AES Ohio did not have significantly excessive earnings in 2020, 2021, or 2022.

***B. The Motion for a Protective Order***

{¶ 23} As stated above, AES Ohio filed a motion for a protective order with the 2022 SEET application. The motion seeks to exempt from public disclosure the estimated future capital expenses reflected in Exhibit PJD-3, which is attached to the testimony of Patrick Donlon that was also filed with the application. The Company submits that these future capital expense estimates are confidential, proprietary, and competitively sensitive trade secret information as defined by R.C. 1333.61(D) and recognized by Ohio Adm.Code 4901-1-24.

{¶ 24} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term “public records” excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

{¶ 25} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document “to the extent that state or federal law prohibits release of the information, including where the information is deemed \* \* \* to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”

{¶ 26} Ohio law defines a trade secret as “information \* \* \* that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. 1333.61(D).

{¶ 27} The Commission has reviewed the unredacted version of Exhibit PJD-3, which contains AES Ohio’s estimated future capital expenditures for the years 2023 through 2027. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court,<sup>2</sup> the Commission finds that the financial information contained in Exhibit PJD-3 attached to Mr. Donlon’s testimony constitutes trade secret information. Its release is, therefore, prohibited under state law. We also find that nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the Commission finds that AES Ohio’s motion for protective order with respect to the estimated future capital expenses reflected in Exhibit PJD-3 is reasonable and should be granted.

{¶ 28} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24

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<sup>2</sup> See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

months from the date of this Opinion and Order. Until that date, the Commission's docketing division should maintain, under seal, the information filed confidentially by AES Ohio on May 15, 2023.

{¶ 29} Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If AES Ohio wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to the Company.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 30} AES Ohio is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 31} R.C. 4928.143(F) requires the Commission to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility.

{¶ 32} On May 17, 2021, AES Ohio filed the 2020 SEET application.

{¶ 33} On May 16, 2022, AES Ohio filed the 2021 SEET application.

{¶ 34} On May 15, 2023, AES Ohio filed the 2022 SEET application.

{¶ 35} Also on May 15, 2023, the Company filed a motion for a protective order, which comports with Ohio law and Commission rules regarding trade secret information, is reasonable, and should be granted.

{¶ 36} On August 22, 2023, the Signatory Parties filed the Stipulation intending to resolve all issues in the three cases. No party opposed the Stipulation.



{¶ 37} The evidentiary hearing was held in this matter on September 12, 2023.

{¶ 38} The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

## VI. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That the Stipulation filed in this proceeding be approved and adopted. It is, further,

{¶ 41} ORDERED, AES Ohio's motion for protective order filed in Case No. 23-543-EL-UNC be granted. It is, further,

{¶ 42} ORDERED, That the Commission's docketing division maintain, under seal, the confidential information filed by AES Ohio on May 15, 2023, for a period ending 24 months from the date of this Opinion and Order. It is, further,

{¶ 43} ORDERED, That AES Ohio takes all necessary steps to carry out the terms of the Stipulation and this Opinion and Order. It is, further,

{¶ 44} ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

{¶ 45} ORDERED, That a copy of this Opinion and Order be served upon all parties of record

**COMMISSIONERS:**

*Approving:*

Jenifer French, Chair  
Daniel R. Conway  
Lawrence K. Friedeman  
Dennis P. Deters  
John D. Williams

PAS/LB/dr

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**Case No(s). 21-0588-EL-UNC, 22-0514-EL-UNC, 23-0543-EL-UNC**

Summary: Opinion & Order that the Commission finds that the stipulation regarding the significantly excessive earnings test meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted. Accordingly, the Commission finds that The Dayton Power and Light Company d/b/a AES Ohio did not have significantly excessive earnings in 2020, 2021, or 2022 electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.