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. 22-900-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 R.C. 4905.13.	**CASE NO. 22-902-EL-AAM**

OPINION AND ORDER

Entered in the Journal on August 9, 2023

I. SUMMARY

{¶ 1} In this Opinion and Order, the Commission adopts the Stipulation filed by various parties and authorizes The Dayton Power and Light Company d/b/a AES Ohio to establish its fourth electric security plan.

II. PROCEDURAL BACKGROUND

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio or the Company) is a public utility as defined under R.C. 4905.02. As such, the Company is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 mandates that an electric distribution utility (EDU) shall provide a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric

generation service, to all consumers within its certified territory. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143. R.C. 4928.143(C)(1) directs that the Commission issue an order on an EDU's application for an ESP not later than 275 days after the application's filing date.

{¶ 4} On September 26, 2022, AES Ohio filed an application to establish the Company's fourth ESP (ESP IV) along with related applications for approval of revised tariffs and for approval of accounting authority (the Application).

{¶ 5} By Entries dated September 30, 2022, and November 21, 2022, the attorney examiner established a procedural schedule for this proceeding. Pursuant to that schedule, motions to intervene were to be filed by November 28, 2022, a local public hearing was conducted on February 2, 2023, in Dayton, Ohio, and the evidentiary hearing regarding AES Ohio's Application was scheduled to commence on March 6, 2023. The schedule also set forth deadlines for discovery and for the filing of intervenor testimony.

{¶ 6} Timely motions to intervene were filed by Ohio Energy Group; Interstate Gas Supply, Inc. (IGS); University of Dayton (UD); the Ohio Manufacturers' Association Energy Group (OMAEG); Ohio Energy Leadership Council fka Industrial Energy Users-Ohio (OELC); Armada Power, LLC (Armada); Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. (collectively, Constellation); The Kroger Company (Kroger); the Citizens' Utility Board of Ohio (CUB); Ohio Partners for Affordable Energy (OPAE); Ohio Consumers' Counsel (OCC); Walmart, Inc. (Walmart); ChargePoint, Inc. (ChargePoint); the Ohio Hospital Association (OHA); the Ohio Environmental Council (OEC); the City of Dayton (Dayton); One Energy Enterprises, Inc. (One Energy); the Retail Energy Supply Association (RESA); and the Environmental Law & Policy Center (ELPC).[1]

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[1] On April 10, 2023, ELPC withdrew from this proceeding.

{¶ 7} On January 9, 2023, One Energy filed a motion to dismiss the Application. On January 19, 2023, AES Ohio filed an unopposed motion for an extension of time to respond to One Energy's motion to dismiss.

{¶ 8} On January 20, 2023, the attorney examiner issued an Entry granting all pending motions to intervene, as well as AES Ohio's motion for an extension of time. Subsequently, on January 31, 2023, the Company filed its memorandum contra the motion to dismiss, and One Energy filed a reply in support of its motion on February 7, 2023.

{¶ 9} Also on January 20, 2023, AES Ohio filed a motion for an extension of time for discovery and for intervenors to file testimony, as well as a request for an expedited ruling, in order to facilitate ongoing settlement discussions. By Entry dated January 26, 2023, the attorney examiner granted AES Ohio's motion. Pursuant to the Entry, the deadline for filing discovery requests, except notices of deposition, was extended to February 16, 2023, and intervenor testimony was extended to February 27, 2023.

{¶ 10} Subsequently, on February 13, 2023, Staff and AES Ohio (Movants) filed a joint motion for a continuance of the evidentiary hearing, as well as an extension of the deadlines for discovery and filing intervenor testimony. Movants requested that the hearing be rescheduled to April 5, 2023, that the deadline for serving discovery requests be reset to March 1, 2023, and that the deadline for intervenors to file testimony be reset to March 15, 2023. On February 15, 2023, Kroger filed a memorandum contra the joint motion for a continuance, in which Kroger's counsel explained a scheduling conflict with Movants' proposed hearing date.

{¶ 11} By Entry issued on February 16, 2023, the attorney examiner directed that, pursuant to published notice, the evidentiary hearing be called as scheduled on March 6, 2023, and continued to April 12, 2023. Additionally, the attorney examiner directed that all discovery requests other than notices of deposition be filed by March 22, 2023, and intervenor testimony be filed by March 29, 2023.

{¶ 12} On March 22, 2023, Constellation filed a motion for extension of time seeking to extend the deadline for serving discovery requests from March 22, 2023, to April 12, 2023; the deadline for filing testimony from March 29, 2023, to April 19, 2023; and the hearing date from April 12, 2023, to May 3, 2023. For cause, Constellation represented that settlement negotiations were ongoing with the prospect that a stipulation would be filed and that the requested extensions would allow parties to focus on settlement efforts.

{¶ 13} By Entry issued April 3, 2023, in consideration of an anticipated stipulation and the directive contained in R.C. 4928.143(C)(1), the attorney granted Constellation's motion and established a new procedural schedule under which testimony in support of any stipulation filed by the parties was due by April 10, 2023; testimony in opposition to such stipulation and all other intervenor testimony is due April 17, 2023; discovery requests, except for notices of depositions, should be also served by April 17, 2023; and the evidentiary hearing was set to reconvene on May 2, 2023.[2] In the Entry, and in response to a statement by Constellation that an extension of deadlines would likely be needed if a joint stipulation was filed, the attorney examiner specifically noted that the new procedural schedule was sufficient to accommodate such a filing.

{¶ 14} On April 10, 2023, AES Ohio filed a joint stipulation and recommendation (Stipulation). All remaining parties except OCC are either signatory parties[3] to the Stipulation or have signed as non-opposing parties who have agreed not to challenge the Stipulation. AES Ohio also filed testimony by Sharon Schroder in support of the Stipulation (AES Ex. 1).

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[2] On March 24, 2023, the attorney examiner notified all parties via email that the procedural dates would be vacated and reset by future entry.

[3] The parties to the Stipulation are Staff, AES Ohio, OEG, OMAEG, Kroger, UD, OELC, IGS, OPAE, Walmart, OHA, ChargePoint, Dayton, Armada, Constellation, and RESA (Signatory Parties).

{¶ 15} On April 14, 2023, OCC filed a motion for an extension of time to file testimony opposing the Stipulation and motion to shorten discovery response time, along with a request for an expedited ruling.

{¶ 16} Upon receipt and review of the motion on April 14, 2023, and upon noting that OCC was unclear as to its efforts to reach out to other parties regarding their position, the attorney examiner contacted all parties via email to inquire as to whether any party intended to object to the motion. The attorney examiner also directed that any memoranda in opposition would be due by noon on Monday, April 17, 2023.

{¶ 17} Also on April 14, 2023, AES Ohio filed a memorandum in opposition to OCC's motion.

{¶ 18} In response to the attorney examiner's email inquiry, no party other than AES Ohio expressed an intent to object to OCC's motion or expedited treatment. Additionally, no party other than AES Ohio filed a memorandum in opposition to OCC's motion.

{¶ 19} By Entry issued April 17, 2023, the attorney examiner granted OCC's motion, in part. The Entry directed AES Ohio to respond to OCC's discovery requests served April 11, 2023, and April 12, 2023, only, within seven days; extended OCC's deadline for filing testimony in opposition to the Stipulation to 5:00 p.m. on April 21, 2023; and stated that all other intervenor testimony unrelated to the Stipulation should also be filed by 5:00 p.m. on April 21, 2023. All other dates established in the April 3, 2023 Entry were unchanged.

{¶ 20} On April 21, 2023, Staff filed a motion for an extension of time to file testimony and requested expedited consideration. Staff requested that its deadline for filing testimony be extended to April 26, 2023. Staff's motion was granted by Entry dated April 24, 2023.

{¶ 21} Also on April 21, 2023, OCC filed two motions for subpoena duces tecum, one directed to AES Ohio and one directed to Staff. In the former, OCC sought to compel Patrick Donlon to attend the hearing and be subject to cross-examination by OCC. In the latter, OCC sought to compel Tamara Turkenton, David Lipthratt, and a Staff-designated person with knowledge and expertise on regulatory practices and principles to attend the hearing and be subject to cross-examination. Both motions also directed that the intended recipients bring with them documents falling within various enumerated categories.

{¶ 22} On the same day, OCC filed the direct testimony of James F. Wilson (OCC Ex. 1), Robert B. Fortney (OCC Ex. 2), and Lafayette K. Morgan, Jr. (OCC Ex. 3). Additionally, Constellation filed the direct testimony of Muralikrishna Indukuri (Constellation Ex. 4).

{¶ 23} On April 24, 2023, AES Ohio filed a motion to quash OCC's subpoena directed at Mr. Donlon. AES Ohio indicated that Mr. Donlon would appear in person at the hearing and be subject to cross-examination. The Company, however, moved to quash that portion of the subpoena requiring Mr. Donlon to bring documents with him based on five listed objections.

{¶ 24} On April 25, 2023, Staff filed a memorandum contra OCC's motion for subpoena.

{¶ 25} On April 26, 2023, the attorney examiner scheduled a prehearing conference to occur on April 28, 2023. Counsel for the parties were given the choice to attend in person or through remote technology.

{¶ 26} Also on April 26, 2023, Staff filed testimony on behalf of Jonathan J. Borer (Staff Ex. 1), Timothy W. Benedict (Staff Ex. 2), Natalia Messenger (Staff Ex. 6), and Jacob J. Nicodemus (Staff Ex. 7).

{¶ 27} On April 28, 2023, the attorney examiners conducted the prehearing conference as scheduled. During the conference, the attorney examiner denied OCC's

motion for subpoena of Staff witnesses and granted AES Ohio's motion to quash. A transcript of the prehearing conference was filed to the docket on May 1, 2023

{¶ 28} The evidentiary hearing was conducted over the course of four days beginning May 2, 2023, and ending on May 5, 2023.

{¶ 29} On May 10, 2023, OCC filed a motion requesting that the Commission take administrative notice of AES Ohio's Amended Application, Part F, filed in Case No. 99-1687-EL-ETP. AES Ohio filed a memorandum contra on May 25, 2023, to which OCC filed a reply on June 1, 2023.

{¶ 30} Meanwhile, on May 26, 2023, initial post-hearing briefs were filed by OELC, AES Ohio, OEG, Staff, RESA, IGS, Constellation, and Walmart. Additionally, OMAEG and Kroger filed a joint brief, as did OPAE and Dayton. On May 30, 2023, OCC filed a corrected initial brief.

{¶ 31} On June 5, 2023, post-hearing reply briefs were filed by Staff, AES Ohio, RESA, OELC, IGS, Walmart, OCC, OEG, and Constellation; OMAEG and Kroger filed a joint reply brief.[4] On June 9, 2023, OCC filed correspondence making a clarifying correction to its reply brief.

DISCUSSION

A. Procedural Issues

1. OCC's Motion for Administrative Notice Should be Denied.

{¶ 32} On May 10, 2023, OCC filed a motion to take administrative notice of Appendix F to the Amended Application filed in AES Ohio's electric transition plan

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[4] OPAE and Dayton filed notice of their election not to file a reply brief.

proceeding. *In re The Dayton Power and Light Co.,* Case No. 99-1687-EL-ETP (*DP&L ETP Case*). On May 25, 2023, Staff and AES Ohio each filed a response to OCC's motion. On June 1, 2023, OCC filed its reply in support of the motion.

{¶ 33} In its motion, OCC represents that the Amended Application, which was approved in 2000, allowed AES Ohio to charge its consumers $699.2 million in transition costs and deferred $28.6 million in accounting-related expenses. OCC contends that Part F of AES Ohio's Amended Application identifies the total transition costs plus the deferral amounts that the Commission authorized for collection as "transition costs."

{¶ 34} OCC claims that under R.C. 4928.04(A), deferred expenses that are authorized by Commission as transition costs must be collected from consumers no later than December 31, 2010. Thus, AES Ohio is 13 years late in requesting to collect these charges, and R.C. 4928.141 precludes a utility from including in its SSO "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." Therefore, OCC argues that the collection of these deferred transition costs violates the law.

{¶ 35} OCC notes that the Commission has the authority to conduct its own hearings and is directed by statute to observe the practice and rules of evidence in civil proceedings. The Supreme Court of Ohio has held that administrative notice can be taken by the Commission as long as the opposing party has prior knowledge and an opportunity to rebut the materials judicially noticed. *Allen v. Pub. Util. Comm.,* 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988). OCC represents that the Commission itself acknowledges its ability to take administrative notice of adjudicative facts, cases, and evidence from separate proceedings.

{¶ 36} OCC also claims that taking administrative notice of Part F of AES Ohio's Amended Application will not prejudice any party and will provide a more comprehensive record for the Commission to base its decision whether to approve the Stipulation in this case. AES Ohio and others will be provided with the opportunity to address this matter

with briefs and respond to the motion to take administrative notice. OCC contends that the facts sought to be noticed are relevant in determining whether the Stipulation satisfies the third prong of the Commission's standard for considering stipulations.

{¶ 37} Staff opposes the motion to take administrative notice filed by OCC because the record is closed, and the document provided by OCC is not suitable for administrative notice. Staff argues that OCC had the opportunity to introduce the document at issue at the evidentiary hearing and did not do so whereas taking administrative notice now would prejudice the parties. Staff further claims that the Supreme Court of Ohio has stated that it is improper to base decisions on evidence presented without the opportunity to explain and rebut it. *Forest Hills Util. Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 1, 3, 313 N.E.2d 801 (1974).

{¶ 38} Staff contends that administrative notice is appropriate when it pertains to an "'adjudicative fact' that is 'not subject to reasonable dispute,'" which is not demonstrated in OCC's motion. Staff alleges that OCC's motion lacks clarity regarding the specific "adjudicative fact" OCC wants on the record. It appears that OCC seeks to include an entire document in the record with no witness being subject to cross-examination by the other parties. The nature of the costs in question is subject to reasonable dispute, as the document does not show that the costs were considered "transition costs" under Ohio law. R.C. 4928.39 defines transition costs as costs that are "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state." Under this definition, Staff argues that there is a reasonable dispute concerning the facts asserted by OCC, and judicial notice is inappropriate. OCC had the opportunity to introduce the documents at the hearing and did not. The documents at issue are more than 20 years old, and OCC has not moved for the record in the case to be reopened.

{¶ 39} Moreover, Staff notes that OCC acknowledged that the application of the judicial notice rule requires "prior knowledge of and an opportunity to rebut the materials judicially noticed." The Amended Application and Part F were not documents that the parties had an opportunity to rebut before OCC requested administrative notice. OCC's

motion denies other parties the chance to cross-examine witnesses regarding the evidence and present their arguments. Based on these reasons, the Staff argues that OCC's motion should be denied.

{¶ 40} AES Ohio opposes OCC's motion for administrative notice and asks the Commission to deny OCC's motion because: (1) the record is closed, and it is too late to take administrative notice; and (2) the documents do not qualify for administrative notice. AES Ohio notes that OCC argues that the documents demonstrate that the deferred costs related to settlement system implementation and consumer education are transition costs and are not recoverable. However, this argument should be rejected because: (1) those costs do not satisfy the statutory definition of transition costs; and (2) even if the costs were transition costs, the "notwithstanding" clauses in R.C. 4928.143(B) and (B)(2)(h) establish they would be recoverable.

{¶ 41} AES Ohio argues that the Commission should not consider administrative notice because the record is closed, and AES Ohio would be prejudiced by introducing new evidence at this late stage. AES Ohio claims that it has not had the opportunity to explain the specific information in the document and rebut any erroneous interpretation of its contents in the evidentiary record. OCC's offer for AES Ohio to respond in its post-hearing brief is insufficient to address this issue. OCC presented evidence from three witnesses and spent an extensive period of time cross-examining witnesses. Further, AES Ohio claims that the cases OCC relied on do not stand for the proposition that a party may properly offer evidence by administrative notice after the record was closed.

{¶ 42} Furthermore, AES Ohio posits that, even if OCC's motion was timely, the Commission should deny it because the documents at issue do not qualify for administrative notice. OCC has failed to provide a copy of the specific document it is referring to, and it has not demonstrated that the document contains "adjudicative facts" that are "not subject to reasonable dispute."

{¶ 43} OCC replies that Supreme Court of Ohio precedent allows for administrative notice to be taken even after the conclusion of the evidentiary hearing. According to OCC, in order to qualify for administrative notice, evidence must be introduced at hearing or otherwise brought to the knowledge of the interested parties prior to decision with an opportunity to explain and rebut. OCC claims that it meets the criteria for administrative notice because OCC raised the issue during the hearing, OCC filed its motion before the Commission made a decision, and parties had the opportunity to respond.

{¶ 44} OCC further responds that the Commission explicitly stated, in its previous Opinion and Order, that the consumer education and retail settlement system costs are indeed transition costs. The costs were approved and specifically identified in the *DP&L ETP Case*. OCC claims that collateral estoppel and res judicata preclude arguments by Staff and AES Ohio that Part F is inappropriate for judicial notice because it is not in dispute that the costs in question are transition costs.

{¶ 45} With respect to AES Ohio's claims that it can collect previously authorized transition charges based on the "notwithstanding" provision in R.C. 4928.143(B), OCC argues that R.C. 4928.141(A) prohibits the collection of previously authorized transition costs from consumers. Although the Supreme Court of Ohio has recognized the applicability of R.C. 4928.141(A) and rejected OCC's claims against the collection of transition charges in a previous case because the transition charges were not "previously authorized allowances for transition costs," OCC contends that the precedent is not controlling because, in this case, the costs in question are previously authorized allowances for transition charges. OCC contends that the previously authorized allowances for transition charges cannot be collected from consumers, as the collection period ended thirteen years ago. OCC argues that in interpreting R.C. 4928.143(B) in relation to R.C. 4928.141(A) the "notwithstanding" clause cannot allow previously authorized transition charges to be collected from consumers in a utility's ESP.

{¶ 46} The Commission finds that the motion for administrative notice should be denied. In its motion, OCC requests that the Commission take administrative notice of Part F of the Amended Application filed in the *DP&L ETP Case* on April 20, 2000. The Commission notes that the Supreme Court of Ohio has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held 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.

{¶ 47} With respect to the request of OCC for administrative notice of documents in the record of the *DP&L ETP Case*, the Commission finds that AES Ohio has not had an opportunity to prepare for, explain, or rebut the evidence for which OCC seeks administrative notice. Likewise, Staff and the other Signatory Parties to the Stipulation filed in this proceeding have not had an opportunity to prepare for, explain, or rebut this evidence. The evidentiary record of the instant proceeding has closed; OCC's request for administrative notice was made on May 10, 2023, after the completion of the hearing on May 5, 2023. Moreover, OCC failed to file a motion to reopen proceedings, pursuant to Ohio Adm.Code 4901-1-34, and OCC made no attempt to demonstrate that the evidence for which OCC now seeks administrative notice could not, with reasonable diligence, have been presented earlier in the proceeding, as provided by that rule.

{¶ 48} OCC's claim that it preserved the ability to seek administrative notice of these documents from the *DP&L ETP Case* through the cross-examination of AES Ohio witness Schroder is not persuasive. First, raising an *issue* on cross-examination is materially different than providing an opportunity to prepare for, explain, or rebut specific *facts or documents*. OCC did not present these documents to Ms. Schroder for review, seek to cross-examine the witness on the documents, or seek the admission of the documents. Further,

OCC did not cross-examine the witness on whether the disputed $2.3 million in regulatory assets were transition costs. Instead, OCC relies upon the fact that it presented Ms. Schroder with a discovery response from AES Ohio that acknowledged that $2.3 million in regulatory assets, for which AES Ohio seeks recovery, were created in the *DP&L ETP Case*. However, as discussed below, the question of whether the regulatory assets were created in the *DP&L ETP Case* is separate from the question of whether the regulatory assets were transition costs. Thus, OCC's cross-examination of Ms. Schroder did not adequately provide AES Ohio, or any other party, with the opportunity to prepare for, explain or rebut the evidence for which OCC seeks administrative notice.

{¶ 49} Further, the Commission finds that AES Ohio would be prejudiced by the taking of administrative notice of the documents from the *DP&L ETP Case*. OCC seeks the Commission to infer from the documents that $2.3 million in regulatory assets represent transition costs, which OCC claims are unrecoverable by AES Ohio. However, 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. Accordingly, the Commission finds 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, of the documents from the *DP&L ETP Case*. Accordingly, we find that OCC's motion to take administrative notice should be denied.

2. THE ATTORNEY EXAMINER'S RULING REGARDING CONFIDENTIAL SETTLEMENT DISCUSSIONS SHOULD BE AFFIRMED.

{¶ 50} OCC argues that the attorney examiner misapplied the "settlement privilege" and wrongfully prevented OCC from cross-examining AES Ohio witness Schroder and Staff witness Messenger on whether the Signatory Parties were knowledgeable about the costs of the Stipulation. OCC claims that this ruling hindered OCC's challenge to the Stipulation as not meeting the first prong of the settlement criteria.

{¶ 51} At the hearing, OCC attempted to cross-examine Ms. Schroder and Ms. Messenger on whether the Stipulation is the product of serious bargaining among capable, knowledgeable parties. When cross-examining Ms. Schroder, OCC inquired as to whether AES Ohio had informed parties before signing the Stipulation that consumers would pay at least $160 million to AES Ohio over three years. OCC asked Ms. Schroder whether the information in OCC Ex. 8 (AES Ohio's response to OCC Interrogatory 18-006) had been conveyed to the Signatory Parties. The attorney examiner sustained the objections to the question and ruled that OCC could not cross-examine Ms. Schroder on the contents of the settlement communications. The attorney examiner pointed out that OCC had the opportunity to put on a witness to testify as to whether the parties are knowledgeable. (Tr. I at 127-30.)

{¶ 52} OCC had also sought to question Ms. Messenger as to whether, prior to signing the Stipulation, the Staff had the information about the cost of the Stipulation, as conveyed on OCC Ex. 8. The attorney examiner sustained the objections to the question, ruling that the question was improper and sought privileged information. The attorney examiner referenced a similar ruling in the recent Columbia Gas of Ohio, Inc. distribution rate case that "upheld the exclusion of questions related to settlement privilege." *In re Columbia Gas of Ohio, Inc.*, Case No. 21-637-GA-AIR, et al. (*Columbia Rate Case*). (Tr. III at 564-75.)

{¶ 53} OCC argues that the attorney examiner's ruling contradicts Ohio law, the Ohio Administrative Code, and Commission precedent. OCC argues that the "settlement privilege" articulated in Ohio Adm.Code 4901-1-26(E) and Evid.R. 408 does not preclude OCC's cross-examination. OCC claims that the question was testing whether parties were aware of the costs of the settlement and was not attempting to prove liability.

{¶ 54} OCC argues that the attorney examiner's ruling was distinguishable from the ruling in the *Columbia Rate Case*. OCC argues that in the *Columbia Rate Case*, counsel was looking into the settlement discussion and what led to provisions being included or

excluded in the stipulation. Here, OCC argues that the questioning was directed to whether parties were knowledgeable about the impact of the settlement on their clients and did not attempt to determine what conversations led to specific provisions being included or excluded in the Stipulation. OCC claims that the line of questioning is permissible and speaks to the exact criteria assessed when determining the reasonableness of the Stipulation. OCC urges the Commission to reverse the attorney examiner's ruling.

{¶ 55} Walmart argues that the Commission did not err, and OCC was not harmed when the attorney examiner sustained objections to OCC's questions that invaded the settlement privilege. OCC argues that the objections sustained hindered OCC's ability to challenge the first prong of the three-part test. Walmart argues that OCC incorrectly interpreted the first prong of the test and OCC was not harmed because they still had the opportunity to cross-examine witnesses regarding whether Signatory Parties were "knowledgeable."

{¶ 56} Walmart argues that OCC's question improperly sought the disclosure of settlement communication in order to invalidate the Stipulation. Additionally, Walmart asserts that seeking to invalidate the Stipulation is not a "valid purpose" within the meaning of Ohio Adm.Code 4901-1-26(E) or Evid.R. 408. Moreover, Walmart alleges that OCC failed to articulate how its purpose is valid. Walmart claims that OCC had the opportunity to obtain the information sought without invading settlement communications.

{¶ 57} Walmart argues that OCC's citation to prior Commission precedent does not support their argument and, instead, upholds the ruling in this case. OCC cites to the attorney examiner's ruling in *In re Ohio Power Co.,* Case Nos. 14-1693-EL-RDR, et al. (*AEP Ohio PPA Rider Case*). Walmart states that upon reviewing the information OCC cited from the case, the objections were raised on the grounds of relevance, not confidentiality. Walmart argues that the portions of the *AEP Ohio PPA Rider Case* transcript that are relevant, such as the attorney examiner's ruling prohibiting the invasion of confidentiality of settlement communications, are consistent with the ruling in this case.

{¶ 58} AES Ohio argues that there were no procedural errors at the hearing and the Commission should conclude that the attorney examiner's rulings were correct. AES Ohio contends that OCC's arguments should be rejected as the ruling was consistent with Ohio Adm.Code 4901-1-26(E) and with Commission precedent. AES Ohio disputes OCC's argument that it is entitled to discovery regarding what information the Signatory Parties had regarding the costs of the Stipulation; AES states that OCC is attempting to use the settlement communications to prove the "invalidity" of the Stipulation which is prohibited by the rule. AES asserts that OCC's intended use of the settlement communications does not fall within the permissible uses outlined in Evid.R. 408.

{¶ 59} Staff argues that OCC's procedural arguments are not viable. Staff asserts that OCC was trying to use settlement communications to prove liability and did not articulate the "valid purpose" it had for the inquiry. Staff states that because the three-part test is an element of the case, questions that get to the merits of the test are questions that relate to liability or whether the settlement meets the three-part test. Therefore, the attorney examiner's ruling regarding OCC's questions about the settlement communications were proper.

{¶ 60} The Commission finds that the rulings of the attorney examiner regarding settlement privilege should be affirmed. The settlement privilege is established by Ohio Adm.Code 4901-1-26(E), which states, in relevant part, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." The Commission has long established that cross-examination aimed at the content of settlement negotiations is wholly inappropriate. *In re Application of Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co. of a Grid Modernization Business Plan,* Case Nos. 16-481-EL-UNC, et al., Opinion and Order (July 17, 2019) at ¶ 19. In the instant case, OCC sought to elicit, through cross-examination of AES Ohio witness Schroder and Staff witness Messenger, whether certain information had been provided to parties in the settlement negotiations. The testimony OCC sought was plainly evidence of the content of statements made in negotiations; thus,

the evidence was inadmissible and the attorney examiner's ruling excluding the evidence should be affirmed.

{¶ 61} We note that Ohio Adm.Code 4901-1-26(E) contains an exception to this rule, stating that the rule "does not require exclusion when the evidence is offered for another valid purpose." Although the rule does not define or provide examples of "another valid purpose," we agree with Walmart that we may look to the Ohio Rules of Evidence for guidance. Ohio Adm.Code 4901-1-26-(E) is parallel to Rule 408 of the Ohio Rules of Evidence, which states that the rule does not require exclusion of evidence offered for another purpose such as proving bias or prejudice of a witness or negativing a contention of undue delay. Evid.R. 408. The ruling in this case does not fit into either of those exceptions, and we are not persuaded that we should expand our interpretation of "another valid purpose" to include the cross-examination of witnesses on the details and substance of information provided by parties in settlement negotiations. The Commission is concerned that any expansion of "another valid purpose" to diminish the settlement privilege will have a chilling effect on future settlement negotiations. As we ruled recently:

> [T]he same parties frequently intervene in various Commission proceedings, and separate Commission proceedings may have similar issues. Given the overlap in parties and issues, we are concerned that allowing the disclosure of the actual content of settlement negotiations will have a chilling effect on those negotiations, as counsel will need to be sure that statements made in settlement negotiations in one case are not able to be used against their client in a subsequent case.

Columbia Rate Case, Opinion and Order (Jan. 26, 2023) at ¶ 131.

{¶ 62} Moreover, we agree with Walmart that OCC's reliance upon the attorney examiner's ruling in the *AEP Ohio PPA Rider Case* is misplaced. The ruling in question overruled objections regarding the relevance of the document sought to be introduced. The

ruling did not address a claim of settlement privilege with respect to a document provided to parties in settlement discussions or statements made during settlement discussions.[5] Finally, OCC's attempt to distinguish the ruling in the *Columbia Rate Case* is unpersuasive. In the *Columbia Rate Case*, the Commission upheld the attorney examiner's ruling sustaining an objection to a question regarding which party to the negotiations had proposed a specific term for the settlement. In this case, OCC asks the Commission to overturn the attorney examiner's ruling sustaining an objection regarding the content of specific communications between the Signatory Parties. Both rulings relate to conduct or statements made by the parties during settlement negotiations, and the attorney examiner's ruling in this case should be affirmed.

3. THE ATTORNEY EXAMINER'S DENIAL OF OCC'S MOTION TO SUBPOENA STAFF SHOULD BE AFFIRMED.

{¶ 63} OCC argues that the attorney examiner's ruling denying OCC's motions to subpoena Staff was unreasonable and unlawful. OCC alleges that the attorney examiner erred in denying OCC's motions for subpoenas and requests for documents and that his ruling is contrary to R.C. 4903.082. OCC maintains that there is no exception in the law that exempts Staff from discovery and that the policy of no discovery regarding Staff under Ohio Adm.Code 4901-1-16(I) is superseded by the statute. OCC argues that the ruling is inconsistent with Commission precedent and that the Commission has previously ruled that parties may subpoena Staff to testify at hearings. OCC argues that documents OCC sought to subpoena were relevant and should have been produced. OCC contends that the ruling denied OCC due process and the Commission should overturn the ruling.

{¶ 64} Staff argues that the Commission's denial of a subpoena of Staff witnesses was not improper. Staff had offered four expert witnesses with knowledge and experience regarding the case and the issues identified by the motion. Staff states that OCC was unable

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[5] We also agree with Walmart that the attorney examiner in the *AEP Ohio PPA Rider Case* subsequently acknowledged the existence of the settlement privilege in Commission proceedings.

to articulate why cross-examining those witnesses was insufficient for speaking to specific issues.

{¶ 65} Staff further notes that OCC claims that they were deprived of the ability to ask Staff about the regulatory accounting decisions in *In re The Dayton Power and Light Co.,* Case No. 20-140-EL-AAM (*Distribution Decoupling Case*). However, Staff witness Jonathan Borer, who presented testimony at the hearing, was part of that case, and OCC did not provide any evidence illustrating that Mr. Borer was unable to answer questions at hearing which Mr. Lipthratt could have answered instead. Staff witness Messenger testified in support of the Stipulation, and OCC provided no evidence that Ms. Messenger was unable to answer the questions at hearing that only Ms. Turkenton would have been able to answer.

{¶ 66} AES Ohio asserts that OCC ignores the rationale offered by the attorney examiner for denying the motion, which was that subpoenas to non-testifying experts are not permitted. Additionally, OCC's argument relies on R.C. 4903.082 which allows for "reasonable discovery." AES Ohio states that OCC was not seeking discovery from Staff but was seeking to compel Staff to testify at a hearing. AES Ohio asserts that R.C. 4903.082 does not address who can be compelled to testify at a hearing. AES Ohio contends that, because Ohio Adm.Code 4901.1-28(A) allows subpoenas to Staff if there is a Staff Report, then subpoenas to Staff are not allowed when there is no Staff Report. AES Ohio concludes that OCC's attempt to subpoena Staff was improper and the attorney examiner correctly denied OCC's motion.

{¶ 67} The Commission finds that the attorney examiner's ruling denying OCC's motion to subpoena members of Staff should be affirmed. We note that, after OCC filed the motion for subpoenas on April 21, 2023, Staff filed the direct testimony of Jonathan Borer, who presented testimony regarding the issues which were the subject of the subpoenas. The attorney examiner denied OCC's motion for subpoenas at the prehearing conference held on April 28, 2023 (Prehearing Tr. at 16-17). Mr. Borer presented his testimony at the hearing and was subject to cross-examination by OCC (Tr. II at 352, 354-413). In light of Mr. Borer's

testimony, subject to cross-examination, we agree with the attorney examiner's ruling that the motion for subpoenas of named and unnamed Staff witnesses was unreasonable and oppressive. Requiring the testimony of additional Staff witnesses, after Mr. Borer's thorough, uncontroverted testimony, would have been needlessly repetitious and cumulative as prohibited by Ohio Adm.Code 4901-1-27(B)(7)(c).

{¶ 68} Further, OCC identified two rulings as "at odds" with the attorney examiner in this case. *In re the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code,* Case No. 06-685-AU-ORD, Finding and Order (Dec. 6, 2006) at 79-80 (denying proposed change to Ohio Adm.Code 4901-1-28 because "Staff may be subpoenaed to testify at a hearing, but not for a deposition.") and *In re Black Fork Wind Energy, L.L.C.,* 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 19 (noting that the parties could have requested that seven staff members who contributed to a report testify at a Power Siting Board hearing). However, these two rulings are inapplicable. Both rulings concern Ohio Adm.Code 4901-1-28, which authorizes parties to subpoena members of the Staff who contributed to a Staff Report to present testimony at hearing regarding the Staff Report, but no Staff Report was filed in this proceeding.[6]

{¶ 69} Likewise, we find that OCC's reliance upon R.C. 4903.082 is misplaced. OCC sought subpoenas of two named members of Staff and one person to be designated by Staff, but OCC's subpoenas were to provide testimony at the hearing. R.C. 4903.082 governs *discovery* in Commission proceedings and provides no authority to require witnesses to attend the *hearing*. Further, even if the subpoenas were for discovery purposes, which they were not, we agree with the attorney examiner that discovery regarding non-testifying

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[6] The Commission notes that the prohibition against repetitious and cumulative cross-examination contained in Ohio Adm.Code 4901-1-27(B)(7)(c) still applies when Staff witnesses are subpoenaed pursuant to Ohio Adm.Code 4901-1-28(E).

experts is not permitted under the Ohio Rules of Civil Procedure, which provides persuasive authority as to this issue. Civ.R. 26(B)(7)(h).

{¶ 70} Finally, OCC has not demonstrated any prejudice resulting from the attorney examiner's ruling. OCC contends that the Staff members OCC sought to subpoena could have provided "relevant information" and aided in "creating a complete record" for the Commission to consider. However, OCC was unable to identify any relevant line of questioning on cross-examination which Mr. Borer or Ms. Messenger were unable to fully answer.

4. THE INQUIRY BY COUNSEL FOR STAFF INTO POTENTIAL CONFLICTS OF INTEREST WAS NECESSARY AND APPROPRIATE.

{¶ 71} On August 10, 2022, the Commission selected Exeter Associates, Inc. (Exeter) as the auditor to assist Staff with the review of the Non-Market-Based Services Rider Pilot Program established by the FirstEnergy EDUs. *In re the Review of the Non-Market-Based Services Rider Pilot Program Established by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 22-391-EL-RDR (*Pilot Program Review*), Entry (Aug. 10, 2022). Subsequently, on April 21, 2023, OCC filed, in this proceeding, the direct testimony of Lafayette K. Morgan, a consultant employed by Exeter.

{¶ 72} On the first day of hearing in this proceeding, OCC made a four-part oral motion[7] based upon an alleged telephone phone call from an unnamed attorney for Staff to Exeter, the employer of OCC witness Morgan. OCC alleged that Staff had requested Exeter to withdraw Mr. Morgan's testimony because there was a conflict of interest with Exeter. In support of the motion, OCC questioned whether the communications between Staff and Exeter "were proper or that they were consistent with rules and ethical responsibilities" and

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[7] In the four-part motion, OCC requested: (1) that any motion to strike, dismiss or otherwise prevent Mr. Morgan from testifying be reduced to writing; (2) that the Commission release all records of the conversation with Exeter; (3) that OCC have an opportunity to voir dire the Staff involved in the communications with Exeter; and (4) that a special master, not employed by or affiliated with the Commission, be appointed to rule on any issues related to the communications with Exeter.

whether Staff has engaged in "inappropriate action" (Tr. I at 17, 18). Staff responded that there was no intention to move to strike or exclude Mr. Morgan's testimony (Tr. I at 16). However, OCC's entire basis for this motion apparently was a discussion with Mr. Morgan, who did not participate in the alleged telephone call (Tr. I at 18). Moreover, the record is clear that OCC had not undertaken even a preliminary investigation of the facts OCC claimed supported the four-part motion (Tr. I at 15-16, 18). For example, OCC appeared to be unaware that Exeter had been selected by the Commission as the auditor in the *Pilot Program Review* (Tr. I at 15-16). Moreover, prior to making the four-part motion, OCC did not raise this issue with Staff to seek clarification of the conversation (*Id.*).

{¶ 73} Subsequently, Staff produced a letter from Exeter stating that Staff had made an inquiry regarding any potential conflicts of interest stemming from the fact that Exeter was serving as an auditor assisting the Staff in one case while providing expert testimony for OCC in another, unrelated matter before the Commission. Exeter explained that they were, in fact, participating in both cases, reviewed their analysis as to why no conflict existed, and explained the steps that they had taken to ensure appropriate safeguards were in place. (Staff Ex. 5.)

{¶ 74} After Staff produced the letter, OCC declined to withdraw the motion but stated that it was not proceeding further at this time (Tr. III at 548). OCC also declined to withdraw the claims and allegation it made regarding counsel for Staff (Tr. III at 550-551). OCC did not address the motion in its briefs, but Staff now seeks a ruling on the four-part motion. Staff argues that the Commission should rule on OCC's unfounded witness tampering allegations. OCC alleged that Staff had improperly contacted OCC witness Lafayette Morgan but failed to provide evidence to support that claim. Staff states that they contacted Exeter and not Mr. Morgan to do a simple conflicts of interest inquiry. Staff states that OCC did not provide any evidence regarding undue witness pressure and that the Commission should deny the request for a special master based on lack of evidence.

{¶ 75} In light of the representations made by OCC at the hearing and the failure to address the motion in its briefs, the Commission finds that the motion has been abandoned by OCC and that no ruling on this abandoned motion is necessary. Nonetheless, based upon the actual facts in the record of this proceeding, the Commission finds that the actions of the counsel for Staff were entirely reasonable. Faced with an unusual situation where OCC has retained the same firm already retained by the Commission in another pending matter, it was both necessary and appropriate to make an inquiry into the potential conflict of interest and whether appropriate safeguards were in place.

{¶ 76} Further, the Commission reminds counsel practicing before the Commission that the Rules of Professional Conduct prohibit a lawyer from asserting an issue in a proceeding unless there is a basis in law and fact for doing so that is not frivolous. Prof.Cond.R. 3.1. Further, the comments to Rule 3.1 state the "[w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." We believe that this is particularly important regarding claims of alleged unethical conduct regarding opposing counsel or Staff. Counsel should thoroughly investigate the facts and law prior to making such claims in proceedings before the Commission.

B. Summary of the Stipulation

{¶ 77} On April 10, 2023, the Signatory Parties submitted the Stipulation for the Commission's consideration. The Stipulation was intended by the Signatory Parties to resolve all outstanding issues in these proceedings. The Stipulation provides, *inter alia,* the following terms.

I. Application Approval

A. The Signatory Parties recommend that the Company's Application be approved unless otherwise modified with the Stipulation, except as set forth in Section III.A.

II. ESP Term: The term of ESP IV shall be three years.

III. Supply and Pricing of Electric Generation Service.

A. AES Ohio shall maintain 100% competitive bidding for its SSO load and will conduct two auctions annually through the term of ESP 4. AES Ohio shall follow the competitive bid process described in the testimony of AES Ohio Witness Lee or a process proposed by a Signatory Party and approved by the Commission. Any Signatory Party may present or oppose proposed modifications to AES Ohio's competitive bid process.

B. AES Ohio shall continue to supply the Renewable Energy Credits required to cover its obligation under R.C. 4928.64 relating to the SSO load.

C. AES Ohio shall continue its Standard Offer Rate (SOR) (Tariff Sheet No. G10) with its current rate design methodology, update, process, and audit schedule.

1. AES Ohio will continue to recover uncollectible expenses associated with bypassable standard service offer rate through a bypassable component of the SOR.

2. AES Ohio AES Ohio will credit an amount equal to the bypassable uncollectible expense component of the SOR to customers at the same allocation as base distribution revenues through the Regulatory Compliance Rider.

D. As part of the Grid Mod Implementation Update Group established in Case No. 18-1875-EL-GRD, et al., AES Ohio also agrees to discuss converting the results of its SSO competitive bid process into retail rates for SSO customers with on-peak and off-peak rates. With this group, AES Ohio agrees to discuss potential roadblocks or timing issues with the deployment of such rates. The Group shall also discuss such issues as whether such an on-peak and off-peak pricing method for SSO customers should be on an opt-out basis. Based on these discussions, AES Ohio or another Signatory Party to this Stipulation may make a filing for the Commission to consider an on-peak and off-peak SSO pricing proposal.

IV. Distribution Investment Rider

A. AES Ohio shall implement a Distribution Investment Ride (DIR) as described in AES Ohio Witness Adams' testimony, subject to the following conditions.

B. Capital costs included in the DIR shall be those recorded in FERC Accounts 360 through 374, provided such costs are not collected from consumers elsewhere, such as the Infrastructure Investment Rider. The calculation of the removal of these assets shall be included in the DIR filings. The DIR shall be computed by comparing the current rate base associated exclusively with plant accounts recorded in the FERC accounts noted above to the most recent rate base related to the same accounts as included in the overall rate base approved in the most recent base distribution case. The DIR revenue requirement shall be limited to (i) a return on distribution rate base using the weighted average cost of capital approved in the most recent base distribution case, grossed up for prevailing tax rates; (ii) depreciation expense; and (iii) property taxes on the incremental rate base accumulated since the

date certain in the most recent electric distribution rate case, grossed up for commercial activity taxes.

C. The beginning DIR date certain balance will include the balance of qualifying incremental investments placed in service through November 30, 2022.

D. AES Ohio shall not recover operations and maintenance expense through the DIR, except as provided in Section IV(K) for DIR audit expense.

E. The DIR shall be subject to revenue caps. In 2023, the cap will be the cumulative amount of $2,350,000 per month effective with DIR commencement; the 2024 cap will be $38,400,000; 2025 will be $49,400,000; and the cap for 2026 will be $5,050,000 per month until the end of the ESP term. DIR revenue collected from consumers less than the cap in a given year shall not increase caps for future years.

F. Reliability Performance

1. For purposes of Section IV(F)(3), the System Average Interruption Duration Index ("SAIDI) performance goals will be: 103 for 2023, 99 for 2024, and 96 for 2025.

2. AES Ohio shall continue to be subject to Section 17(a) of the Stipulation in Case No. 18-1875-EL-GRD, et al.

3. SAIDI Performance Goal Effect on DIR Revenue Caps

Should AES fail to achieve their annual SAIDI performance goals during calendar years 2024 through 2025, the revenue cap for future years through 2026 will be decreased as set forth at pages 8-10 of the Stipulation.

G. Should AES Ohio fail to file a new base distribution rate case on or before December 31, 2025, then the DIR will sunset and the DIR rate shall be set to zero on January 1, 2026. Should AES Ohio file a new base distribution rate case, DIR caps will be revised to reflect the updated base rates in that case, to go into effect upon Commission Order in that case. It will then continue for the remainder of the ESP term, unless otherwise extended by the Commission.

H. The DIR will be trued up for over/under recovery of revenues compared to the Company's DIR revenue requirement.

I. The recovery of incentive compensation in the DIR shall be treated in the same manner as such compensation is treated in the Company's then-operative rate case.

J. AES Ohio shall include the Protected Excess ADIT the Company proposed to credit customers as an offset to the DIR revenue requirement per Case No. 19-572-EL-UNC. The Company will comply with the normalization rules under the Internal Revenue Code sections 167 and 168. In the event new rulings or guidance from the IRS or Department of Treasury would result in this treatment of Protected Excess ADIT being out of compliance with normalization rules—or if the allowed return in a future distribution rate case differs from the allowed return in the effective ESP—the parties will revisit the treatment of Protected ADIT and Protected Excess ADIT in this agreement.

K. AES Ohio shall file quarterly updates on or about the first of February, May, August, and November, with rates charged to consumers being effective 60 days after filing unless otherwise suspended by the Commission. The filings shall be subject to review, as well as an annual audit with the expenses relating to such audits being deferred

and collected from consumers through the DIR. Annual audits will include but not be limited to:

1. On-site inspections of new capital assets;
2. Tracking capital expenses from continuing property records, invoices, and other supporting documentation to the used and useful assets and vice versa;
3. Verification of proper accounting and computation of annual property tax expense;
4. Verification of proper accounting and computation of state, local, and federal income tax expense, as well as taxes other than income;
5. Verification of proper accounting and computation of annual depreciation expense;
6. Verification of proper accounting for DIR revenues; and
7. Verification with FERC Form 1.

L. AES Ohio shall solicit input from Signatory Parties in order to develop an annual work plan to emphasize proactive distribution maintenance, improve service reliability and resilience of the grid, and promote equity for low-income communities. The plan shall include identification of those expenditures that will help reduce customers' minutes interrupted. AES Ohio shall update Staff quarterly on expenditures made under the work plan and how those expenditures align with planned investments in individual reliability programs. AES Ohio shall file the work plan in the DIR docket by December 31 each year.

M. AES Ohio will notify Staff and Signatory Parties of any changes to its capitalization policy that materially affects the DIR and provide documentation of the revised policy.

V. Proactive Reliability Optimization Rider

A. AES Ohio shall implement a Proactive Reliability Optimization Rider (PRO Rider).

B. The PRO Rider shall collect all prudently incurred vegetation management expenses authorized for deferral on an annual basis up to the caps identified by the Commission in Case Nos. 15-1830-EL-AIR and 20-1651-EL-AIR and not otherwise recovered in base distribution rates.

C. Upon approval of this Stipulation by the Commission, AES Ohio shall initially include for recovery in the PRO Rider the vegetation management deferral balance reflecting expenses incurred above the baseline set in Case No. 15-1830-EL-AIR in 2021 and 2022. The accumulated deferral balance in this section shall be recovered evenly over a three-year period. Pursuant to the Opinion and Order in Case No 15-1830-EL-AIR, the deferral balance is not subject to carrying costs.

D. AES Ohio shall file an annual update on or before March 31 of each year, with rates effective 60 days after filing. This annual update shall be subject to Commission review, audit, and reconciliation. If a third-party audit occurs, the expense of such audits shall be deferred and recovered through the PRO Rider. Such audit shall include a determination of whether expenditures are prudent in rendering utility service to customers. The Company shall not file updates more frequently than once per year.

E. In performing vegetation management, AES Ohio shall make reasonable efforts to return to a five-year trim cycle on all circuits. During the annual audit, Staff will assess these efforts to determine if reasonable improvement has been made in this area.

VI. Regulatory Compliance Rider

A. AES Ohio shall implement a Regulatory Compliance Rider (RCR) as described in the AES Ohio Witness Donlon's testimony, subject to the following conditions.

B. The RCR shall recover the following amounts:

1. $28,269,739 of deferred Ohio Valley Electric Corporation (OVEC) costs, which reflect the balance of that deferral as of July 31, 2022, minus $660,616, which represents AES Ohio's portion of a penalty assessed by PJM to OVEC owners.[8]

   a) The OVEC deferral shall accrue carrying costs based on a long-term debt rate of 4.40% beginning at the time the costs were incurred, i.e., from October 1, 2014 through October 31, 2017, and from December 19, 2019 through December 31, 2019.

   b) To avoid double payment by consumers, the OVEC deferral identified in this Section, including carrying costs, were and shall not be recovered either through the Company's former Reconciliation Rider or current Legacy Generation Rider.

2. $13,796,923 of deferred Decoupling amounts through December 18, 2019, consistent with Case No. 15-1830-EL-AIR.

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[8] Kroger, CUB, OEC, and OELC do not support the recovery of deferred OVEC costs but agree not to oppose this provision of the Stipulation as a package. OMAEG, Kroger, CUB, OEC, and OELC's non-opposition shall not be relied upon in any other forum or proceeding.

3. $6,315,489 of deferred Prior RCR costs.

4. Any Uncollectible Amounts that reflect a reconciliation to the amounts approved in base rates in Case No. 20-1651-EL-AIR upon implementation of those rates.

5. The deferral of operation and maintenance (O&M) expenses associated with implementation of AES Ohio's new Customer Information System upon demonstration of the functionality detailed in the Stipulation and Recommendation approved in Case No. 18-1875-EL-GRD, et al., subject to a reasonableness and prudency review.

6. Regulatory assets later approved for collection from consumers by the Commission. AES Ohio must file an application to the Commission to request recovery of any future regulatory asset or liability from consumers though the RCR. Signatory Parties are allowed to challenge any such request.

C. The Company shall withdraw its application in Case No. 20-140-EL-AAM and will not recover or seek to recover decouple amounts in the future.

D. AES Ohio shall provide the credit relating to uncollectible expense authorized by Section I(C)(2) through the RCR.

E. Costs allocated to non-residential customers shall be charged as a dollar per bill by tariff class. Secondary class charges shall be further differentiated by unmetered, single phase, and three phase service. Costs allocated to residential customers shall be charged as a percentage of base distribution revenue. This rate design shall not affect the allocation of costs among tariff classes.

F. To mitigate bill impacts, AES will extend recovery of the amounts authorized for recovery through the RCR over five years, including carrying costs at the Company's then-authorized cost of long-term debt. Such going-forward costs shall be capped at $4 million.[9]

VII. Storm Cost Recovery Rider

A. AES Ohio shall continue its Storm Cost Recovery Rider (SCRR), subject to certain modifications described in AES Ohio Witness Donlon's testimony.

B. AES Ohio shall implement SCRR updates on April 1 and October 1 annually, with rates effective 60 days after filing unless otherwise suspended by the Commission.

C. The April 1 filing update shall be subject to annual Commission review, audit, and reconciliation. Such audit shall review the 12-month period ending September 30 of the prior year. If a third-party audit occurs, the expense of such audit shall be deferred and recovered through the SCRR. Such audit shall include a determination of whether expenditures are prudent in rendering utility service to customers. Audit adjustments resulting from the annual audit shall be accounted for and captured in the filing next following Commission Order issued pursuant to the results of the annual audit.

D. AES Ohio shall not collect carrying charges from consumers on balances approved for recovery through the SCRR.

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[9] The $4 million cap reflects estimated carrying costs over a three-year amortization schedule at 4.40 percent instead of five years.

VIII. Decoupling Rider

A. AES Ohio withdraws the proposed Decoupling Rider and agrees not to collect from any consumers decoupling revenues or lost revenues during the three-year ESP term, notwithstanding any change in law, except for the agree-upon amounts identified in Section VI(B)(2).

IX. Customer Programs Rider

A. AES Ohio shall implement a Customer Program Rider (CPR) as described in Company Witness Inman's testimony, subject to the following conditions.

B. The CPR will recover the costs from residential consumers for the Low-Income Assistance Programs described in Section IX(E) and the Electric Vehicle (EV) programs described in Section IX(F).

C. AES Ohio shall file annual updates of the CPR. The filings shall be subject to annual Commission review, audit, and reconciliation. The audit shall be conducted by Staff or a third party under the supervision of Staff. If a third-party audit is conducted, the expense of such audits shall be deferred and recovered through the CPR. Audit adjustments resulting from the annual audit shall be accounted for and captured in the annual filing next following a Commission Order issued pursuant to the results of the annual audit.

D. AES Ohio withdraws its request in its Application relating to energy efficiency, demand-side management, and demand-response programs, but will implement the Low-Income Assistance Programs described in the next section.

E. Low-Income Assistance Programs

1. Subject to the provisions of this Section, AES Ohio withdraws its request for collection of costs from consumers relating to the

demand-response and behavior customer programs described in the testimony of AES Ohio Witness Houdek. AES Ohio shall collect from residential consumers an annual amount of $5.7 million to fund an annual budget for certain low-income-eligible programs (Low-Income Assistance Programs), which shall include (1) the Weatherization and Bill Payment Assistance Program, and (2) the Disadvantaged Communities Energy Initiative.

2. The administration of the Weatherization and Bill Payment Assistance Program will be bid out through a Request for Proposal (RFP) process to select the best candidate. The winning bidder (third-party administrator) shall work with AES Ohio to administer the program with $3 million of the annual budget of the Low-Income Assistance Programs, including (1) $2.5 million of that annual budged dedicated to weatherization for residential customers modeled after the Ohio Home Weatherization Assistance Program, except that the income eligibility cap shall be 250% of the federal poverty level, and (2) $500,000 of that annual budget dedicated to low-income bill payment assistance, modeled after the Ohio Home Energy Assistance Program, with an income eligibility range of 175% to 250% of the federal poverty level. Any unused funds shall roll over to the next year until they are exhausted. The third party will receive an administration fee for overseeing the weatherization portion of the program based on the percentage of cost of that program; no fee will be paid for administering the bill payment assistance program. AES Ohio, Staff, and Non-Opposing Parties who are not selected as the administrator will work with the third-party administrator to establish key performance indicators. The third-party

administrator shall submit a report annually regarding its performance. AES Ohio may terminate any such agreement with the third party for cause, including but not limited to failure to achieve key performance indicators.

a) AES Ohio shall select the third-party administrator through a competitive RFP.

b) AES Ohio, with input from Staff and interested Signatory and Non-Opposing Parties, shall establish minimum criteria for bidders to be included in the RFP.

c) The winning applicant shall be chosen as AES Ohio's sole discretion. AES Ohio may consider factors listed in the Stipulation and any other criteria it deems appropriate with no single criterion being conclusive.

3. AES Ohio shall provide $2.7 million of the annual budget of the Low-Income Assistance Program to support a Disadvantaged Communities Energy Initiative. Any unused funds will roll over to the next year but all funds unspent at the end of the ESP term shall be returned to consumers.

   a) AES Ohio shall provide funding to three municipalities in the Company's service territory with the highest per capita poverty rates.

   b) Municipalities seeking such funding shall apply explaining how awarded funds will be used for energy-related purposes in Qualified Census Tracts to benefit low-income consumers in the area and how such funds promote social-economic benefits to the municipality and its residents. The assistance to low-income consumers shall be used for socio-economic benefits,

including but not limited to, utility bill assistance, reconnection fees, deposits to establish service due to arrearage, and weatherization.

c) AES Ohio will work with Staff and interested Signatory Parties and Non-Opposing Parties to develop key performance indicators, and AES Ohio shall submit a report annually regarding performance.

4. AES Ohio shall not collect from consumers shared savings associated with the Low-Income Assistance Program.

5. AES Ohio agrees to meet with Commission Staff and other interested Signatory Parties and Non-Opposing Parties on an annual basis during the term of the ESP to discuss opportunities to weatherize properties of low-income customers. Discussion topics may include, but are not limited to: (1) ways for AES Ohio to streamline administrative and operational costs among funding sources so that Low-Income Assistance Program funds can reach more customers; (2) the average cost of weatherizing a home/property for the Low-Income Assistance program; (3) maximizing recipients and beneficiaries of Low-Income Assistance Program funds; and (4) whether certain customer groups should be prioritized in the Low-Income Assistance Program.

F. Electric Vehicles

1. Subject to the provisions of this Section, AES Ohio shall only implement the following EV program from its Application. The program will encourage utilization of the distribution grid during off-peak hours.

a) The Residential Off-Peak Incentive Program costs will be capped at $260,000 annually during the three-year ESP period and will be sunset at the end of the ESP term, unless otherwise extended.

(i) Up to 20 percent of the total program costs eligible for recovery may be for outreach, labor, and evaluation of the Program

(ii) Using the lessons learned from the Residential Off-Peak Incentive Program, the Company will propose a cost-based EV charging distribution service tariff to encourage off-peak charging for residential customers as part of its next EL-AIR or EL-SSO proceeding. Signatory Parties retain all litigation rights regarding such proposals.

(iii) The costs of this program shall be allocated only to residential consumers.

2. AES Ohio withdraws its request for collection of costs from consumers relating to the following EV programs: the Residential Managed Charging program, the Low-to-Moderate Income EV Subscription program, the C&I Managed Charging program, the C&I EVSE Rebates for Disadvantage Communities program, the C&I Fleet Solutions Program, and the C&I EVSE Lease Program.

3. In the Commission's next review of Ohio Adm.Code Chapter 4901:1-9, AES Ohio will propose that for non-residential customers, electric utilities shall be responsible for eighty percent of the total cost of line extensions for publicly available EVSE, and customers will be responsible for the remaining twenty percent. Signatory Parties retain the right to take any position regarding the proposal.

X. Green Energy Alternative Tariff[10]

A. AES Ohio shall implement an optional Green Energy Alternative Tariff, as described in AES Ohio Witness Donlon's testimony, to offer agreements with mercantile customers to construct customer-sited renewable energy resources pursuant to R.C. 4928.47.

B. Each agreement between AES Ohio and mercantile customers electing to take service under this tariff shall be submitted to the Commission for approval pursuant to R.C. 4928.47.

XI. AES Ohio proposes to continue the following existing riders with their respective rate design methodologies, update processes, and audit schedules:

A. Tax Savings Credit Rider;

B. Infrastructure Investment Rider;

C. Economic Development Rider;

D. Transmission Cost Recovery Rider (subject to billing changes described in Section XVI); and

E. Energy Efficiency Rider (pending final reconciliation).

XII. As part of AES Ohio's next distribution rate case application, the Company agrees to evaluate the cost to serve customers that have interconnected large onsite distributed generation (DG) facilities (larger than 500 kW of capacity) by current and proposed rate classes. The Company shall provide a list of customers included in the evaluation to PUCO Staff, marked as confidential where appropriate. The Company shall also provide the current revenues, the fully allocated cost to serve,

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[10] IGS takes no specific position on this provision of the Stipulation.

and the net operating income for those customers during the year period at current and proposed rates. Pursuant to the Opinion and Order in Case No. 20-1651-EL-AIR, et al., the Company will also "provide analysis of the impact of any rate change on distributed generation resources," notably customers with large onsite DG facilities as described above. Based on this information, AES Ohio will also evaluate its existing cogeneration and small power production tariff and tariff for net metering and consider any appropriate modification to those tariffs and/or the addition of a DG tariff.

XIII. Residential Customer Education and Information

A. In an effort to reduce disconnections, AES Ohio agrees to conduct educational outreach and marketing of utility assistance programs and low-income energy efficiency programs. AES Ohio will prioritize its outreach into communities that have the highest percentage of disconnection notices issued. AES Ohio will explore outreach in multiple languages where appropriate and at local public events. On an annual basis, AES Ohio will provide to Signatory Parties and Non-Opposing Parties a performance metrics report on the outreach conducted, along with disconnection data in these communities.

B. Upon receiving all necessary customer consent, AES Ohio will provide competitive retail electric service (CRES) providers and third-party aggregators available customer data to allow them to enroll residential accounts to participate in the PJM ancillary services market. As part of the first meeting of the Grid Mod Implementation Update Group established in Case No. 18-1875-EL-GRD, et al., AES Ohio will discuss what data may be available under this section and when usable data will be available. Usable data sharing under this section shall begin

no more than one year from the date of such Grid Mod Implementation Update Group meeting.

XIV. AES Ohio shall amend Tariff Sheet No. D26 to eliminate the $25 Reconnection of the Meter charge for customers with AMI meters who are reconnected remotely.

XV. For 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. Signatory Parties retain the right to take any position regarding such proposal.

XVI. Transmission: AES Ohio will bill all non-residential customers taking service at primary voltage and above, and any non-residential customers taking service at secondary voltage that opt-in, for all Transmission Cost Recovery Rider (TCRR) demand charges on the basis of their Network Service Peak Load (NSPL). Billing based on NPSL shall be implemented starting June 2025. Secondary customers who opt-in may not opt-out within two years of opting-in. This change in transmission billing shall not shift any transmission costs to residential customers. AES Ohio will continue its existing TCRR Opt-Out Pilot program until the NSPL billing change is effective. Enrollment in the existing TCRR Opt-Out Pilot program shall be open to Signatory Parties served at secondary voltage or primary voltage and above on an opt-in basis. Enrollment in the existing TCRR Opt-Out Pilot shall be capped at 50 customers. Billing will operate as it does now for residential customers.

XVII. Economic Development Incentive

A. The Economic Development Incentive, Economic Development Incentive Tariff and the Economic Development Rider proposed in the

Application and described in AES Ohio Witness Inman's testimony are approved and shall be modified as follows:

1. AES Ohio will enter into a Service Agreement with an existing or new non-residential customer with a demand of 500 kW or greater at a single site to establish an Economic Development Incentive to support development in AES Ohio's service territory. For customers served at Secondary and Primary voltage level of service, the incentive will be implemented through the following percentage reductions of the customer's monthly billed demand for two years, based on the amount of capital invested by the customer, or the load growth, in the new or expanded facilities. For customers served at Primary-Substation and High Voltage level of service, the incentive will be implemented through the following percentage reductions of the customer's monthly billed demand, for base distribution service and transmission service only, for two years based on the amount of capital invested by the customer, or the load growth, in the new or expanded facilities.

    a) >$20 million of investment or load growth of >500kW: 50 percent

    b) >$30 million of investment or load growth of >750kW: 55 percent

    c) >$40 million of investment or load growth of >1,000kW: 60 percent

    d) >$50 million of investment or load growth of >1,250kW: 65 percent

    e) >$60 million of investment or load growth of >1,500kW: 70 percent

2. To qualify, the construction work with new or expanded facilities must commence after this ESP is approved by the Commission and must be substantially completed within three years of commencement of construction. The Service Agreement to establish the incentive may be made any time before substantial completion of construction and must include reasonable evidence of the expected capital investment or load growth.

3. Within 60 days of the substantial completion of the construction of new or expanded facilities, the customer must submit to AES Ohio evidence of the amount of capital investment made or load growth attributable to the new or expanded facilities. The discount will take effect in the first full billing cycle following the date of this submission and remain in effect for 24 months.

4. The Economic Development Incentives will be collected from all consumers through delta revenues in the Economic Development Rider. AES Ohio agrees to a cap of $1.50 per year per residential customer, $10.00 per year per customer served at secondary voltage level, and $750.000 per year per customer served at primary voltage level or above on the amount of delta revenue collected relating to these incentives.[11]

5. AES Ohio shall provide any Service Agreements entered under this section to Staff on a confidential basis.

XVIII. AES Ohio agrees to meet with the OHA at least once per year to discuss opportunities that enhance reliability and resiliency for hospitals in its service territory.

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[11] These customer bill caps represent approximately $1.6 million of delta revenue per year.

XIX. AES Ohio agrees to extend the waiver of the Contract Capacity Charge related to Redundant Service (Alternate Feed Service) for Dayton and all OHA members until (1) the term of the ESP IV ceases or (2) AES Ohio ceases recovery through the Infrastructure Investment Rider, whichever event occurs later. This waiver shall be applied to Dayton and all OHA members regardless of whether they are currently paying Alternate Feed Service charges or require Alternate Feed Service in the future. Revenue that is not collected due to this waiver shall not be collected from other customers.

XX. Significantly Excessive Earnings Test

A. The threshold for determining whether the Company had excessive earnings under R.C. 4928.143(F) in 2023, 2024, and 2025 shall be a return on equity of 13%. AES Ohio agrees not to request to offset any excessive earnings under R.C. 4928.143(F) in those years with future committed investments. AES Ohio agrees to credit any significantly excessive earnings in those years within 12 months an Order finding that the Company had significantly excessive earnings.

XXI. Consumer Hardship Bill Payment Assistance

A. AES Ohio shall contribute $50,000 per year for three years of shareholder funds to the AES Ohio Gift of Power program. Funds not distributed shall be rolled over to the next year until exhausted.

XXII. AES Ohio shall convene a working group open to all Signatory Parties, to meet at least three times before filing its next base distribution rate case, to discuss and design a potential non-residential rate structure to collect the costs of providing electric service to customers with low energy use, including but not limited to EV charging stations. The working group shall consider a variety of rate designs currently in effect in Ohio or

elsewhere. Based on the working group's discussion, AES Ohio will propose an appropriate rate structure for such customers in that rate case.

XXIII. Staff will issue an RFP to review data associated with uncollectible expense recovery. Specifically, the consultant shall conduct a review of

A. Customer account billing records for SSO and CRES customers in which balances were written off during the 12 months prior to the signing of the Stipulation;

B. The Company's collection and disconnection practices;

C. The process for applying partial payments; and

D. Any other records or information deemed appropriate.

Costs associated with this review shall be recoverable through the RCR on a nonbypassable basis.

XXIV. The Signatory Parties recommend that the Commission find that this electric security plan, as reflected in the Application and modified by the Stipulation, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code.

XXV. AES Ohio will work collaboratively with Dayton to support the interconnection of any solar project at the Valleycrest Superfund site.

XXVI. Rate Case Items

A. Pursuant to the Opinion and Order in Case No. 20-1651-EL-AIR:

1. AES Ohio agrees to eliminate the switching fees in Tariff Sheet Nos. D34 and G9.

2. AES Ohio agrees to implement its proposal for the Low-Load Factor Charge (fka the Max Charge Provision) as described in its

January 13, 2023 Application for Rehearing in Case No. 20-1651-EL-AIR to evenly phase in rates to gradually target customers with approximately ten percent load factors, so that customers with approximately the following load factors would continue to be billed under the Low-Load Factor Charge:

a) Year 1: 16 percent

b) Year 2: 12 percent

c) Year 3: ten percent

(Signatory Parties Ex. 1 at 3-36.)

C. Consideration of the Stipulation

{¶ 78} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.,* 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), *citing 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 supported or unopposed by the vast majority of parties and resolves all issues presented in the proceeding in which it is offered.

{¶ 79} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Dominion Retail v. Dayton Power and Light,* Case Nos. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005); *In re Cincinnati Gas & Elec. Co.,* Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.,* Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Cleveland Elec. Illum. Co.,* Case No. 88-170-EL-AIR, et al., 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 the 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 of Ohio has endorsed the Commission's analysis using these criteria to resolve cases 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, 629 N.E.2d 423 (1994), *citing Consumers' Counsel* at 126.

1. IS THE SETTLEMENT A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 80} Staff, RESA, OEG, OPAE/Dayton, OELC, OMAEG/Kroger, IGS, Walmart, and AES Ohio submit that record evidence conclusively establishes that the Stipulation is the product of a fair, open, thoughtful, and transparent bargaining process among parties who are capable, knowledgeable, and otherwise experienced in the complex issues at issue in this matter. Staff and others state that the parties engaged in multiple settlement discussions—including 15 all-party bargaining sessions and multiple meetings with individual intervenors and stakeholder groups—in negotiating the Stipulation, for which all parties made concessions and compromises. RESA, IGS, OPAE/Dayton and others explain that all parties were invited to participate in the negotiations, and AES Ohio witness Schroder confirmed that the parties were able to make comments and ask the Company questions about the Stipulation during negotiations (AES Ex. 1 at 5; Tr. I at 131). Furthermore, AES Ohio emphasizes that the parties engaged in and/or had access to

extensive discovery regarding the Company's Application and, ultimately, the Stipulation (AES Ohio Ex. 1 at 6-7; Signatory Parties Ex. 1 at 3). OEG adds that most, if not all, parties involved in this matter have extensive experience in Commission matters and were represented by competent counsel with similar experience, had ample time to review and analyze settlement proposals, and made significant compromises in crafting the Stipulation. OELC stresses that no party received everything it wanted because the Stipulation balances the parties' diverse interests and is the result of numerous compromises. Additionally, Staff contends that, despite the diversity of interests represented by the Signatory Parties in this case, diversity of interest is not required; nor does the absence of OCC's signature indicate a failure of the first prong. *AEP Ohio PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 52-53. The parties point to the testimony of Company witness Schroder and Staff witness Messenger in support of their arguments (AES Ohio Ex. 1 at 5-7; Tr. I 131-132; Staff Ex. 6 at 4-5). They further highlight that OCC's own witnesses testified that they had no reason to doubt that the Stipulation meets this prong of the Commission's reasonableness test (Tr. II at 307; Tr. IV at 669).

{¶ 81} The only party to challenge the Stipulation, OCC submits that the Stipulation is not the product of serious bargaining among knowledgeable parties. Instead, says OCC, there is no evidence to indicate whether the Signatory Parties knew that they were agreeing to pay over $160 million to AES Ohio under the terms of the Stipulation. OCC characterizes this lack of information as prima facie evidence that the Signatory Parties were not, in fact, knowledgeable. Citing testimony by Company witness Schroder, OCC additionally argues that AES Ohio had quantified only some of the benefits to each customer class under the Stipulation, but not all. Because not all benefits were quantified, argues OCC, the Signatory Parties may not have known the benefits of the Stipulation, calling into question whether they were knowledgeable. OCC further urges the Commission to give little, if any, weight to the fact that numerous parties, potentially unaware of the $160 million cost, signed a Stipulation of unquantified benefits due to the disparate bargaining power enjoyed by AES Ohio under R.C. 4928.143(C)(2). Given the utility's greater power in ESP proceedings, OCC

submits that the Commission should carefully review all terms and conditions of the Stipulation and place greater emphasis on the second and third prongs of the reasonableness test.

{¶ 82} In response, Walmart, OMAEG/Kroger, AES Ohio, and Staff assert that OCC mischaracterizes what it means for the Signatory Parties to be "knowledgeable" in the context of analyzing a Stipulation. While OCC focuses on a single point of knowledge, OMAEG/Kroger assert that the Commission looks instead to whether the parties are knowledgeable about the Commission's process and regulatory matters or whether they are represented by competent, capable, and knowledgeable counsel familiar with Commission proceedings and have access to technical experts. *See In re Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 21-887-EL-AIR, et al. (*Duke Rate Case*), Opinion and Order (Dec. 14, 2022) at ¶ 100; *In re East Ohio Gas Company dba Dominion Energy Ohio*, Case No. 19-468-GA-ALT, Opinion and Order (Dec. 30, 2020) at ¶ 44. Walmart adds that Commission has judged whether parties are knowledgeable where they have "proven their ability to grasp and resolve complex utilities issues." *Consumers' Counsel*, 64 Ohio St.3d at 126, 592 N.E.2d 1370. In short, Walmart contends that OCC's argument relies on its own mischaracterization of the applicable standard and that there is no legitimate argument that all Signatory Parties are required to know the cumulative cost of a Stipulation to knowledgeably negotiate and sign the same.

{¶ 83} Furthermore, argue Walmart, OMAEG/Kroger, and AES Ohio, as much as OCC asserts that the Signatory Parties may not have known of the $160 million cost of the Stipulation, there is no evidence to demonstrate that the Signatory Parties, in fact, did not know that information. There is, however, testimony from Staff witness Messenger that Staff looked at the cost of the Stipulation to consumers, was aware of the costs of the Stipulation to all customer classes, and was able to review monthly bill impacts (Tr. III at 562, 576-577). And, as previously mentioned, all parties had the opportunity to inquire as to the cumulative cost to different customers and different customer classes (Tr. I at 131-132). Moreover, argues AES Ohio, the Stipulation itself repeatedly identifies the costs—or

cost caps—associated with particular items. Staff additionally asserts that it is impossible to quantify all benefits because some are intangible. And some costs, like those associated with storms, cannot be predetermined (Tr. I at 87-88).

{¶ 84} Finally, Staff and Walmart urge the Commission to reject OCC's arguments regarding allegedly unequal bargaining power. Walmart and Staff state that, other than inserting the argument into consideration with citations to a dissenting and concurring opinion issued 15 years ago, OCC makes no claim of unfair tactics nor points to any evidence that serious, arm's length bargaining did not occur. Staff posits that a utility's statutorily conferred right to withdraw an ESP does not amount to evidence of unfair bargaining. Additionally, Walmart contends that OCC's argument here is an improper attempt to rehash arguments made and rejected by the Commission in Duke Energy Ohio, Inc.'s most recent rate case. *Duke Rate Case*, Opinion and Order (Dec. 14, 2022) at ¶ 35, 100-104.

{¶ 85} In its reply brief, OCC maintains that none of the other parties' arguments contradict OCC's point that the intervening parties were not knowledgeable about the Stipulation's ultimate $160 million cost to their clients. OCC argues that there is no evidence to indicate otherwise. And, without understanding the total cost the Stipulation imposes on consumers, the Signatory Parties were not knowledgeable regarding the Stipulation.

{¶ 86} The Commission finds that the evidence in the record demonstrates that the Stipulation was the product of serious bargaining by capable, knowledgeable parties. Both AES Ohio Witness Schroder and Staff Witness Messenger testified that the parties routinely practice before the Commission and that the parties were represented by counsel with substantial experience practicing before the Commission (AES Ohio Ex. 1 at 5-6; Staff Ex. 6 at 4-5). On the other hand, there is no testimony in the record that the Stipulation was *not* the product of serous bargaining by capable, knowledgeable parties. OCC witness Fortney stated that he had "no reason to doubt that "the Stipulation is the product of serious negotiations among knowledgeable, capable parties (Tr. II at 307). OCC witness Morgan testified that "I accept that the parties that were at the table negotiating * * * were capable of

engaging in a rigorous negotiation." (Tr. IV at 669). OCC witness Wilson does not address the issue in his testimony (OCC Ex. 1 at 3-4). Moreover, although a diversity of interests is not a strict requirement for a stipulation to be approved, it is beneficial in the consideration of a stipulation, and, in this case, the Signatory Parties represent a diverse set of interests, including low-income residential customers, industrial customers, large retail customers, CRES providers and other market participants, Dayton, the utility and Staff (AES Ohio Ex. 1 at 4-5).

{¶ 87} Instead of evidence, OCC relies on a misinterpretation of the word "knowledgeable" backed by nothing more than conjecture and speculation. OCC posits that, *if* the Signatory Parties were not aware of the costs of the Stipulation, *then* there is *prima facie* evidence that the Signatory Parties were not "knowledgeable" parties, and the Stipulation fails the first prong.

{¶ 88} However, OCC's interpretation of "knowledgeable" is not consistent with prior decisions of the Commission which were affirmed by the Supreme Court of Ohio. OCC argues that the Signatory Parties were not knowledgeable if the Signatory Parties were unaware of the total cost of the Stipulation to ratepayers. The Commission has held that signatory parties are capable and knowledgeable where those parties have "proven their ability to grasp and resolve complex utilities issues" and where those parties have been involved "with the issues presented over a number of years." *Consumers' Counsel,* 64 Ohio St.3d at 126, 592 N.E.2d 1370; *Industrial Energy Consumers,* 68 Ohio St.3d at 562, 629 N.E.2d 423.

{¶ 89} Moreover, the Commission finds that OCC's allegation that Signatory Parties may have lacked knowledge of specific facts in this case is undermined by the extensive discovery conducted in this proceeding. The Stipulation represents that AES Ohio served upon the parties in this case discovery responses to 14 sets of Staff data requests, 1043 interrogatories, 163 requests for production of documents and 36 requests for admission, all including subparts (AES Ohio Ex. 1 at 6-7; Signatory Parties Ex. 1 at 2).

Moreover, 633 of the interrogatories and 84 of the requests for production of documents were propounded by OCC. (Signatory Parties Ex. 1 at 2). OMAEG also represents that AES Ohio complied with the usual practice before the Commission and served all discovery responses upon all parties in the proceeding. This extensive discovery suggests that there was no lack of knowledge among the Signatory Parties regarding the issues in this case.

{¶ 90} Finally, regarding OCC's concerns that the intervenors in this proceeding and Staff lack bargaining power with AES Ohio, the Commission has on numerous occasions rejected claims of disparate bargaining power and declined to modify the three-prong test for consideration of stipulations. *See, In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co.,* Case No. 10-388-EL-SSO (*FirstEnergy ESP II Case*), Opinion and Order (Aug. 25, 2010) at 21, Third Entry on Rehearing (Feb. 9, 2011 at 9-10). *See also*, *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co.,* Case No. 14-1297-EL-SSO (*FirstEnergy ESP IV Case*), Opinion and Order (Mar. 31, 2016) at 41; *AEP Ohio PPA Rider Case,* Second Entry on Rehearing (Nov. 3, 2016) at ¶ 42, Fifth Entry on Rehearing (Apr. 5, 2017) at ¶ 27; *In re Ohio Power Co.,* Case No. 16-1852-EL-SSO, et al. (*AEP Ohio ESP IV Case*), Opinion and Order (Apr. 25, 2018) at ¶ 129-131, Second Entry on Rehearing (Aug. 1, 2018) at ¶ 61. Accordingly, we decline to follow OCC's suggestion that the Commission give little weight to the fact the numerous parties signed the Stipulation. The Signatory Parties represent a diverse set of interests (AES Ohio Ex. 1 at 5-6), and we are confident that the parties are capable of determining their own best interests and whether any potential benefits outweigh any potential costs. *FirstEnergy ESP IV Case*, Opinion and Order at 44.

{¶ 91} Nonetheless, with respect to OCC's request that the Commission carefully review all terms and conditions of the Stipulation, the Commission *always* carefully reviews all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest. In making this determination, the Commission exercises its independent judgement, based upon its statutory authority, the evidentiary record in the case, and the Commission's specialized expertise and discretion. *FirstEnergy ESP II Case*,

Opinion and Order at 21 citing *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921.

2. DOES THE SETTLEMENT, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 92} AES Ohio OPAE/Dayton, RESA, OELC, OEG, IGS, OMAEG/Kroger, Walmart, and Staff submit that the Stipulation, as a package, benefits ratepayers and the public interest.

{¶ 93} AES Ohio submits that the Stipulation provides significant benefit to customers by generally leading to greater reliability, providing specific benefits, eliminating any financial integrity or provider of last resort (POLR) charges, and resulting, still, in the lowest transmission and distribution rates in the state. As examples of provisions leading to greater reliability, the Company cites the DIR and the PRO Rider. AES Ohio states that the DIR encourages incremental investments to the distribution system and is paired with annual caps on the revenue requirement and penalties that lower those caps if the Company fails to meet predetermined reliability benchmarks. Additionally, the Company is committed to develop an annual work plan to emphasize proactive distribution maintenance focusing on where it will have the greatest impact on maintaining and improving service reliability and grid resiliency. (Staff Ex. 6 at 4-6; Staff Ex. 7 at 5.) Additionally, the PRO Rider incentivizes the Company to focus on increasing its vegetation management activity, which is expected to increase reliability (Staff Ex. 6 at 6). AES Ohio witness Schroder also points to the Infrastrucure Investment Rider (IRR) and SCRR as provisions that will lead to increased reliability.

{¶ 94} AES Ohio further submits that the Stipulation will provide more specific benefits to customers. Listed examples of specific benefits arising from the proposed ESP include: (1) competitively sourced generation for SSO customers; (2) a commitment to meet with Grid Mod Implementation Update Group to discuss converting the results of the SSO auction into retail rates that include on-peak and off-peak pricing; (3) a process through

which a proactive distribution maintenance plan will be developed; (4) an RCR to recover deferred costs, which is critical to the Company's ability to maintain and improve reliability; (5) the withdrawal of the *Distribution Decoupling Case*; (6) implementation of the Low-Income Assistance Program, which will provide weatherization and bill assistance programs and a Disadvantaged Communities Energy Initiative; (7) implementation of the Off-Peak Incentive Program for vehicle charging; (8) implementation of the Green Energy Alternative Tariff to offer customer-sited renewable energy resources for mercantile customers pursuant to R.C 4928.47; (9) continuation of the Tax Savings Credit Rider (TSCR), which returns to customers benefits associated with the Tax Cuts and Jobs Act; (10) a commitment by AES Ohio to evaluate the costs to serve customers with large, distributed generation facilities as part of the next distribution rate case; (11) commitments by the Company to conduct educational outreach and marketing of assistance programs in an effort to reduce disconnections; (12) sharing customer data to CRES providers and third-party aggregators when appropriate to allow participation in the PJM ancillary services market; (13) elimination of a $25 reconnect fee when the customer can be reconnected remotely; (14) capping the equity component of any distribution rate case filed during the term of ESP IV; (15) billing transmission costs to non-residential customers based on their contribution to AES Ohio's NSPL beginning in 2025; (16) implementation of Economic Development Incentives to support new and expanding businesses in the service territory; (17) a commitment to annual meetings with OHA to discuss reliability and resiliency; (18) the continued waiver of redundant service charges for Dayton and OHA for a specified period; (19) a negotiated Significantly Excessive Earnings Test (SEET) threshold of 13 percent during the term of ESP IV; (20) a contribution of $150,000 in shareholder funds to the AES Ohio Gift of Power program to assist with consumer hardship bill payment assistance; (21) a commitment to meet with other Signatory Parties to discuss potential rate structure for non-residential customers with low energy utilization, such as EV charging stations; (22) an RFP process to review data associated with the recovery of uncollectible expenses; (23) cooperation between AES Ohio and Dayton to support the interconnection of a solar project at a local Superfund site; (24) the elimination of fees for customers who switch

to or from a CRES provider; and (25) an agreed phase-in of the Company's proposal to adjust its Low-Load Factor protection to gradually target customers with approximately ten percent load factors, which will limit subsidization by other customers within their class while still managing bill impacts (AES Ohio Ex. 1 at 10-15). The Company submits that OCC witness Fortney admitted that many of these items are beneficial to customers (Tr. II at 310-314). The Company additionally emphasizes the testimony of Staff witness Messenger, who quantified the withdrawal of the *Distribution Decoupling Case* as a $51 million benefit to customers (Staff Ex. 6 at 8). AES Ohio further dismisses the notion that withdrawal of the *Distribution Decoupling Case* is not a benefit to customers because recovery of the decoupling amounts at issue in that case was unlawful. To the contrary, AES Ohio submits that recovery of those amounts would have been lawful under R.C. 4928.143(B)(2)(h); the Company also observes that the procedural history for the recovery of those amounts is identical to the procedural history for deferred uncollectible amounts, which the Commission authorized for recovery in the Company's last distribution rate case.

{¶ 95} Continuing, AES Ohio proffers the elimination of any financial integrity or POLR charge as a benefit to customers flowing from the Stipulation. Not only is such a charge absent from the Stipulation, but the existing rate stabilization charge (RSC) will be terminated one year early. (AES Ohio Ex. 1 at 15-16; Tr. I at 103-104.) Moreover, says AES Ohio, these numerous and varied benefits will accrue to customers while AES Ohio continues to have the lowest transmission and distribution rates in the state (AES Ohio Ex. 1 at 18-19; Tr. I at 65). As such, the Company avers that the Stipulation, as a package, benefits ratepayers and the public interest.

{¶ 96} OPAE/Dayton assert that the Stipulation benefits customers and the public interest by improving AES Ohio's reliability, supporting low-income residential customers, and providing opportunities for economic development. OPAE/Dayton indicate that the Stipulation will result in improved reliability by providing for more consistent vegetative management, recovery of incremental investment into the distribution system, allowing recovery of certain smart grid investments, and decreasing revenue requirement caps tied

to reliability. Furthermore, the Stipulation protects low-income customers with a low-income weatherization program administered by a competitively bid third party, which program expands eligibility to those making 250 percent of the federal poverty level. It also provides $500,000 annually for low-income bill payment assistance with expanded eligibility and for $2.7 million annually to the newly created Disadvantaged Communities Energy Initiative, for use by customers in certain municipalities with the highest per capita poverty rates in the Company's service territory to help with bill payment assistance, reconnections fees, deposits to establish service due to arrearage, and weatherization measures. Moreover, the Stipulation obligates AES Ohio to annually meet with Staff and all signatory or non-opposing parties to discuss how to best streamline administrative and operation costs among the Low-Income Assistance Programs to maximize the programs' impacts.

{¶ 97} Like OPAE/Dayton, OELC names service reliability improvements and low-income assistance programs as benefits conferred by the Stipulation. OELC cites the DIR, PRO Rider, IRR, and SCRR as provisions in the Stipulation that will serve the public interest in maintaining reliable electric distribution throughout AES Ohio's service area. OELC lauds the CPR for promoting weatherization and bill assistance for low-income communities, as well as the Disadvantaged Communities Energy Initiative to help low-income residences in three of the most underprivileged municipalities with utility bill payments, reconnection fees, and fee deposits necessary to establish service. Finally, OELC also emphasizes that the Economic Development Incentives provided in the Stipulation promote economic development projects for new and existing non-residential customers in the AES Ohio service territory while still ensuring that AES Ohio's ratepayers are not unreasonably burdened by these incentives.

{¶ 98} IGS states that the Stipulation benefits the public interest by maintaining the successful declining clock auction process for procuring SSO generation, allowing AES Ohio to make needed investments into safety and reliability infrastructure and vegetation management, implementing low-income assistance programs, reducing fees and other

charges paid by certain customer groups (such as customer switching fees), and eliminating the RSC. In addition to these listed benefits, IGS points to the expanded data access for third-party providers that is provided for in the Stipulation. IGS maintains that this information sharing will enable participation in the PJM ancillary services market and expand customer choices within AES Ohio's service territory.

{¶ 99} OMAEG/Kroger articulate that the Stipulation, as a package, benefits ratepayers and the public interest by significantly lowering costs to customers, obtaining concessions from AES Ohio, encouraging economic development through the Economic Development Incentives, and enabling the Company to continue making reliability improvements. Other benefits listed by OMAEG/Kroger include the negotiated SEET threshold, changes to the TCRR allowing transmission costs to non-residential customers to be billed based on their contribution to AES Ohio's NSPL in 2025, the possibility of converting SSO auction results into retail rates that include on-peak and off-peak pricing, the elimination of switching fees and reconnect fees where reconnection can be done remotely, implementation of low-income assistance programs, and a $150,000 shareholder contribution to the AES Ohio Gift of Power program. Furthermore, the Stipulation secures a number of reductions and limitations to the revenue AES Ohio will receive, which will ultimately benefit customers through lower costs. As mentioned by others, the Stipulation also requires AES Ohio to withdraw the *Distribution Decoupling Case,* to forego the applied-for $10 million in O&M costs from the DIR, to reduce the OVEC amounts recovered under the RCR by approximately $660,000 and the RCR decoupling amounts by over $40 million. Additionally, recovery of the RCR amounts would occur over five years under the Stipulation, which means customers pay less per year while still allowing AES Ohio to recover costs. Last, the public interest is furthered through increased reliability with investment from the DIR and PRO Rider and through economic development efforts that will bring jobs to the AES Ohio service territory. In sum, OMAEG/Kroger maintain that the Stipulation provides meaningful and valuable benefits to customers and benefits the public interest.

{¶ 100} OEG and RESA opine that the Stipulation benefits customers by achieving a reasonable outcome that is superior to AES Ohio's litigation position in these proceedings, i.e., the ESP as set forth in the Application. For example, the DIR now has caps on the amounts the Company may recover and expressly ties recovery to satisfying reliability benchmarks. Similarly, the amounts recoverable under the RCR are significantly reduced, and a SEET threshold is established. RESA also contends that the Stipulation eliminates several proposals that would have been forced upon customers through monopoly power products and services otherwise available in the competitive marketplace, i.e., certain EV provisions and the provision of active demand management services (Signatory Parties Ex. 1 at 25). OEG further opines that the Stipulation benefits customers by improving existing rate recovery mechanisms, such as the TCRR being modified to eventually use a methodology under which customers would be billed based on their individual NSPL. OEG states that this modification better aligns costs with causation and incentives non-residential customers to reduce individual usage during the Company's system-wide peak. RESA also emphasizes that the Stipulation eliminates switching fees and establishes a collaborative process to discuss converting SSO auction results into retail rates for customers with on-peak and off-peak rates as part of grid modernization. Like several other parties, OEG also emphasizes the benefits associated with the Economic Development Incentives under the Economic Development Rider (EDR).

{¶ 101} Guided by Commission precedent, Walmart asserts that the Stipulation, viewed as a package, benefits customers and the public interest.[12] Walmart focuses its arguments on improved reliability and economic development as benefits flowing from the Stipulation. As to the former, Walmart states that the Stipulation will provide much-needed capital to AES Ohio for the specific purpose of improving its reliability metrics (AES Ohio Ex. 1 at 7-8). More importantly, the capital comes with strings attached: the Stipulation imposes significant financial penalties on the Company should its reliability metrics not be

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[12] Walmart cites the *AEP Ohio ESP IV Case,* Opinion and Order (Apr. 25, 2018) at ¶ 204 as instructive.

met during the term of the ESP (Staff Ex. 6 at 5-6). The Stipulation also obligates the Company to develop an annual work plan specifying what work is necessary to ensure that monies are spent in order to have the "greatest impact on maintaining and improving system reliability and resiliency of the grid for all customers" (Staff Ex. 7 at 5). Other notable customer safeguards relate to administration of the SEET during the ESP period. These provisions include a negotiated SEET threshold, no allowance of any excessive earnings with future committed investments as permitted by R.C. 4928.143(F), and the return of any excessive earnings to customers within a specified time. (Signatory Parties Ex. 1 at 33.)

{¶ 102} As to its latter argument, Walmart contends that all customers, the utility, and the state benefit when economic growth occurs in the Company's service territory, which the Stipulation encourages through several provisions. OCC witness Fortney concedes as much (Tr. II at 309-310). Walmart focuses on the Economic Development Incentive and the Green Energy Alternative Tariff (Jt. Ex. 1 at 26-27). Walmart remarks that, while the Economic Development Incentives are funded by all ratepayers and provides benefits directly to larger customers, all ratepayers benefit from the investment made by those larger customers and are protected by the enumerated caps. OCC witness Fortney further concedes that the caps proposed in the Stipulation are reasonable (Tr. II at 326). Walmart also challenges OCC's anticipated arguments against the Economic Development Incentives—i.e., the incentives being unnecessary given the availability of reasonable arrangements and an alleged inability to challenge or review agreements executed under the incentives—as lacking proper analysis or otherwise unreasonable. And Walmart asserts that the Green Energy Alternative Tariff provides only benefits. Once again, Walmart cites to OCC witness Fortney's comment that the Green Energy Alternative Tariff is "good" if a customer is interested in the opportunities presented by the tariff, which does not harm non-participating customers (Tr. II at 312). In short, Walmart posits that the Commission should find that the inclusion of the Economic Development Incentives and the Green Energy Alternative Tariff is a reasonable and beneficial part of the package provided by the Stipulation.

{¶ 103} Staff tenders many of the same arguments articulated by the other briefing Signatory Parties as support for the conclusion that the Stipulation benefits ratepayers and the public interest. In other words, Staff names increased reliability through long-needed investments by the Company and better management of vegetation on its distribution lines through the DIR and PRO Rider; low-income assistance programs through the CPR; Economic Development Incentives through the EDR; and the implementation of safeguards such as rate caps and dropped fees. (AES Ohio Ex. 1 at 8-9; Staff Ex. 6 at 5-7; Staff Ex. 7 at 5-6.) Staff also names the improvements to the competitive bid process, such as the reintroduction of laddering, and the Commission's consideration of stakeholder-proposed changes to the SSO auction process as benefits provided by the Stipulation (AES Ohio Ex. 1 at 16-17). Finally, Staff provides a laundry list of benefits similar to those enumerated by the Company and touched upon by others, such as the negotiated SEET threshold; the sharing of customer data, where appropriate, to encourage access to the PJM ancillary services market and other customer choice enhancements; billing transmission costs for non-residential customers based on the contribution to AES Ohio's NSPL; the Green Energy Alternative Tariff's offering of customer-sited renewable energy sources for mercantile customers; and elimination of switching fees and reconnect fees where reconnection can be done remotely. Staff states that these benefits, and others, weigh in favor of a finding that the Stipulation, as a whole, benefits ratepayers and the public interest.

{¶ 104} OCC argues that the Stipulation does not benefit consumers or the public interest. Instead, it primarily benefits AES Ohio. OCC asserts that the Stipulation benefits AES Ohio by allowing the Company to collect $76 million of past charges through the RCR that are unrelated to the provision of the applied-for SSO and thus provide no benefit to consumers. It further benefits the Company by creating a DIR for faster recovery from consumers of distribution plant investment, investment that the Company is already required to make to fulfill its duty to provide consumers with necessary and adequate facilities. OCC posits that Company witness Malinak's supposition that increased spending by AES Ohio will benefit customers through better reliability is flawed as there is no

guarantee that increased spending will result in more reliable service. In support of that argument, OCC cites its own witness' observation that despite recent large investments to improve reliability, AES Ohio failed to meet its CAIDI standard in four of the last five years (OCC Ex. 2 at Ex. RBF-1). On the other hand, argues OCC, what is certain to result from the Stipulation is increased cost to consumers, many of whom are struggling. In short, OCC submits that imposing $160 million in charges during a period of unique economic hardship in exchange for uncertain, hypothetical increases in reliability is not in the public interest.

{¶ 105} In its reply brief, AES Ohio argues that OCC's arguments fail to consider the Stipulation as a package, which is required by Commission precedent. AES Ohio also asserts that OCC's argument is contrary to the extensive evidence demonstrating the wide-ranging benefits of the Stipulation, including testimony by OCC witnesses conceding that the Stipulation includes benefits to customers (Staff Ex. 6 at 4-7; AES Ohio Ex. 1 at 7-19; Tr. II at 310-314; Tr. IV at 654-655). In short, AES Ohio contends that OCC's focus on insular provisions it disfavors rather than on the actual benefits conferred by the stipulated ESP IV is in error.

{¶ 106} OMAEG/Kroger also observe that OCC's arguments regarding the second prong are contrary to Commission precedent in failing to consider the Stipulation as a package. These parties maintain that the Stipulation, as a package, provides a host of benefits, such as lowering costs incurred by consumers over the course of the ESP term, obtaining concessions from the Company like withdrawal of the *Distribution Decoupling Case*, enabling continued reliability improvements, and encouraging economic development through the Economic Development Incentives, which will support new and expanding businesses in AES Ohio's service territory. OMAEG/Kroger also contend that OCC's narrow arguments criticize what OCC finds unfavorable while ignoring the associated benefits. For example, OCC argues that the Stipulation does not benefit customers because it allows AES Ohio to collect deferred costs through the RCR but ignores the significant reduction to the RCR amounts realized through negotiation of the Stipulation. OMAEG/Kroger also point to OCC's similar treatment of the DIR. In short,

OMAEG/Kroger submit that the manifest weight of the evidence demonstrates that the Stipulation, as a package, benefits ratepayers and the public interest.

{¶ 107} OELC focuses its reply brief on the Economic Development Incentives. OELC states that it agrees with Staff, AES Ohio, OMAEG/Kroger, OEG, Walmart, and OPAE/Dayton that the benefits associated with the Economic Development Incentives proposal are numerous. The proposal incentivizes investments in new and expanded facilities by businesses in AES Ohio's service territory through reduced base charges established through clearly delineated guidelines for participation. Additionally, the proposal is thoughtfully designed to ensure that non-commercial and industrial customers are not unduly burdened by the rate recovery mechanism. Moreover, OELC agrees with Walmart that the proposal provides important benefits that are not addressed in the existing statutory process for reasonable arrangements. Despite these benefits and others espoused by the briefing Signatory Parties, OELC observes that OCC did not address the Economic Development Incentives.

{¶ 108} In its own reply, OCC gives no credence to AES Ohio's arguments in support of the second prong. OCC reiterates that there are no guaranteed benefits to customers stemming from the DIR, only guaranteed costs. OCC further takes issue with AES Ohio's list of alleged specific benefits to consumers because, even if some individual provisions may benefit consumers, the Stipulation must be considered as a package. Moreover, many of AES Ohio's touted benefits provide only speculative benefits, or none at all. For example, says OCC, providing a SSO via a competitive bidding process (CBP) is not unique to the Stipulation because providing the SSO is required of any electric utility, whether through an ESP or an MRO. Similarly, the elimination of the RSC is achieved through any new SSO, regardless of form, and any benefit is cancelled by the Company's distribution rate increase going into effect. And, as argued previously, implementation of an RCR to recover deferred costs is a benefit to the Company, not to ratepayers. OCC relates that any benefits provided through the Low-Income Assistance Program are funded by customers through the Customer Programs Rider, not shareholders. In addition to those allegedly realized through

the DIR, OCC characterizes as speculative any benefit that may result from AES Ohio providing customer data to CRES providers and third-party aggregators for possible participation in the PJM ancillary services market or a predetermined SEET threshold. Furthermore, two alleged benefits—the continuation of the TSCR and the elimination of fees for reconnection where a customer cannot be reconnected remotely—are required by other proceedings and, thus, not benefits of the Stipulation. OCC also disputes the notion that the Economic Development Incentive is a unique benefit to consumers produced by the Stipulation, arguing that R.C. 4905.31 already authorizes reasonable arrangements in a transparent manner that is more protective of consumers. Finally, OCC reiterates that the Stipulation as a package imposes $160 million in new charges to consumers over three years with few, if any, benefits flowing to consumers. As such, OCC urges the Commission to find that the Stipulation does not benefit consumers and the public interest.

{¶ 109} The Commission finds that the Stipulation benefits ratepayers and the public interest. As a preliminary matter, we note that the second part of the three-part test is not whether there are different or additional provisions that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest. *Columbia Rate Case,* Opinion and Order (Jan. 26, 2023) at ¶ 170, citing *In re Ohio Power Co.*, Case No. 20-585-EL-AIR (*AEP Ohio Rate Case*), Opinion and Order (Nov. 17, 2021) at ¶ 151; *In re The East Ohio Gas Co. dba Dominion Energy Ohio,* Case No. 19-468-GA-ALT, Opinion and Order (Dec. 30, 2020) at ¶ 73 and *In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opinion and Order (Apr. 21, 2021) at ¶ 63. Further, the Stipulation must be viewed as a package for purposes of part two of the three-part test used to evaluate stipulations. *See, In re Ohio Power Co.,* Case No. 94-996-EL-AIR, et al., Opinion and Order (Mar. 23, 1995) at 20-21; *In re Columbus S. Power Co. and Ohio Power Co.,* Case No. 99-1729-EL-ETP, et al., Opinion and Order (Sept. 28, 2000) at 44. We have repeatedly found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing the issues before the Commission, while also avoiding the considerable time and expense associated with the litigation of a fully

contested case. *See, In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 12-1230-EL-SSO (*FirstEnergy ESP III Case*), Opinion and Order (July 18, 2012) at 42; *In re Columbus S. Power Co. and Ohio Power Co.,* Case No. 11-5568-EL-POR, et al., Opinion and Order (Mar. 21, 2012) at 17. We, therefore, reaffirm that the Stipulation offered by the Signatory Parties in these proceedings must be viewed as a whole.

{¶ 110} We find that a key benefit in the Stipulation is the continuation of the CBP to supply generation to SSO customers (Staff Ex. 2 at 2). Provisions for the supply and pricing of electric generation service are the primary element of an ESP. R.C. 4928.143(B)(1). Under the Stipulation, AES Ohio will implement changes to the CBP in order to reduce price volatility (AES Ohio Ex. 1 at 10-11; Staff Ex. 2 at 3-4). We further note that Staff witness Messenger testified that the Stipulation included additional provisions that are focused on (1) improving reliability, (2) funding for low-income customer assistance programs and (3) encouraging economic development (Staff Ex. 6 at 5-7).

{¶ 111} Staff witness Messenger testified that two provisions of the Stipulation will promote reliability. First, the DIR will be used to make incremental investments in the distribution system. The Stipulation includes annual caps on the revenue requirement in order to protect ratepayers from unreasonable increases in the rider (Signatory Parties Ex. 1 at 7-8). The Commission notes that the DIR will be subject to an annual audit by Staff or an independent auditor directed by Staff (Signatory Parties Ex. 1 at 11-12). In addition, the Stipulation provides incentives to the Company to meet its reliability targets by specifying that the annual caps will be lowered if the Company fails to meet a specified target.[13] (Staff Ex. 6 at 5-6; Signatory Parties Ex. 1 at 8-10). The Stipulation also provides that the Company will develop, with input from interested parties, an annual work plan to focus spending on

[13] The Commission notes that nothing in the Stipulation limits the ability of the Commission and Staff to take any action regarding reliability standards as set forth in Ohio Adm.Code 4901:1-10-10 or any Commission order, rule or law.

where it will have the greatest impact on sustaining reliability and resilience of the grid for all customers (Staff Ex. 7 at 6-7; Staff Ex. 6 at 5-6; Signatory Parties Ex. 1 at 12-13).

{¶ 112} Moreover, the Commission finds that the Stipulation strikes an appropriate balance by allowing the accelerated recovery of investments to promote reliability and providing a strong incentive to the utility to file distribution rate cases on a regular basis. Under the Stipulation, the DIR will sunset if AES Ohio fails to file a new distribution rate case by December 31, 2025 (Signatory Parties Ex. 1 at 10). At the same time, the accelerated recovery of investments in reliability, with annual caps, will mitigate the amount of any subsequent increase in base distribution rates resulting from such distribution rate case (Tr. I at 83-84).

{¶ 113} Staff witness Messenger testified that the second provision which will promote reliability is the PRO Rider, which will incentivize AES Ohio to focus on increasing its vegetation management activity (Staff Ex. 6 at 6). In performing vegetation management, AES Ohio will make reasonable efforts to return to a five-year cycle for performing vegetation management on its circuits. This rider is also subject to an annual audit by Staff or an independent auditor directed by Staff, including a determination of whether AES Ohio is making improvement in returning to a five-year cycle for vegetation management on circuits (Signatory Parties Ex. 1 at 14).

{¶ 114} Staff witness Messenger also identifies a provision for low-income customer assistance as being in the public interest. Under the Stipulation, the CPR will fund low-income customer assistance programs, including a weatherization and bill payment assistance program and a disadvantaged communities energy initiative. We note that the Stipulation provides for ratepayer funding of these low-income customer programs in the amount of $5.7 million annually for three years, which is a significant commitment of ratepayer funding. However, we are mindful of the need for funding for weatherization and bill assistance, particularly with respect to at-risk populations. *Columbia Rate Case,* Opinion and Order (Jan. 26, 2023) at ¶ 176.

{¶ 115} Moreover, Staff witness Messenger testified that the Stipulation contains provisions for economic development which are in the public interest. She notes that the Stipulation includes certain incentives for economic development (Staff Ex. 6 at 6). These incentives will encourage investment in AES Ohio's service territory and create more jobs. Moreover, the recovery of these incentives from customers is capped by the Stipulation. (AES Ohio Ex. 1 at 13-14).

{¶ 116} Further, Company witness Schroder identified additional benefits in the Stipulation, including a Residential Off-Peak Incentive Program to encourage off-peak EV charging; a Green Energy Alternative Tariff to offer customer-sited renewable energy resources; elimination of the reconnect fee for customers who can be reconnected remotely; a cap, at the currently authorized amount, on the return on equity in AES Ohio's next distribution rate case; a stipulated SEET threshold of 13 percent during the ESP; and the elimination of switching fees in order to promote retail competition (AES Ohio Ex. 1 at 12-15).

{¶ 117} We are not persuaded by OCC's arguments that the Stipulation is not in the public interest. OCC witness Fortney testifies that the Stipulation, as a package, does not benefit customers and is not in the public interest (OCC Ex. 2 at 4). However, Mr. Fortney's primary objection with respect to the second prong of the three-part test for the consideration of stipulations stems from his position that the proposed ESP does not meet the "More Favorable in the Aggregate" (MFA) test for ESPs set forth in R.C. 4928.143(C)(1), stating that the Stipulation is per se not in the public interest because the ESP fails the MFA test (OCC Ex. 2 at 4, 44). We will address this testimony below in our consideration of the MFA test.

{¶ 118} Mr. Fortney also opined that the Stipulation imposes "unneeded and accelerated costs upon consumers" (OCC Ex. 2 at 41). However, we are not persuaded by Mr. Fortney's testimony. As AES Ohio witness Schroder explained on cross-examination, the accelerated recovery of these costs will mitigate the amount of any future distribution

rate increase and any increases in overall rates will be more gradual over time (Tr. I at 83-84). Mr. Fortney also conceded that the DIR proposed in the Stipulation contains annual caps on how much can be recovered from customers while there is no cap in the statute on how much may be requested in a distribution rate case (Tr. II at 349). Further, Mr. Fortney agreed that the proposed DIR promotes rate certainty, predictability, and stability (Tr. II at 349-350). We agree with Mr. Fortney, and we find that rate certainty, predictability, and stability are all in the public interest.

{¶ 119} As stated above, the Stipulation provides that AES Ohio will modify the CBP in order to reduce price volatility (AES Ohio Ex. 1 at 10-11; Signatory Parties Ex. 1 at 2). Further, the Stipulation expressly provides that any modification of the CBP resulting from the Commission's current review of the Ohio EDUs' CBPs commenced on January 3, 2023, will not be considered a modification of the Stipulation. *See In re Ohio Edison Co., et al,* Case Nos. 16-776-EL-UNC, et al., Entry (Jan. 3, 2023).[14]

{¶ 120} Accordingly, for the reasons set forth above, the Commission finds that the Stipulation, as a package, benefits ratepayers and the public interest.

3. DOES THE SETTLEMENT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLES OR PRACTICES?

{¶ 121} The Signatory Parties who briefed this issue assert various arguments in support of a finding that the Stipulation, as a package, complies with the Ohio Revised Code, the Ohio Administrative Code, and Commission precedent such that it should be approved. Moreover, many of these parties also contend that that the Stipulation promotes state policy as codified in R.C. 4928.02. Only OCC disagrees.

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[14] *In re the Procurement of Std. Serv. Offer Generation for Customers of Dayton Power & Light Co.,* Case No. 17-957-EL-UNC (SSO Procurement Case) is one of the consolidated cases being reviewed.

*a. **The Stipulation does not violate important regulatory principles and practices.***

{¶ 122} Staff submits that the General Assembly plainly lists the policies it intends to promote through electric regulation restructuring in R.C. 4928.02. Staff contends that the Stipulation's terms are authorized by Ohio law. Staff further maintains that the Stipulation complies with all relevant and important regulatory principles and practices and furthers many policies enumerated by the legislature, all of which are adequately described by other Signatory Parties. RESA adds that the Stipulation's removal of certain EV programs proposed in the Application, through which AES Ohio sought to enter competitive markets as a regulated entity, is consistent with important regulatory principles and practices. In support, RESA argues that the Commission has held that EV charging, energy efficiency, and demand response programs should be offered by the competitive market. *In re Commission Investigation into Elec. Vehicle Charging Service*, Case No. 20-434-EL-COI, Finding and Order (July 1, 2020) at ¶ 27; *AEP Ohio Rate Case*, Opinion and Order (Nov. 17, 2021) at ¶ 128; *Columbia Rate Case*, Opinion and Order (Jan. 26, 2023) at ¶ 56.

{¶ 123} OMAEG/Kroger state that Stipulation does not contain any provisions that run contrary to Commission precedent, and witness testimony supports a finding that the Stipulation does not violate any important regulatory principles or practices (Staff Ex. 6 at 6; AES Ohio Ex. 1 at 23). Even OCC's witness Fortney agreed that a number of provisions align with important regulatory principles, such as the caps on the DIR providing rate certainty, predictability, and stability, which improves upon AES Ohio's proposals within the Application. OMAEG/Kroger also assert that the Stipulation promotes, rather than violates, the regulatory principle of gradualism by significantly lowering the total bill impacts proposed in the Application. Additionally, the Stipulation lengthens the period over which the RCR will be collected, which results in customers paying less per bill. On the topic of the RCR, these parties contend that OCC witness Morgan ignores important distinctions between the decoupling amounts at issue in the *Distribution Decoupling Case* and the amounts allowed under the Stipulation and, therefore, his argument that the Stipulation

should not allow any recovery of the decoupling deferrals must fail. OMAEG/Kroger emphasize that Staff's opposition in the *Distribution Decoupling Case* is not contradictory to Staff's support of the Stipulation because the decoupling amounts at issue relate to wholly different timeframes.

{¶ 124} Walmart primarily challenges Mr. Fortney's conclusions that the Stipulation violates important regulatory principles because the stipulated ESP is not more favorable in the aggregate than an MRO and because it violates the principle of gradualism (OCC Ex. 2 at 42-43). Walmart first asserts that Mr. Fortney's testimony inextricably links the third prong of the three-part test with the MFA test. Thus, should the Commission find that the ESP is more favorable in the aggregate than an MRO, then OCC automatically fails to prove that the Stipulation violates that regulatory principle. To supplement what it characterizes as ample evidence proffered by Staff and AES Ohio to show that the stipulated ESP is more favorable than a hypothetical MRO, Walmart offers its position that any delay in implementing distribution rates is not relevant to whether the ESP is more favorable than a hypothetical MRO. Walmart maintains that the Commission should reject Mr. Fortney's argument in that regard because (1) any "value" to the delay is not the correct standard when comparing the two SSO forms and (2) forcing the Company to file an MRO for the express purpose of delaying the implementation of the approved, but frozen, distribution rates is not an appropriate reason to find the MRO more favorable. Second, Walmart argues that Mr. Fortney's opinion that a 21.9 percent increase to a residential bill violates the principle of gradualism is incorrect not only because it inflates the increase authorized by the Stipulation by incorporating the rates authorized in the distribution rate case but also because Mr. Fortney did not explain how he calculated the alleged 21.9 percent impact. In truth, says Walmart, under the terms of the Stipulation, residential customers will initially see a rate decrease in the first year that increases to a rate increase of only $2.07 in the third year. And, while customers may pay the amounts sooner with riders under an ESP, there is no evidence that customers would avoid the amounts altogether through a distribution

rate case filed with an MRO. Regardless, Walmart posits that there is no evidence that the Stipulation violates the principle of gradualism.

{¶ 125} AES Ohio focuses on OCC's litigation position that the RCR is not lawful and, therefore, the Stipulation cannot pass muster. AES Ohio counters this position with arguments that the RCR is lawful as authorized by R.C. 4928.143(B)(2)(d) and R.C. 4928.143(B)(2)(h). More specifically, the Company submits that R.C. 4928.143(B)(2)(d) authorizes recovery of OVEC, Decoupling, and Prior RCR amounts through the RCR, and R.C. 4928.143(B)(2)(h) authorizes the recovery of Decoupling and Prior RCR amounts.

{¶ 126} Relative to R.C. 4928.143(B)(2)(d), AES Ohio states that the Ohio Supreme Court has concluded that a proposed ESP item is lawful if three criteria are met: (1) it is a term, condition, or charge, (2) it relates to one of the limited set of listed items, and (3) it has the effect of stabilizing or providing certainty regarding retail electric service. *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, at ¶ 26. As a (1) charge, (2) relating to limitations on customer shopping, deferrals, standby default service, and/or carrying costs, that (3) provides for stable service, AES Ohio maintains that the RCR, including the OVEC, Decoupling, and Prior RCR components, is authorized by statute.

{¶ 127} In support of that argument, AES Ohio relates the following. First, there is no dispute that the RCR is a charge (AES Ohio Ex. 1 at 20; Tr. IV at 632). Second, as costs recovered on a nonbypassable basis, the OVEC, Decoupling, and Prior RCR amounts are related to "limitations on customer shopping" under (B)(2)(d). *See In re Ohio Power Co.*, at ¶ 28-31. Alternatively, the second element is satisfied if a charge relates to "deferrals, including future recovery of such deferrals," and there is no dispute that the Decoupling and Prior RCR amounts are deferred on the Company's accounting records (AES Ohio Ex. 2 at 5-6). Similarly, the Commission authorized AES Ohio to defer the OVEC amounts in the Company's generation separation case and the Company began recording them as a deferral in 2014 (OCC Ex. 4 at 1-2). *In re Application of The Dayton Power and Light Co.*, Case

No. 13-2420-EL-UNC (*Generation Divestiture Case*), Finding and Order (Sept. 17, 2014). AES Ohio denies writing the deferral off, explaining instead that it took a reserve against that deferral in 2022, meaning that the Company maintains a $28.9 million regulatory asset and has an offsetting $28.9 million reserve against the asset (AES Ohio Ex. 6 at 1-2; Tr. at 49-50, 174-176; Tr. II at 244-245). Thus, the OVEC amounts also qualify as a charge related to "deferrals, including future recovery of such deferrals" under R.C. 4928.143(B)(2)(d). As a third option, AES Ohio maintains that the OVEC amounts also relate to "standby * * * default service," arguing that OVEC generation could be used to supply the SSO load if one of the winning bidders in the SSO auction were to default (AES Ohio Ex. 1 at 20; Tr. IV at 644-45). AES Ohio notes that the Stipulation also authorizes the Company to recover certain carrying costs on the RCR amounts; as costs related to "carrying costs," these, too, are recoverable under (B)(2)(d). As to the final element for analysis, AES Ohio asserts that Ms. Schroder's testimony demonstrates that the RCR will allow AES Ohio to provide stable service by providing revenue necessary to make necessary investments (AES Ohio Ex. 1 at 20-21).

{¶ 128} AES Ohio also submits that the RCR is lawful under R.C. 4928.143(B)(2)(h) as a provision regarding the utility's distribution service, which can include provisions regarding single issue ratemaking or a revenue decoupling mechanism. The Company states that there is no dispute that the Decoupling and Prior RCR amounts relate to distribution service (AES Ohio Ex. 2 at 5-6; AES Ohio Ex. 9, Ex. A at 3-4). The Company further contends that recovery of both the Decoupling amounts and the Prior RCR amounts qualify as single-issue ratemaking, and the recovery of Decoupling amounts would constitute revenue decoupling (Tr. IV at 655-657; Tr. II at 361-362). And, last, the Company maintains that Staff witness Nicodemus and AES Ohio witness Schroder demonstrated, with no evidence offered to the contrary, that AES Ohio and its customers' expectations regarding reliability are "aligned" with the Company placing "sufficient emphasis on" reliability under R.C. 4928.143(B)(2)(h) (Staff Ex. 7 at 3-6; AES Ohio Ex. 1 at 21-23). As such, the Decoupling and Prior RCR amounts being recovered through the RCR under the proposed ESP are also lawful under R.C. 4928.143(B)(2)(h).

{¶ 129} OCC contends that the Stipulation violates important regulatory practices and principles by allowing for the collection of a variety of deferred costs from consumers through the RCR. OCC's arguments are aimed at three portions of the RCR: Prior RCR costs; deferred OVEC costs; and deferred decoupling amounts.

i. PRIOR RCR COSTS

{¶ 130} OCC first takes issue with $6.3 million of Prior RCR costs the Stipulation allows AES Ohio to collect through the RCR. OCC argues that two of the regulatory assets that comprise the Prior RCR deferrals—the consumer education campaign and retail settlement system deferrals—are regulatory assets OCC indicates were previously authorized by the Commission as transition costs. And, because the period for collecting transition costs from consumers ended on December 31, 2010, AES Ohio is precluded from collecting them through its ESP. OCC further asserts that R.C. 4928.141 precludes utilities from including in its SSO any previously authorized allowances for transition costs. Given these statutory prohibitions, OCC argues that the Stipulation is contrary to law.

{¶ 131} Continuing with the Prior RCR argument, OCC states that the remaining assets that make up the deferral—identified as related to the green pricing program, generation separation regulatory assets, and bill format redesign—have not been shown to be permissible provisions under an ESP and, therefore, are not allowed to be collected from consumers. More specifically, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32, OCC contends that these deferral charges do not fit within one of the categories listed in R.C. 4928.143(B)(2) and are thus not authorized by statute for collection through the ESP. Starting with the green pricing deferrals, OCC states that these deferrals relate to the remaining balance of implementation costs that were not recovered by the time the program ended in December 2011 (OCC Ex. 9; OCC Ex. 10). OCC asserts that AES Ohio has not carried its burden of showing that these deferrals are permitted under R.C. 4928.143(B)(2)(d) as a charge related to limitations on customer shopping, bypassability, standby, back-up or supplemental power service or default service.

Nor has the Company shown that the recovery of the deferrals would stabilize rates. Absent this showing, OCC states that inclusion of the deferrals in the ESP is not proper. OCC makes similar arguments regarding the generation separation deferrals, which relate to generation separation costs and, per OCC, have not been shown to meet the requirements for inclusion in the ESP under R.C. 4928.143(B)(2)(d). Lastly, OCC contends that collection of the bill format design deferrals, which represent AES Ohio's costs to implement Commission-ordered bill modifications in 2014, violates regulatory principles of cost causation. OCC further contends that AES Ohio is seeking recovery in the wrong forum, i.e., not a distribution rate case, and that the Company failed to identify which category of deferral the costs relate to under R.C. 4928.143(B).

{¶ 132} In reply to OCC, AES Ohio submits that it plainly demonstrated that R.C. 4928.143(B)(2)(d) and/or R.C. 4928.143(B)(2)(h) authorize recovery of the Prior RCR amounts through ESP IV. Responding specifically to OCC's arguments regarding consumer education and retail settlement system costs, AES Ohio declares that these elements of the Prior RCR charges are not transition costs. AES Ohio points out that much of the material OCC bases its argument upon should not be part of the record. Regardless, AES Ohio asserts that the Commission should reject the transition cost argument because they do not meet the statutory definition of transition costs set forth in R.C. 4928.39. The Company reasons that consumer education and retail settlement system costs are not directly assignable to retail electric generation service as transition costs are defined. Instead, the settlement system costs are related to billing and collection, which is a different component than generation service. AES Ohio further reasons that customer education costs do not involve supplying electricity to consumers and are thus not directly attributable to retail generation electric service. Furthermore, argues AES Ohio, if the General Assembly had intended for technical implementation costs (such as those related to billing systems) or consumer education costs as transition costs, then it would have listed them in R.C. 4928.39, but they did not. AES Ohio additionally notes that the Commission previously approved these costs for recovery in its third ESP case (ESP III), a case in which OCC never asserted that the costs

were disallowed transition costs. *In re Application of The Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al. (*ESP III Case*). Regardless, even if the Commission were to find that the subject costs are transition costs, AES Ohio submits that OCC's argument is barred by the "notwithstanding" clauses in R.C. 4928.143(B) and R.C. 4928.143(B)(2)(h). *In re Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, at ¶ 19.

{¶ 133} Further responding, AES Ohio reasserts that the deferred costs associated with green pricing, generation separation, and bill format are recoverable through the ESP under R.C. 4928.143(B)(2)(d) and R.C. 4928.143(B)(2)(h). As to the bill format redesign deferrals, AES Ohio additionally observes that the Commission has previously rejected OCC's argument that these costs should be charged to marketers, not customers. *In re Commission Investigation of Ohio's Retail Elec. Service Market*, Case No. 12-3151-EL-COI, Finding and Order (Mar. 26, 2014) at ¶ 25.

{¶ 134} Staff responds generally that recovery of deferrals is allowed under R.C. 4928.143(B)(2)(d) and (B)(2)(h). Staff rejects OCC's argument that an SSO may recover deferrals only insofar as those deferrals should have a prospectively stabilizing effect. Staff articulates that a rational reading of R.C. 4928.143(B) accommodates an interpretation that it is the deferral, and not the charge, that relates to stabilizing or providing certainty regarding retail electric service in the past. Regardless, Staff remarks that OCC witness Morgan agreed that portions of the Stipulation, including the RCR, would provide more stable and reliable distribution service (Tr. IV at 654-655).

{¶ 135} As to the Prior RCR costs specifically, Staff avers that OCC did not properly litigate whether the Prior RCR deferrals constitute transition costs and should not be permitted to address matters outside the record. Regardless, Staff maintains that the deferrals are not unrecoverable transition costs. Instead, the settlement system implementation and consumer education costs are recoverable under R.C. 4928.143(B)(2)(d) or R.C. 4928.143(B)(2)(h). Furthermore, Staff contends that the deferred costs associated

with settlement system implementation and consumer education do not constitute transition costs as defined by R.C. 4928.39. Regardless, like AES Ohio, Staff also argues that application of the "notwithstanding" clause in R.C. 4928.143(B) establishes that costs that qualify for recovery under the ESP statute can be recovered even if they would otherwise constitute transition costs. *In re Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, at ¶ 19.

{¶ 136} In its reply brief, OCC asserts that AES Ohio fails to meet its burden of proving that the Prior RCR charges are recoverable under a specific provision of the ESP statute. OCC asserts that AES Ohio's arguments that the Prior RCR amounts are authorized under R.C. 4928.143(B)(2)(d) and (h) require misinterpretation of the statutes and are contrary to R.C. 1.48. OCC rejects AES Ohio and Staff's arguments that the settlement system implementation and consumer education deferrals are not transition costs despite them being labeled as such in the *DP&L ETP Case* and adds that any argument to the contrary violates R.C. 4903.10 and the legal doctrines of collateral estoppel and res judicata. OCC similarly disputes AES Ohio's argument that these deferrals are not barred by the "notwithstanding clause" of R.C. 4928.143(B), arguing that the Ohio Supreme Court's opinion in *In re Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320 is distinguishable. OCC further disagrees that the Prior RCR deferrals are properly includable in the ESP as a provision under R.C. 4928.143(B)(2)(h) or (B)(2)(d), stating that they are not distribution costs or limitations on shopping, and they do not stabilize service or provide certainty to consumers over the three years of the proposed ESP IV.

ii. **DEFERRED OVEC COSTS**

{¶ 137} OCC further contends that the third prong cannot be satisfied because the Stipulation allows AES Ohio to collect deferred OVEC costs. OCC argues that this violates R.C. 4928.141 and R.C. 4928.143 by permitting collection of past generation costs, i.e., past fuel costs, related to ownership shares of two coal plants, incurred but not collected during AES Ohio's first ESP case (ESP I) and second ESP case (ESP II) (from October 1, 2014 through

October 31, 2017, and from December 19, 2019 through December 31, 2019), which will not have the effect of stabilizing or providing certainty regarding retail electric service during ESP IV. OCC submits that R.C. 4928.143 authorizes the Commission to approve the collection of generation costs under limited circumstances only, none of which would justify collection of AES Ohio's share of the coal plant costs from consumers. This is so, says OCC, because the costs are not part of the "firm supply of generation service" offered as part of the SSO to be established for ESP IV under R.C. 4928.141. Nor are they related to the cost of fuel or purchased power "used to generate the electricity supplied under [ESP IV]" under 4928.143(B)(2)(a), nor were they incurred during ESP IV such that they could be justified as a "limitation on customer shopping" or a hedge under 4928.143(B)(2)(d). OCC additionally argues that the OVEC deferrals fall outside of the recovery authority granted through the Reconciliation Rider approved in AES Ohio's ESP III or through R.C. 4928.148 as legacy generation costs.

{¶ 138} OCC also argues that permitting AES Ohio to collect past generation costs during ESP IV, where the generation services were provided during prior ESPs, violates R.C. 4928.143, as well as regulatory practices and principles. OCC maintains that R.C. 4928.143 does not allow the collection of past generation charges unrelated to the utility's current SSO to consumers and, therefore, permitting the OVEC deferrals is contrary to Supreme Court of Ohio precedent announced in *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.

{¶ 139} Still discussing the OVEC deferrals, OCC states that their inclusion in the Stipulation violates the prohibition against retroactive ratemaking because it allows AES Ohio to collect past charges in future rates. OCC argues that the Stipulation violates this regulatory principle in three ways. First, the deferrals include charges dating back as far as 2014. Second, under the Stipulation, consumers will be paying for the balance of OVEC charges as it retroactively existed on July 31, 2022, but that balance did not exist on AES Ohio's books when it filed its September 26, 2022 Application. And third, the Stipulation

allows AES Ohio to collect carrying charges on the deferrals that had never been recorded on AES Ohio's books.

{¶ 140} Continuing, OCC asserts that the Stipulation violates important regulatory principles and practices because it allows AES Ohio to collect the OVEC deferrals without prior Commission approval to amend Company accounting practices to record the deferral. OCC contends that a utility must follow generally accepted accounting principles (GAAP) and the Uniform System of Accounts unless and until the Commission orders otherwise through an application to amend accounting authority. Here, OCC alleges that AES Ohio skipped this important step. Relatedly, OCC contends that the Stipulation violates R.C. 4905.13, Supreme Court of Ohio precedent, and regulatory principles and practices under Accounting Standards Codification 980 (ASC 980) by allowing AES Ohio to both establish a deferral and collect that deferral in a single proceeding. This is especially true, avers OCC, where the Company's internal management concluded that there was not a 75 percent or greater likelihood that AES Ohio would collect the OVEC costs and, thus, wrote the deferral off its books before submitting the Application, reducing the OVEC amount to zero and charging it as a power purchase expense. Even if the OVEC deferral was properly recorded, which OCC does not concede, OCC additionally argues that, under proper accounting treatment, AES Ohio should have charged off the OVEC deferral when the Company withdrew from ESP III in December 2019. Moreover, OCC asserts that the Stipulation violates important regulatory principles and practices because it allows AES Ohio to collect costs without a prudence review of the operation and performance of the OVEC plants during the period the costs were incurred. Here, OCC attests that any prior authorization AES Ohio may have had with regard to OVEC costs under ESP III came with rigorous performance and operations prudence reviews, yet the Stipulation provides no such protection for consumers.

{¶ 141} In reply to this portion of OCC's argument, AES Ohio submits that it plainly demonstrated that R.C. 4928.143(B)(2)(d) authorizes recovery of the OVEC deferral through ESP IV. AES Ohio next asserts that, contrary to OCC's statement that the OVEC deferrals

are not authorized for recovery because they were incurred outside the approved ESP period, there is no such limitation in R.C. 4928.143(B)(2)(d). AES Ohio maintains that OCC's argument places temporal limitations on deferrals that do not exist and should not be imposed. AES Ohio further notes that there is a distinction between a cost incurred and a charge recovered; it is not the cost incurred but the charge recovering that cost which is analyzed under R.C. 4928.143(B)(2)(d).

{¶ 142} Continuing, AES Ohio states that the Commission should reject OCC's position that recovery of the OVEC deferrals would constitute retroactive ratemaking. First, AES Ohio repeats that it currently has a Commission-approved deferral of the net OVEC costs recorded on its FERC Form 1, and OCC's witness Morgan admitted that recovery of such an asset is not retroactive ratemaking (Tr. IV at 634-635). Second, the Company contends that OCC's argument that the Commission can look only to the future when setting rates would effectively prohibit the recovery of all deferrals, which represent past costs by definition. And third, recovery of the OVEC deferrals is lawful under R.C. 4928.143(B)(2)(d) due to application of the notwithstanding clause.

{¶ 143} AES Ohio also reiterates that OCC's representations that the Company taking a reserve against the deferrals constitutes a write-off of the deferrals are mistaken. Similarly, AES Ohio characterizes OCC's argument that the Company should have written off the OVEC deferrals when ESP III was terminated as nonsensical. Finally, AES Ohio states that, contrary to OCC assertions, Staff did conduct a prudency review of the OVEC deferrals (Staff Ex. 1 at 4; Tr. II at 406-407). In fact, that review resulted in the removal of approximately $660,000 from the net OVEC costs from the Stipulation, as those costs were found to be imprudent (Signatory Parties Ex. 1 at 15; Tr. I at 160).

{¶ 144} Staff responds that recovery of net OVEC costs relate to a limitation on customer shopping under R.C. 4928.143(B)(2)(d). As did AES Ohio, Staff represents that the OVEC costs were properly authorized by the Commission for deferral in the Company's generation separation case. *Generation Divestiture Case*, Finding and Order (Sept. 17, 2014).

Staff also faults OCC's arguments regarding accounting practices. First, Staff states that contrary to OCC's representation that AES Ohio wrote off the OVEC deferrals, the Company, in fact, took a reserve against the deferral. Second, Staff disputes OCC's position that the Stipulation violates important regulatory policies and practices under ASC 980 in allowing AES Ohio to collect the OVEC deferral even though the Company concluded that there was not a 75 percent or greater likelihood of collection. Staff relates that witness Borer fully explained that ASC 980 was not violated and the 75 percent threshold argument is not the bright-line issue OCC wishes it to be.

{¶ 145} In its reply brief, OCC states that AES Ohio's argument that the OVEC deferrals are lawful under R.C. 4928.143(B)(2)(d) as a limitation on customer shopping has no merit. OCC reaches the same judgment regarding the Company's position that the OVEC costs are legal under R.C. 4928.143(B)(2)(d) because they are a deferral. OCC states that the cited section only allows for deferrals in an ESP to the extent the same are otherwise lawful under R.C. 4928.143. Here, OCC reiterates that AES Ohio never properly recorded the OVEC deferral on its books. OCC points to AES Ohio's internal accounting memo, SEC Form 10-K, and FERC Form 1 to support its argument that the accounting treatment of the OVEC costs belies their characterization as lawful deferrals. OCC additionally avers that AES Ohio's argument that the OVEC deferrals are legal under R.C. 4928.143(B)(2)(d) as standby service is unsupported by the record or by the Company's tariffs during the 2014-2017 timeframe in which the costs were incurred. Similarly, OCC rejects the concept that the OVEC deferrals are legal under R.C. 4928.143(B)(2)(d) because it will allow AES Ohio to increase its revenues and achieve financial stability. OCC declares that, if that were a feasible argument, any possible ESP provision would be legal because any charge collected by an ESP will increase a utility's revenues. OCC provides the same treatment to the Company's claim that the OVEC costs are carrying costs under R.C. 4928.143(B)(2)(d).

iii. Deferred Decoupling Costs

{¶ 146} Similar to its arguments regarding the Prior RCR and OVEC deferrals, OCC argues that the Stipulation fails the third prong of the reasonableness inquiry by allowing AES Ohio to collect three-year old decoupling revenues. First, OCC states that allowing AES Ohio to collect decoupling revenues from before December 18, 2019, violates R.C. 4903.10 and the law of the case doctrine because previously, in its Order approving AES Ohio's withdrawal of ESP III, the Commission ruled that the Company could no longer charge consumers for any decoupling revenues under ESP I. *In re Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, et al. (*ESP I Case*), Second Finding and Order (Dec. 18, 2019). Thus, when AES Ohio withdrew from ESP III and ultimately failed to challenge the Commission's ruling, it lost the right to collect $13 million in lost revenues it had incurred during ESP III. OCC next argues that allowing AES Ohio to collect those pre-December 19, 2019 decoupling revenues, the Stipulation violates Ohio Supreme Court precedent requiring the Commission to respect its own prior rulings. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060. OCC asserts that, in order to abandon its ruling in the Second Finding and Order, the Commission must provide its rationale, which is lacking. OCC posits that allowing AES Ohio to collect the deferrals through the Stipulation similarly violates basic legal concepts of res judicata and collateral estoppel. OCC additionally contends that the Stipulation violates R.C. 4905.13 and important regulatory accounting principles in permitting the Company to collect the decoupling revenues because ASC 980-605 places limits on deferring lost revenue as a regulatory asset under an alternative revenue program.

{¶ 147} In reply to OCC, AES Ohio submits that it plainly demonstrated that R.C. 4928.143(B)(2)(d) and/or R.C. 4928.143(B)(2)(h) authorize recovery of the decoupling amounts through ESP IV. The Company then challenges OCC's argument that AES Ohio's withdrawal of ESP III cuts off the Company's ability to collect the amounts included in the Stipulation for four reasons. First, despite all of its varied arguments, OCC never contends

that the ESP statute prohibits recovery of the decoupling amounts. Second, the recovery of decoupling amounts through the RCR is consistent with prior Commission orders. Third, the Commission has never held that the Company could not recover the decoupling deferrals; the Commission only held that the Company could not recover the deferrals while operating under ESP I. And fourth, even if AES Ohio's decision to terminate ESP III pursuant to R.C. 4928.143(C)(1) somehow barred the Company from recovering the amounts, such recovery would nonetheless be lawful with application of the "notwithstanding" clause of R.C. 4928.143(B)(2). Finally, AES Ohio states that OCC's reliance on res judicata and collateral estoppel is plainly misplaced because the Commission has never held that recovery of the decoupling amounts is unlawful. Nor does ASC 980-605 bar their recovery. This is so, AES Ohio argues, because application of accounting principles cannot supersede statutory authority and because ASC 980-605 addresses when a utility can record revenue on its books, not whether a utility can recover charges from customers through an SSO.

{¶ 148} As it did regarding OVEC deferrals, Staff asserts that OCC incorrectly applies ASC 980-605 to argue that the decoupling deferral violates GAAP. Staff indicates that ASC 980-605 addresses revenue recognition, not whether revenue deferrals are permitted (Tr. II at 418). Additionally, Mr. Borer testified that ASC 980-605 is an important regulatory principle only in a limited context, as the Commission does not apply it consistently (Tr. II at 416-417). Continuing, Staff disagrees with OCC's assertion that recovery of the decoupling deferrals is barred by res judicata. Staff states that OCC ignores the key distinction between deferral authority and recovery authority, explaining that only the latter was associated with ESP III. Even with the termination of ESP III, says Staff, the Commission did not opine on the Company's ability to recover the deferrals in the future; termination of a recovery mechanism does not necessarily terminate the right to recover the amounts that would have been collected had the mechanism continued. *See In re Application of The Dayton Power and Light Co. to Increase Rates for Elec. Distribution Service*, Case Nos. 20-1651-EL-AIR, et al. (*2020 Rate Case*), Opinion and Order (Dec. 14, 2022).

{¶ 149} OMAEG/Kroger aver that OCC attempts to invalidate the Stipulation under the third prong of the Commission's reasonableness test simply because OCC does not approve of certain individual provisions with the RCR even though stipulations must be judged as a package. OMAEG/Kroger claim that, in its insular attack on the RCR, OCC ignores benefits conferred by the Stipulation with regard to the amounts allowed to be recovered under the rider. OMAEG/Kroger further relate that the Stipulation promotes important state policy, as is discussed below.

{¶ 150} In its reply brief, OCC states that AES Ohio's argument that the decoupling deferrals were lawful under R.C. 4928.143(B)(2)(h) fails because the Company did not have a decoupling rider approved or obtain Commission approval to defer decoupling revenues. OCC concedes that AES Ohio complied with these requirements in the ESP III proceeding. But, because AES Ohio failed to satisfy these prerequisite conditions here, the Stipulation violates important regulatory principles by allowing the Company to collect these decoupling revenues. OCC further asserts that AES Ohio's claim that it should be allowed to collect the decoupling revenues because their procedural history is identical to that for uncollectible amounts, which were approved in the Company's last rate case, is false. OCC contends that while deferrals of both the decoupling revenues and uncollectibles were provided for in ESP III, the rate case authorized the collection of uncollectible amounts only. AES Ohio did not, however, obtain approval of the decoupling amounts. Thus, they cannot be classified as distribution revenues under R.C. 4928.143(B)(2)(h). OCC reiterates that AES Ohio simply did not have authority to defer decoupling revenues, whether new or old, after it withdrew from ESP III. As such, OCC submits that OMAEG/Kroger's arguments must also fail.

{¶ 151} OCC raises arguments that the Stipulation violates several regulatory principles and practices. None of these arguments are persuasive.

{¶ 152} The Commission finds that the collection of deferrals under the RCR does not violate important regulatory principles or practices. These deferrals include:

(1) deferrals related to OVEC; (2) deferrals authorized under a prior version of the RCR, authorized by the Commission in the Company's ESP III; (3) decoupling deferrals; (4) deferrals of uncollectible expenses; and (5) deferrals authorized in AES Ohio's recent grid modernization case (AES Ohio Ex. 2 at 4-5).

{¶ 153} The Commission further finds that recovery of the OVEC-related deferrals does not violate any important regulatory principles. OCC claims that AES Ohio lacked Commission approval for the deferral of the OVEC expenses. This claim is wholly without merit. These deferrals (also referred to as a "regulatory asset") were authorized by the Commission when we approved AES Ohio's application, and supplemental applications, to divest its generation assets. *Generation Divestiture Case*, Finding and Order (Sept. 17, 2014). In its applications, AES Ohio requested that the Commission grant accounting authority pursuant to R.C. 4905.13 to permit AES Ohio to defer costs associated with OVEC which were not being recovered through AES Ohio's fuel rider.[15] Further, AES Ohio proposed to defer those expenses for future recovery from all customers, beginning at a date to be determined in a subsequent Commission proceeding. *Generation Divestiture Case,* Finding and Order (Sept. 17, 2014) at 14. The Commission approved the applications subject to conditions set forth in the Finding and Order. *Id.* at 22-23. OCC, and other parties, filed for rehearing. *Generation Divestiture Case,* Entry on Rehearing (Dec. 17, 2014). No party appealed the Commission's decision. Accordingly, the Commission's order in the *Generation Divestiture Case* approving the deferrals is a final, nonappealable order.

{¶ 154} OCC attempts to confuse this issue by claiming that AES Ohio only sought authority to begin the deferral in the future, at a date to be determined in a future proceeding; but it is clear from both the applications and the Finding and Order that there were two separate issues: (1) a request for authority to begin the deferrals, to take effect immediately; and (2) a proposal to recover those deferrals from ratepayers beginning at a

[15] At the hearing, the attorney examiner took administrative notice of all three applications filed in the *Generation Divestiture Case* (Tr. IV at 673-674).

date to be determined in a subsequent Commission proceeding. *Generation Divestiture Case*, Finding and Order (Sept. 17, 2014) at 14. Moreover, the testimony of OCC witness Morgan, that the Commission did not actually approve the deferral of the OVEC expenses, is not persuasive. In his testimony, rather than addressing the language in the order approving the applications, Mr. Morgan quotes the conditions related to OVEC which the Commission ordered as part of our approval of the applications in the *Generation Divestiture Case*. However, the Finding and Order plainly describes the request for deferral authority in the applications and the ordering paragraph in the *Generation Divestiture Case* clearly states that the applications filed by AES Ohio were approved, subject only to the conditions set forth by the Commission (AES Ohio Ex. 2 at 5). *Generation Divestiture Case*, Finding and Order (Sept. 17, 2014) at 14, 25.

{¶ 155} Moreover, OCC's claim that AES Ohio had already "written off" the deferrals is not supported by the evidence in the record. The evidence demonstrates that AES Ohio has never written off the deferral and charged it as an expense. The regulatory asset was originally booked in December 2015[16] when AES Ohio determined that the unrecovered OVEC expenses were more than 75 percent probable for recovery (OCC Ex. 4 at 5; Tr. I at 46-47). Subsequently, in the third quarter of 2022, AES Ohio reviewed the likelihood of recovery of the OVEC regulatory asset and determined that the likelihood of recovery had fallen below the 75 percent probable for recovery standard (OCC Ex. 4 at 5-6; Tr. I at 166-170). Therefore, AES Ohio booked "a reserve against the regulatory asset for the full deferral amount" as of September 30, 2022 (OCC Ex. 4 at 5-6). AES Ohio witness Schroder explained that booking a reserve is different from a write-off (Tr. I at 174). Further, Staff witness Borer, who is a certified public accountant (Staff Ex. 1 at 1), testified that booking a reserve against the OVEC regulatory assets was an appropriate option:

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[16] This action was subsequent to the Commission's order authorizing AES Ohio to defer the unrecovered OVEC expenses in the *Generation Divestiture Case*.

> Q. (By Mr. Finnigan) Mr. Borer, under Generally Accepted Accounting Principles, what is your understanding as to how a company should treat a regulatory asset on its books once the possibility of recovery goes below 75 percent?
>
> A. We would need to determine if perhaps an impairment or a reserve or some action would need to be taken to account for reporting or disclosing the less than 75 percent probability in its financial reports to shareholders.
>
> Q. And would another action be to charge the cost off as an expense, as a current expense, as opposed to continuing to capitalize it as an asset?
>
> A. It can be charged to expense for a variety of ways. I believe that with -- *you could write it off and charge it to expense, or you can recognize it as an expense by creating a reserve against it, so a writeoff is not necessarily the only option.*

(Emphasis added.) Tr. II at 360-361.

{¶ 156} Accordingly, based upon the evidence in the record, we find that AES Ohio has never "written off" the OVEC deferrals. Therefore, we disagree with OCC's argument that the Stipulation violates important principles because AES Ohio lacked Commission approval for recording a deferral on its books. Likewise, we find that OCC's argument that the Stipulation violates important regulatory principles because it allowed AES Ohio to establish a deferral and to collect the deferral in the same proceeding to be wholly without merit. The evidence cited above demonstrates that creation of the regulatory asset was approved by the Commission in the *Generation Divestiture Case*, and the regulatory asset was never written off by AES Ohio.

{¶ 157} In support of its claim that AES Ohio had written off the OVEC regulatory asset, OCC cites to a "charge" recorded on an AES Ohio 10-K and a FERC Form 1 (OCC Ex.

3 at Attachment LM-4 at 113; OCC Ex. 19 at 53). However, AES Ohio witness Donlon explains that the "charge" reflected in AES Ohio's 10-K and in the FERC Form 1 is the accounting "reserve" described in the accounting memo updated, by Mr. Donlon, on November 1, 2022 (Tr. I at 49-50; OCC Ex. 4 at 6). On the other hand, OCC cites to no testimony that the OVEC deferral was written down to zero and removed from AES Ohio's books. On cross-examination, OCC witness Morgan could not explain why the "charge" to offset the regulatory asset was different from an accounting "reserve" under the accounting standards; instead, the witness gave an evasive answer which served only to undermine the credibility of his testimony:

> Q. Do you know on that FERC Form 1 whether the regulatory -- I'm sorry, whether OVEC amounts are still reported as a regulatory asset?
>
> A. The amount according to -- it's recorded -- basically there is one line item that shows the regulatory asset and there is a separate line item that removes the regulatory asset.
>
> Q. Do you understand that second line item to which you are referring booked a reserve against that regulatory asset?
>
> A. That's what is -- what it's described as. *I don't -- I don't understand that terminology.* It doesn't seem to -- to make sense to me.
>
> When you read the -- the notes to the financial statement, it says that this regulatory asset was removed, and that if approved by this Commission -- and this is where it supports my statement that it doesn't exist -- if it's approved by this Commission, DP&L/AES Ohio would record the regulatory asset.

> So essentially what they are saying is that the regulatory asset no longer exists.

(Tr. IV at 642-643 [emphasis added].)

{¶ 158} Further, we find that, because OCC's argument that that the Stipulation violates the prohibition against retroactive ratemaking relies upon the erroneous claim that AES Ohio had written off the OVEC regulatory assets, OCC's argument regarding retroactive ratemaking should be rejected. OCC witness Morgan conceded that the recovery of an approved deferral is not retroactive ratemaking (Tr. IV at 634-635). We also note that OCC failed to identify any precedent where the recovery of a previously-approved regulatory asset was rejected as retroactive ratemaking.

{¶ 159} OCC next argues that, even if the OVEC deferral was properly recorded on AES Ohio's books, AES Ohio should have written off the deferral when it withdrew from its third ESP in 2019. However, OCC witness Morgan acknowledges that recovery of the OVEC regulatory asset was not included in the approved third ESP (OCC Ex. 3 at 20). Given that the recovery of the regulatory asset was not included in the approved third ESP, it does not follow that the withdrawal from the third ESP should have caused AES Ohio to write off the OVEC regulatory asset. Nonetheless, the evidence demonstrates that AES Ohio continued to review the deferral on a quarterly basis from November 2017 through the second quarter of 2022 and AES Ohio continued to assess the OVEC regulatory asset as probable of recovery until the third quarter of 2022 when AES Ohio booked a reserve against the deferral and updated its accounting memo (OCC Ex. 4 at 4-5; Tr. I at 40-41, 44).

{¶ 160} The Supreme Court of Ohio has, on two occasions, upheld the collection of generation-related costs in an ESP, pursuant to R.C. 4928.143(B)(2)(d). In the appeal of the *AEP PPA Rider Case*, the Court upheld the recovery of OVEC costs, holding that:

> [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 at ¶ 26.

{¶ 161} The RCR, which includes the recovery of the OVEC-related deferral, is a "charge." The RCR also relates to "deferrals, including the future recovery of such deferrals," one of the limited set of listed items in the statute. Further, we find that recovery of the OVEC deferral meets the criteria of "stabilizing or providing certainty regarding retail electric service." AES Ohio witness Malinak explained that AES Ohio is currently operating under financial distress. AES witness Schroder testified that, due to financial stress and a low return on equity, AES Ohio has struggled to make necessary distribution improvements and that, without recovery of the RCR, AES Ohio would continue to struggle to provide reliable service. Thus, according to Ms. Schroder, recovery of the OVEC deferral would have the effect of stabilizing or providing certainty regarding retail electric service. (AES Ohio Ex. 1 at 21.) In addition, the Commission notes that the record is clear that AES Ohio withdrew its request for recovery of the OVEC deferral in ESP III in order to mitigate rate impacts on customers (OCC Ex. 4 at 5). R.C. 4928.143(B)(2)(d) should not be interpreted to authorize deferrals in order to stabilize rates but preclude the future recovery of such deferrals. Therefore, we find that the OVEC deferral, including its future recovery, had the effect of stabilizing rates pursuant to R.C. 4928.143(B)(2)(d).

{¶ 162} With respect to the fact that the OVEC-related costs were incurred prior to the proposed ESP, we note that in AEP Ohio's first ESP, the Court allowed the recovery, during the ESP, of incremental capital carrying costs on past environmental investments pursuant to R.C. 4928.143(B)(2)(d). These environmental investments were made prior to the implementation of the ESP and had not previously been included in rates. The Court affirmed the Commission's decision, on remand, that the incremental capital carrying costs

were authorized for recovery by R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶ 20-21, 30-35.

{¶ 163} Finally, regarding OCC's claim that the Stipulation violated important regulatory principles by approving recovery of the OVEC deferrals without a prudence review, the record reflects that Staff had performed a prudency review; in fact, Staff disallowed recovery of a penalty of $660,616 imposed by PJM, which Staff determined was imprudently incurred (Staff Ex. 1 at 4; Tr. II at 406-407). 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 (Tr. IV at 659-660; OCC Ex. 3 at 30). Moreover, Staff conducts reviews in numerous cases without employing third-party auditors, and the decision whether to employ a third-party auditor is at the Commission's discretion based upon the need to properly allocate Staff resources. OCC did ask Staff witness Borer a number of questions regarding the scope of the review (Tr. II at 407-412), but OCC witness Morgan did not testify that the areas identified in the questions were an essential part of a prudence review (OCC Ex. 3 at 29-30); and OCC provides no other evidence that the areas identified in those questions are an essential part of a prudence review.

{¶ 164} OCC objects to the recovery of $2.3 million in accounting-related expenses from DP&L's electric transition case. These accounting-related expenses are unrecovered expenses related to consumer education and retail settlement system implementation mandated by Am. Sub. Senate Bill 3, which restructured the electric industry. We find that collection of the accounting-related expenses identified in the *DP&L ETP Case* does not violate any important regulatory principles.

{¶ 165} We disagree with OCC's characterization of these accounting-related expenses as "transition costs," the recovery of which is precluded by law. The accounting-

related expenses are not "transition costs" as defined by R.C. 4928.39. That statute defines transition costs as meeting specific criteria:

> (A) The costs were prudently incurred.
>
> (B) The costs are legitimate, net, verifiable, and *directly assignable or allocable to retail electric generation service* provided to electric consumers in this state.
>
> (C) The costs are unrecoverable in a competitive market.
>
> (D) The utility would otherwise be entitled an opportunity to recover the costs.

{¶ 166} The expenses related to consumer education and retail settlement system implantation are not directly assignable or allocable to retail electric generation service. Both expenses were required to be incurred by AES Ohio due to its status as an EDU pursuant to R.C. 4928.31, which required EDUs to file transition plans which included plans for operational support systems and for consumer education. R.C. 4928.31(A)(3) and (5).

{¶ 167} Moreover, we find that, if the General Assembly had intended to define the accounting-related expenses as "transition costs," it would have done so explicitly. R.C. 4928.31 listed the requirements of a transition plan, including, but not limited to: operational support systems and any other technical implementation requirements (i.e., the retail settlement system); an employee assistance plan; and a consumer education plan. However, only the costs of employee assistance plans were expressly included as "transition costs." R.C. 4928.39 states that "[t]ransition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan * * *." Having expressly stated that the costs of the employee assistance program be considered "transition costs," it is clear that the General Assembly did not intend for the retail settlement system expenses or the consumer education to be considered transition costs, according to the principle of statutory construction, expressio unius est exclusio alterius.

{¶ 168} Further, contrary to OCC's claims, the Commission did not approve the accounting-related expenses as "transition costs" in the *DP&L ETP Case*, Opinion and Order (Sep. 21, 2000). Although the quote cited by OCC may be ambiguous, the Commission had clarified, previously in the Opinion and Order, that the accounting-related expenses were not "transition costs":

> Section 4928.40(A), provides, among other things, that a company may create *additional regulatory assets* * * * DP&L presented in its amended transition plan at Part F, a request for $699.2 million in *transition cost* (the total regulatory transition costs and customer transition costs as determined by DP&L). DP&L *further requested* deferred recovery of *an additional $28.6 million in accounting related expenses.*

(Emphasis added.) *DP&L ETP Case*, Opinion and Order (Sept. 21, 2000) at 27.

{¶ 169} The applications filed in the *DP&L ETP Case* included both an application for approval of its electric transition plan and an application for approval to change accounting methods, as well as an application for approval to amend its tariff; and 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.

{¶ 170} Further, we find that the recovery of the accounting-related expenses, as well as the recovery of the green pricing program expenses, generation separation expenses, and bill format redesign expenses, are authorized by statute. We find that the expenses related to these five programs were incurred by AES Ohio due to its provision of distribution service in this state. Retail settlement system expenses and consumer education expenses were incurred by AES Ohio as an EDU as required by R.C. 4928.31. Green pricing programs

expenses were incurred by AES Ohio as an EDU as part of the provision of the SSO.[17] Generation separation expenses were incurred by AES Ohio in fulfilling its obligation, as an EDU, to separate or divest its generation assets as required by R.C. 4928.17; in fact, the Commission has already determined that the generation separation expenses are distribution costs, and that determination is a final and nonappealable order. *Generation Divestiture Case*, Entry on Rehearing (Dec. 17, 2014) at 4. Bill format redesign expenses were incurred as part of AES Ohio's obligation, as an EDU, to unbundle generation, transmission, and distribution services. Moreover, expenses related to the provision of distribution service may be recovered through the provision for single issue ratemaking expressly authorized by R.C. 4928.143(B)(2)(h). R.C. 4928.143(B)(2)(h) states, in relevant part, that an EDU may include in an ESP:

> 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 * * * As part of its determination as to whether to allow in an electric 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.

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[17] We find that AES Ohio offered the green pricing program as part of its obligations as an EDU; therefore, we find that the green pricing program was related to distribution service rather than generation service. Nonetheless, even if we had found that the green pricing program was related to generation service rather than distribution service, the costs of the program would be recoverable under R.C. 4928.143(B)(2)(a), which authorizes the automatic recovery of the costs of purchased power supplied under the SSO.

{¶ 171} Staff witness Nicodemus testified that Staff had examined the reliability of the distribution system in order to ensure that customers' and the utility's expectations were in alignment (Staff Ex. 7 at 4-6). Mr. Nicodemus concluded that, although AES Ohio had missed reliability targets related to outage duration recently, AES Ohio had consistently met its standards related to outage frequency (Staff Ex. 7 at 4). Further, Staff reviewed the results of a survey conducted by the Company regarding customer expectations and the survey demonstrated that customer expectations were being met (Staff Ex. 7 at 4-6). We find that Staff's review met the requirements of R.C. 4928.143(B)(2)(h). Therefore, we find that the accounting-related expenses, as well as the green pricing expenses, generation separation expenses and bill format redesign expenses, were related to AES Ohio's provision of distribution service and such expenses may be recovered pursuant R.C. 4928.143(B)(2)(h).

{¶ 172} We also find that the recovery of the remaining deferred revenue from the decoupling rider does not violate any important principles or practices. The decoupling rider was created as a zero-based rider in ESP III. *ESP III Case*, Opinion and Order (Oct. 20, 2017) at 11-12. The stipulation adopted in the *ESP III Case* specifically provided that lost distribution revenue, which was at the time being collected in AES Ohio's energy efficiency rider, would be recovered through the decoupling rider, but all other details would be addressed in either *In re Dayton Power and Light Co.,* Case Nos. 15-1830-EL-AIR, et al. (*2015 Rate Case*), which was pending at the time of the stipulation, or in AES Ohio's next energy efficiency portfolio proceeding. *ESP III Case* at 11-12. Subsequently, in the *2015 Rate Case*, the Commission approved a stipulation[18] which included all details necessary for the implementation of the decoupling rider, including carrying charges for unrecovered decoupling deferral balances. *2015 Rate Case* at 28.

{¶ 173} AES Ohio subsequently withdrew from ESP III. *ESP III Case,* Finding and Order (Dec. 18, 2019). Accordingly, pursuant to R.C. 4928.143(C)(2)(b), AES Ohio reverted

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[18] OCC was a signatory party to the stipulation and advocated for the implementation of the decoupling rider. *2015 Rate Case*, Opinion and Order (Sept. 26, 2018) at ¶ 12, 66.

to the provisions, terms, and conditions of its most recent SSO, which was AES Ohio's first ESP. *ESP I Case,* Second Finding and Order (Dec. 18, 2019) at ¶ 4, 9-10, 26-27. In adopting the provisions, terms, and conditions of ESP I, the Commission determined that the decoupling rider should not be continued because it was created in the *ESP III Case*:

> [W]e agree with parties who argued that ESP I did not include riders such as the DIR, the reconciliation rider, the decoupling rider, the RCR, and the uncollectible rider, and that these riders should not be continued with the withdrawal of ESP III. Each of these riders was created in the *ESP III Case*. DP&L has proposed the elimination of the reconciliation rider, and we agree, as the reconciliation rider was created in ESP III. Likewise, although DP&L has proposed to continue the decoupling rider and the RCR, these two riders were created in ESP III and should be eliminated.

ESP I Case, Second Finding and Order (Dec. 18, 2019) at ¶ 36.

{¶ 174} OCC's arguments are based upon two fundamental misinterpretations of the Second Finding and Order in the *ESP I Case*. First, OCC claims that AES Ohio no longer had the authority to continue to defer the decoupling revenues after AES Ohio withdrew from ESP III. Second, OCC posits that, when AES Ohio withdrew from ESP III, it lost the right to recover the decoupling revenues it had deferred during ESP III. Neither interpretation is supported by the evidence in the record of this proceeding or by the plain language of the Commission's orders in the *ESP I Case*, the *ESP III Case*, or the *2015 Rate Case.*

{¶ 175} We are not persuaded by OCC's argument that, after the withdrawal from ESP III, AES Ohio should have sought authority to continue its deferral authority for decoupling revenues which had already been deferred during the abbreviated term of ESP III. The Second Finding and Order in the *ESP I Case*, quoted above, plainly eliminated the decoupling rider created in ESP III, but nowhere does the Second Finding and Order

discuss, modify, or eliminate AES Ohio's authority to continue to defer the decoupling revenues. Moreover, AES Ohio's authority to defer the decoupling revenues was independently confirmed in the *2015 Rate Case* when the stipulating parties agreed to carrying charges on the unrecovered balances of the deferred decoupling revenues. OCC witness Morgan agreed that, in the *2015 Rate Case,* "the Commission authorized the Company to create a deferral associated with the decoupling amounts" (Tr. IV at 647-648). Mr. Morgan also conceded that he was unaware of anything in the *ESP III Case* that required that the deferral authority that was established in the *2015 Rate Case* cease to exist in the event that ESP III was terminated (Tr. IV at 649).

{¶ 176} We also reject OCC's claim that, when AES Ohio withdrew from ESP III, AES Ohio *forever* lost the right to recover the decoupling revenues it had deferred during ESP III. This argument is not supported by the Second Finding and Order in the *ESP I Case*; the Commission never stated that AES Ohio lost the right to recover the decoupling revenues in the future. The Commission properly eliminated the *mechanism,* created by the *ESP III Case,* to recover the deferred decoupling revenues, and the Commission denied recovery of the deferred decoupling revenues *while the provisions, terms, and conditions of ESP I were in effect*. The Commission never precluded AES Ohio from seeking to implement a mechanism to recover the deferred decoupling revenues in a future proposed ESP, such as the instant case.

{¶ 177} OCC's specific legal arguments against the proposed recovery of the deferred decoupling revenues all fail because such arguments are based upon the two erroneous interpretations of the Second Finding and Order in the *ESP I Case* discussed above. OCC contends that the Stipulation violates R.C. 4903.10 because the Stipulation allows the recovery of the deferred decoupling revenues even though AES Ohio did not file an application for rehearing regarding the Second Finding and Order. However, the Second Finding and Order prohibited recovery of the deferred decoupling revenues while the provisions, terms, and conditions of ESP I remain in effect, and AES Ohio does not seek to recover the deferred decoupling revenues while the provisions, terms, and conditions of

ESP I remain in place. Instead, the Stipulation allows AES Ohio to recover the deferred decoupling revenue when a new ESP is implemented, and the Second Finding and Order in the *ESP I Case* does not speak to what provisions, terms and conditions may be included in a new ESP. Accordingly, we find that there was no need for AES Ohio to file an application for rehearing regarding the Second Finding and Order in the *ESP I Case* in order to recover the deferred decoupling revenue in a new ESP.

{¶ 178} Similarly, OCC contends that, by allowing AES Ohio to collect decoupling revenues deferred before December 18, 2019, the Stipulation violates the holding of the Supreme Court of Ohio requiring the Commission to respect its own precedents. *In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060. OCC also claims that the Stipulation violates the Second Finding and Order in the *ESP I Case* and the principles of collateral estoppel and res judicata. However, in the Second Finding and Order in the *ESP I Case*, we eliminated the rider, created by the *ESP III Case,* which recovered the deferred decoupling revenues, and the Commission denied recovery of the deferred decoupling revenues while the provisions, terms, and conditions of ESP I were in effect. The Commission never precluded AES Ohio from seeking to implement a mechanism to recover the deferred decoupling revenues in the future in a proposed ESP, and adoption of the proposed ESP will not violate any precedent set by the Second Finding and Order in the *ESP I Case*. Further, because nothing in the Second Finding and Order speaks to whether AES Ohio could seek to recover the deferred decoupling revenues in the future, this issue was not actually litigated in the *ESP I Case,* and, therefore, neither collateral estoppel nor res judicata apply to this case.

{¶ 179} Finally, the Commission is not persuaded that the Stipulation violates important regulatory accounting principles because the Stipulation allows AES Ohio to recover decoupling revenues which were deferred prior to December 18, 2019, when the Commission approved AES Ohio's withdrawal from ESP III. In order to demonstrate how the Stipulation violates regulatory accounting principles, OCC, and its witness Morgan, rely heavily upon the Staff Report and Recommendation filed the *Distribution Decoupling Case*,

which is currently pending before the Commission. The Commission notes, as an initial matter, that the Staff Report in that case represents the litigation position of Staff in the *Distribution Decoupling Case,* and that, pursuant to the Stipulation in this case, the Company will withdraw its application in that case if the Stipulation is adopted (Signatory Parties Ex. 1 at 16; Tr. II at 413-414). In addition, Staff witness Borer explained why the *Distribution Decoupling Case* should be distinguished from this case. Most importantly, the deferrals in this case were booked while the Company had an approved decoupling rider; the proposed deferrals in the *Distribution Decoupling Case* covered a different time period, specifically the time period commencing on December 18, 2019, after the withdrawal of ESP III (Tr. II at 414-415). Moreover, the deferral in this case represents an "underrecovery" resulting from the decoupling rider. In the *Distribution Decoupling Case*, there is no rider to recover the proposed deferrals and, thus, there is no underrecovery (Tr. II at 415).

{¶ 180} In addition to finding that the Stipulation violates no important regulatory principles or practices, we find that the Stipulation promotes important regulatory principles. As noted above, OCC witness Fortney conceded that the DIR promotes rate certainty, predictability, and stability. (Tr. II at 349-350). Mr. Fortney also agreed that rate certainty, predictability, and stability are each important regulatory principles (Tr. II at 350).

{¶ 181} Moreover, the accelerated recovery of investments in reliability, with annual caps, will mitigate the amount of any subsequent increase in base distribution rates resulting from such distribution rate case. This promotes gradualism, an important regulatory principle. (Tr. I at 83-84). The record reflects that the PRO Rider will also promote gradualism, by providing for the recovery, without carrying costs, of deferred vegetation management costs which were authorized in AES Ohio's previous distribution rate cases (Tr. I at 86; Signatory Parties Ex. 1 at 13-14).

b. The Stipulation contains numerous provisions which promote state policy as codified in R.C. 4928.02.

{¶ 182} AES Ohio, OMAEG/Kroger, IGS, OEC, OELC, and OPAE/Dayton all assert that the ESP IV Stipulation furthers the policy of the state as codified in R.C. 4928.02. IGS states simply that the Stipulation strips away fees, increases accessibility of customer data related to new and innovative products, and opens doors to create retail rates for SSO customers with on- and off-peak rates. Otherwise, the parties broadly argue that the Stipulation contains terms and conditions that ensure availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced service; ensure diversity of supplies and suppliers; encourage innovation and market access for cost-effective supply and demand-side retail electric service, protects at-risk populations, and facilitates the state's effectiveness in global economy.

{¶ 183} In support of these statements, these parties offer the following. In furtherance of state policy to ensure availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail service under R.C. 4928.02(A), the Stipulation is designed to allow increased investment in distribution to improve reliability, with penalties if certain reliability measures are not met, while still maintaining the lowest distribution prices (AES Ohio Ex. 1 at 23). To ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging development of distributed and small generation facilities under R.C. 4928.02(C), the Stipulation maintains the auction process to procure generation of SSO customers, eliminates fees for customers who switch to or from competitive providers, and obligates the Company to evaluate how to allocate costs to distributed generation facilities as part of AES Ohio's next base distribution rate case (AES Ohio Ex. 1 at 24; Signatory Parties Ex. 1 at 27, 35). To support the state policy to encourage innovation and market access for cost-effective supply- and demand-side retail electric service under R.C. 4928.02(D), the Stipulation includes a Residential Off-Peak Incentive Program to encourage EV charging at off-peak times (AES Ohio Ex. 1 at 24; Signatory Parties Ex. 1 at

25). The DIR and IRR will also provide incremental and impactful investments—such as smart meter infrastructure that will allow time-differentiated pricing—and includes a commitment to discuss utilization of time-differentiated rates for SSO customers (AES Ohio Ex. 1 at 24; Signatory Parties Ex. 1 5-6, 26). In order to protect at-risk populations in accordance with R.C. 4928.02(L), the Stipulation provides for a comprehensive Low-Income Assistance Program and for funding the Disadvantaged Communities Energy Initiative (AES Ohio Ex. 1 at 25, Signatory Parties Ex. 1 at 19-24). Furthermore, the Stipulation will facilitate the state's effectiveness in the global economy under R.C. 4928.02(N) by including revenue caps and reliability requirements, as well as Economic Development Incentives (Signatory Parties Ex. 1 at 8-10, 30-32). Finally, pursuant to the policy set forth in R.C. 4928.02(O) to encourage cost-effective, timely, and efficient access to and sharing of customer usage data with customers and competitive suppliers to promote customer choice and grid modernization, the Stipulation continues the IRR, which will allow AES Ohio to implement grid modernization including improved data sharing, and allows the Company, with proper consent, to share customer data with the goal of providing residential customers access to participation in the PJM ancillary services market and encouraging better choices about electricity use (AES Ohio Ex. 1 at 25-26; Signatory Parties Ex. 1 at 28).

{¶ 184} The Commission finds that three key provisions of the Stipulation, continuation of the CBP to provide generation for SSO customers, implementation of the DIR, and implementation of the PRO Rider, promote the availability to consumers of adequate, *reliable*, safe, efficient, nondiscriminatory, and *reasonably priced retail electric service (*Signatory Parties Ex. 1 at 4, 6-13, 13-14; AES Ohio Ex. 1 at 23). R.C. 4928.02(A).

{¶ 185} Moreover, the Stipulation contains additional provisions for residential customers which promote the policies of the state. The residential off-peak incentive program, which will target electric vehicles, encourages innovation and market access for cost-effective supply-side retail electric service through time-differentiated pricing and provide a coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates (Signatory Parties Ex. 1 at 24-

25; AES Ohio Ex. 1 at 24). R.C. 4928.02(D) and (J). In addition, the low-income customer programs' funding through the CPR will assist at-risk populations (Signatory Parties Ex. 1 at 19-24; AES Ohio Ex. 1 at 25). R.C. 4928.02(L).

{¶ 186} The Commission notes that it is also the policy of this state to: ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities; encourage cost-effective, timely, and efficient access to and sharing of customer usage data with customers and competitive suppliers to promote customer choice and grid modernization; and ensure that a customer's data is provided in a standard format and provided to third parties in as close to real time as is economically justifiable in order to spur economic investment and improve the energy options of individual customers. R.C. 4928.02(B), (C), (O), and (P). The Stipulation provides for, with appropriate customer consent, the sharing of customer data with CRES providers and third-party aggregators to allow the enrollment of residential customer accounts to participate in the PJM ancillary service markets (Signatory Parties Ex. 1 at 28; AES Ohio Ex. 1 at 25-26). The Stipulation also provides for the elimination of switching fees for customers that choose a CRES provider (Signatory Parties Ex. 1 at 35; AES Ohio Ex. 1 at 24).

{¶ 187} The Stipulation contains provisions for non-residential customers which will facilitate Ohio's effectiveness in the global economy as provided by R.C. 4928.02(N). These provisions include: the Green Energy Alternative Tariff, which will offer agreements with mercantile customers to construct customer-sited renewable energy resources pursuant to R.C. 4928.47; the modifications to billing for transmission service for non-residential customers taking service at primary and above or at secondary voltage; and the Economic Development Incentive Tariff (Signatory Parties Ex. 1 at 26, 29-30, 30-32). The Green Energy Alternative Tariff also will encourage implementation of distributed generation, consistent with the policies set forth in R.C. 4928.02(C), (F) and (K). AES Ohio witness Schroder also

testified that reliable service is particularly important to commercial and industrial customers and that by improving reliability, the Stipulation will facilitate the ability of those businesses to compete (AES Ohio Ex. 1 at 25).

{¶ 188} Accordingly, we find that the record demonstrates that the Stipulation violates no important regulatory principles and practices and should be adopted by the Commission.

D. Administration of the More Favorable in the Aggregate Test

1. ARGUMENTS OF THE PARTIES

{¶ 189} AES Ohio Staff, OMAEG/Kroger, and OPAE/Dayton all advance the position that the stipulated ESP IV is more favorable in the aggregate than a hypothetical MRO.

{¶ 190} AES Ohio submits that the Commission should conduct the MFA test prescribed in R.C. 4928.143(C)(2)(a) as stated in Mr. Malinak's testimony. That is to say, according to Commission precedent under which the Commission has taken a broad view of the expected effects of both the ESP and the MRO including quantifiable differences in prices to be charged for electric generation service under each (Aggregate Price Test), other quantifiable differences in customer charges, and non-quantifiable or difficult-to-quantify differences, including expected short- and long-term effects on quality, reliability, rates, and the range of product offers. Or, in other words, by considering quantifiable and non-quantifiable or difficult-to-quantify characteristics of the proposed ESP IV versus those of a hypothetical MRO. (AES Ohio Ex. 3 at 4.) AES Ohio notes that OCC's witness Fortney agreed that Mr. Malinak, in advocating for and using this test, followed the standard methodology that has been used in other ESP filings (Tr. II at 266).

{¶ 191} Beginning with the Aggregate Price Test, AES Ohio contends that every witness who addressed the MFA test agreed that generation would be priced the same

under either the ESP or an MRO, i.e., generation would be sourced and priced through a competitive process (Staff Ex. 6 at 7; AES Ohio Ex. 3 at 16; OCC Ex. 2 at 11).

{¶ 192} AES Ohio next addresses quantitative benefits. AES Ohio submits that quantitative benefits of ESP IV include: the Company's withdrawal of the *Distribution Decoupling Case*, resulting in elimination of litigation risk and of ratepayers paying more than $51 million in past decoupling amounts, and $150,000 funding for the AES Ohio Gift of Power Program, neither of which would be present in an MRO (Staff Ex. 6 at 7). AES Ohio also points to ESP IV's inclusion of riders that allow the Company to recover costs on an accelerated basis, e.g., the DIR or SCRR. While AES Ohio concedes that some of these costs could be recovered through a distribution rate case if paired with an MRO, accelerated recovery would not be; the Company asserts that accelerated recovery benefits customers who will then receive reliability benefits earlier. (AES Ohio Ex. 3 at 7-8). And, while OCC witness Fortney testified that accelerated recovery was not a benefit to consumers, Mr. Fortney also conceded that, since the same costs could be recovered through a distribution rate case if a utility was operating under an MRO, over the long-term those costs are even (Tr. II at 276-277). Finally, AES Ohio observes that, with regard to recovery of regulatory assets through riders, ESPs present financial benefits over MROs due to how those assets are recovered. Specifically, when regulatory assets are recovered through a rider, the rider will terminate once the asset is fully recovered. Under an MRO, however, the regulatory assets are recovered through base rates over an amortization period that estimates how long it will be until the utility's next rate case. And, if a rate case is not filed within the estimated period, the company could over-recover those assets. (Tr. II at 273-275.)

{¶ 193} Moving on to qualitative differences, AES Ohio articulates that the Commission has determined that reliability improvements, low-income assistance programs, and economic development benefits present advantages to ESPs. *In re Duke Energy Ohio, Inc.*, Case Nos. 17-32-EL-AIR, et al., Opinion and Order (Dec. 19, 2018) at ¶ 290-292; *AEP Ohio ESP IV Case*, Opinion and Order (Apr. 25, 2018) at ¶ 268-269. To that end, the

Company points to testimony from Ms. Messenger listing investments focused on reliability improvements, low-income assistance programs, and economic development as qualitative benefits in ESP IV, as well as from Mr. Malinak, who affirmed that accelerated cost riders associated with such programs would deliver benefits to customers sooner than under an MRO (Staff Ex. 6 at 7-8; AES Ohio Ex. 3 at 18-20). Mr. Malinak further averred that the accelerated recovery under an ESP, relative to an MRO, would reduce the risks associated with AES Ohio's financial stress (AES Ohio Ex. 3 at 19). As to non-quantifiable or difficult-to quantify benefits of ESP IV relative to an MRO, AES Ohio points to the ESP encouraging more timely and robust capital investment and O&M expenditures; improvement to the Company's borrowing costs and, potentially, credit ratings; the yearly administration of the SEET test; and the structural flexibility afforded by an ESP where implementing an MRO precludes future SSOs in the form of an ESP (AES Ohio Ex. 3 at 21-22).

{¶ 194} Staff asserts that the record demonstrates that the Stipulation is more favorable to customers—evaluated from a quantitative and qualitative perspective—than would be expected of an MRO and, therefore, should be approved. Staff states that compliance with this statutory test is supported by Ms. Messenger, who considered both quantitative and qualitative factors included as part of the Stipulation, and opined that the benefits added by the ESP outweigh any added costs (Staff Ex. 6 at 7-9; Tr. III at 604). Furthermore, while the Stipulation includes riders that would not be present in an MRO, Staff relates that the Commission has consistently found that the revenue requirements for such distribution-related riders is considered to be the same whether recovered through an ESP or through a distribution rate case paired with an MRO. *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO (*Duke ESP Case*), Opinion and Order (Dec. 19, 2018) at ¶ 289. The same is true when considering capital investments recovered through riders such as the DIR, provided that the investments are used and useful. *AEP Ohio ESP IV Case*, Opinion and Order (Apr. 25, 2018) at ¶ 267. Staff additionally contends that, as testified to by Ms. Messenger, for certain costs, approving a cost recovery mechanism is preferable to approving deferrals that may later be included in base rates; riders allow Staff to audit the

cost annually and reconcile spending with what the Company is recovering (Tr. III at 602). Finally, Staff lists several qualitative benefits it believes the Stipulation provides, such as investments focused on reliability improvements, low-income assistance programs, and economic development programs.

{¶ 195} OMAEG/Kroger also cite Ms. Messenger's testimony to support the position that the Stipulation's benefits outweigh any added costs. With ESP IV calling for the SSO load to be procured through a CBP, both the ESP and an MRO provide market-based rates. Additionally, AES Ohio commits to withdraw the *Distribution Decoupling Case* under the Stipulated ESP, which eliminates the risk of ongoing litigation and consumers paying more decoupling amounts. In short, considering all benefits provided under the proposed ESP IV—such as investments focused on reliability improvements, low-income assistance programs, and economic development—OMAEG/Kroger agree that, to the extent the ESP IV provisions add costs not seen in the MRO, those additional costs are outweighed by the benefits provided. (Staff Ex. 6 at 6-8; Tr. III at 598-599.)

{¶ 196} According to OPAE/Dayton, the record demonstrates that the total benefits of the Stipulated ESP IV, including both quantitative and qualitative benefits, are considerably more favorable in the aggregate as compared to the expected results of an MRO. OPAE/Dayton state that, from a quantitative perspective, the Stipulation is similar to an MRO because AES Ohio will implement a CBP to secure energy for the SSO. And, from a qualitative perspective, customers benefit from the ESP through low-income assistance programs, reliability improvements, and economic development that would not be present in an MRO. Thus, in the aggregate, the ESP is more favorable than an MRO.

{¶ 197} In contrast to the other parties, OCC argues that the Commission should consider the MFA test from the consumers' perspective and in the short term, consistent with the three-year term of the ESP. OCC believes this approach, as set forth in Mr. Fortney's testimony, is reasonable and carries out the objective of the test—to protect

consumers from paying too high electricity rates under an ESP. Under this approach, OCC submits that AES Ohio's ESP IV is less favorable in the aggregate than an MRO.

{¶ 198} When considering the consumer perspective, OCC asserts that the ESP imposes extra quantifiable costs because it features accelerated cost recovery through riders, costs that consumers must pay more quickly than they would otherwise pay under an MRO. OCC shares that, while AES Ohio witness Malinak acknowledges that the accelerated recovery riders avoid the more delayed recovery under standard rates, such as those under an MRO, and Company witnesses Malinak and Schroder admit that consumers will pay sooner under the ESP than an MRO, neither witness considered that accelerated recovery as a quantifiable cost to consumers under the ESP (AES Ex. 3 at 7-8, 20; Tr. I at 83-88). Mr. Fortney, however, testified that accelerated recovery is not a benefit from the consumer's perspective (OCC Ex. 2 at 7). OCC states that the costs imposed or associated with regulatory lag should be quantified as a benefit under the MRO and a cost to consumers under the ESP. And, because these costs were not quantified from the consumer's perspective by Staff or the Company, the costs of the ESP are understated in relation to the MRO.

{¶ 199} OCC additionally claims that the OVEC deferral costs could not be included in an MRO, and, thus, on a quantitative basis the MRO is at least $36.8 million less costly to consumers than the ESP proposed in the Stipulation. OCC alleges that, under an MRO, charges collected from consumers are strictly limited to the cost of the SSO and the CBP through which the SSO is set; there is no ability to collect past generation costs such as the OVEC deferrals allowed under the Stipulation. Nor would these costs be subject to collection from consumers in a base distribution rate case. OCC attests that these quantifiable costs should be considered in the MFA test; that Staff and the Company failed to do so; and that, when properly considered, the MRO is more favorable in the aggregate to consumers than the ESP by at least $36.8 million.

{¶ 200} Similarly, OCC argues that there is a quantifiable cost to AES Ohio's ESP IV associated with the lead time in filing an MRO application that has not been properly considered. Specifically, OCC reasons that because AES Ohio did not apply for an MRO when it applied for an ESP, the establishment of an MRO would take longer than the ESP, therefore delaying any Commission order adopting an SSO. And, during that delayed timeframe, AES Ohio would still operate under the rate freeze imposed in its last distribution rate case. *2020 Rate Case*, Opinion and Order (Dec. 14, 2022). Thus, there is an added monthly cost to consumers associated with the ESP that would not be found with the MRO—AES Ohio's ability to collect approximately $6 million per month in new distribution rates—that was not considered by the Company or Staff in their analyses. OCC claims that the total cost of the ESP was understated in comparison to the MRO due to this omission.

{¶ 201} OCC also contends that AES Ohio overvalued the benefits associated with the ESP by including as a benefit to ESP IV the non-quantifiable benefits of the SmartGrid modernization program, which the Commission had already considered in Case No. 18-1875-EL-GRD. OCC witness Fortney testified that considering those benefits again as part of the MFA test is double counting, which the Commission has previously rejected. Additionally, OCC avers that Staff and the Company wrongly rely on other non-quantifiable, hypothetical benefits they expect to result from AES Ohio's implementation of a new DIR. OCC criticizes this position, stating that, as indicated in Mr. Fortney's testimony, increased distribution investment does not guarantee that consumers will benefit from increased safety and reliability.

{¶ 202} In short, OCC submits that the ESP set forth in the Stipulation is more favorable than an MRO only to AES Ohio. The emphasis, however, should be on whether the ESP is more favorable in the aggregate to consumers. For OCC, the quantifiable $160 million cost to consumers cannot be outweighed by unproven, hypothetical benefits consumers might receive, especially when those benefits have been previously considered to justify prior allowances.

{¶ 203} Replying to OCC, OMAEG/Kroger contend that Mr. Fortney's focus on costs in the short-term requires a change in Commission precedent considering ESP costs in the long-term when performing the MFA test and should be rejected. The Commission, instead, should abide by its own precedent and consider the stipulated ESP IV costs in the long-term, which would thus be "a wash" when compared to the costs of an MRO.

{¶ 204} Staff agrees that OCC's focus on the short-term, rather than the effects of ESP IV in its totality, is improper. As the costs of each of the riders in question (DIR, SCRR, PRO Rider, CPR, and IRR) would be recoverable through a distribution rate case, the pertinent question is whether accelerated recovery is a detriment under the test. However, OCC's witness Fortney could not, and did not, explain why cost recovery by the company in the near term was worse than cost recovery in the far term. But, says Staff, Ms. Messenger testified that near-term costs recovery would be beneficial for the Company because near-term cash flows would mitigate the effects of AES Ohio's long-term cost of debt, which ultimately benefits ratepayers. As such, the evidence shows that accelerated recovery under the present circumstances is prudent and beneficial to the overall public interest. Staff further opines that OCC's emphasis on the quantitative costs of OVEC deferrals does not disqualify the stipulated ESP as that same cost could potentially also be recoverable in a rate case as distribution-related costs. And, if not, recovery of OVEC deferrals is still not fatal to the MFA test. Similarly, to the degree OCC claims the collection of carrying costs are detrimental to the ESP, Staff asserts that carrying costs are authorized by the ESP statute and are recoverable in distribution rate cases, which renders their existence equal to both forms of SSO. Closing out its response to OCC on this topic, Staff disputes the argument that the benefits stemming from the DIR are too hypothetical to be considered under the MFA test. Staff observes that the evidence supports a finding that, as a rider mechanism, the DIR would be audited to ensure that investments remain beneficial on an ongoing basis and that investments made through the DIR are expected to increase reliability.

{¶ 205} AES Ohio also disputes OCC's arguments regarding the MFA test. The Company first takes issue with OCC's treatment of accelerated cost recovery riders.

Contrary to OCC, AES Ohio states that Commission precedent treats these riders as "a wash" under the test because the costs are recoverable under either an ESP or an MRO. *Duke ESP Case*, Opinion and Order (Dec. 19, 2018) at ¶ 289. *AEP Ohio ESP IV Case*, Opinion and Order (Apr. 25, 2018). And the Ohio Supreme Court has affirmed this position. *In re Application of Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 23-27. AES Ohio further disagrees with OCC's contention that the deferred net OVEC costs would not be recoverable in a distribution rate case; the Company asserts that nothing in R.C. 4928.01(A)(6) precludes the OVEC costs from being deemed regulatory assets. Regardless, states AES Ohio, even if the costs were not recoverable under an MRO, the evidence demonstrates that there are significant quantitative and qualitative benefits of the ESP that would be available and could be valued to exceed the cost of the OVEC deferrals. Like Walmart, AES Ohio finds unpersuasive OCC's notion that delay in implementing new distribution rates associated with an MRO taking longer to establish gives value to a hypothetical MRO. To this point, the Company asserts that comparison is between an ESP and a hypothetical MRO that the Commission would have approved on the same day. AES further discounts any argument that the Company has double-counted the reliability benefits associated with SmartGrid investments where such investments are ongoing and unavailable under an MRO. And, finally, AES Ohio points to Mr. Malinak's extensive analysis regarding higher utility investment being associated with better reliability to counter OCC's claims that the benefits stemming from the DIR are purely speculative, especially where the ESP includes provisions that penalize the Company with lower rate caps if it fails to achieve specified reliability targets (AES Ohio Ex. 3 at 9-16; Signatory Parties Ex. 1 at 7-10).

{¶ 206} In its reply brief, OCC criticizes arguments that withdrawal of the Company's request for decoupling deferrals in the *Distribution Decoupling Case* and the availability of accelerated cost recovery constitute quantitative benefits under the ESP not found in an MRO. OCC states that withdrawal of pending applications is commonplace in distribution rate case settlements and, therefore, an MRO coupled with a distribution rate

case could provide the same result as the ESP. Similarly, OCC reiterates that accelerated cost recovery under an ESP is not a benefit to consumers, only the utility. OCC further critiques as unsound arguments that emphasize reliability improvements, low-income assistance, and the Economic Development Incentives as qualitative benefits provided by the ESP. OCC reiterates that these benefits are speculative and/or capable of realization through an MRO coupled with a distribution rate case. As such, OCC maintains that the qualitative benefits are "a wash" in the MFA analysis. Finally, regarding OMAEG/Kroger's argument that the Commission should abide by its own precedent and consider the ESP IV costs in the long-term, rather than the short-term as urged by OCC, OCC states that the circumstances in this case call for a departure from precedent and a focus on the three-year term the ESP is in effect.

2. COMMISSION CONCLUSION

{¶ 207} R.C. 4928.143(C)(1) provides that the Commission should approve, or modify and approve, an application for an ESP if the Commission finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is *more favorable in the aggregate* as compared to the expected results that would otherwise apply under an MRO pursuant to R.C. 4928.142. OCC argues that the proposed ESP in the Stipulation fails the MFA test and, thus, the Stipulation fails the third prong; OCC witness Fortney testified that "[b]ecause the settlement-modified ESP does not pass the statutory test for approval by the [Commission], adopting it, in lieu of an MRO, would violate regulatory practices and principles embodied in Ohio ESP law" (OCC Ex. 2 at 5). We disagree.

{¶ 208} The Commission finds that the record in these proceedings demonstrates that the proposed ESP is, in fact, more favorable in the aggregate than the expected results of an MRO under R.C. 4928.142. In conducting the MFA test, the Commission will look at the *relative price* to be paid by SSO customers for generation service under both the proposed ESP and a hypothetical MRO, whether there are *quantitative benefits* to the ESP that would

not exist in an MRO, and whether there are *qualitative benefits* to the ESP that would not exist in an MRO.

{¶ 209} In examining the relative price between the proposed ESP and a hypothetical MRO, the Commission notes that, under the proposed ESP, the rates to be charged SSO customers will be established through a CBP which is similar to, if not identical with, the CBP under an MRO. OCC witness Fortney agreed that the SSO price for generation under both the ESP and an MRO during the term of the proposed ESP reflects the same projected competitively-bid rate (OCC Ex. 2 at 12). AES Ohio witness Malinak conducted an analysis of the rates and charges to customers under the proposed ESP to the rates and charges under an MRO (AES Ohio Ex. 3 at 4-7, 16-17). Mr. Malinak concluded that that there were no "material net quantifiable differences between [the proposed ESP] and a hypothetical MRO" (*Id.* at 17).

{¶ 210} OCC witness Fortney disputed AES Ohio witness Malinak's analysis of the relative price of the proposed ESP and a hypothetical MRO. Mr. Fortney initially testified that he disagreed with Mr. Malinak's analysis of the MFA test because Mr. Malinak included six riders[19] that would be charged to customers under a hypothetical MRO. Mr. Fortney initially claimed that riders are not permitted under an MRO and that recovery of the same costs through a distribution rate case would take three years rather than the 15 months under the proposed ESP, and Mr. Fortney expressed "grave concerns about the expedited collection of costs from consumers (through riders) that result from the implementation of the ESP" (OCC Ex. 2 at 13-14). However, at the hearing, Mr. Fortney changed his testimony and conceded that the costs of the six riders would be the same under an MRO or an ESP (Tr. II at 344-348). Therefore, Mr. Malinak's conclusion that there are no material net quantifiable differences between the proposed ESP and a hypothetical MRO is

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[19] These six riders in question are the SOR, TCRR, energy efficiency rider, EDR, TSCR, and RCR.

uncontroverted,[20] and we find that the evidence in the record demonstrates that the rates in the proposed ESP would be equivalent to the results which would be obtained under an MRO pursuant to R.C. 4928.142.

{¶ 211} OCC argues that the proposed ESP imposes additional quantifiable costs on consumers because the ESP includes provisions for the accelerated recovery of costs, through riders, requiring consumers to pay more quickly than they otherwise would through an MRO. The Commission notes the Supreme Court of Ohio has cast significant doubt on whether this is a valid objection in the MFA test. In an appeal of the FirstEnergy EDU's third ESP, the Court rejected claims that costs which would be recovered in a distribution rate case should not be considered in the MFA test, holding that:

> NOPEC's argument fails to recognize that unlike an MRO, an ESP will include all sorts of cost-recovery mechanisms at the outset, *see* R.C. 4928.143(B)(2)(a). Therefore, under NOPEC's statutory interpretation, the MRO will *always* appear to be quantitatively more favorable but will never reflect the true cost of the MRO over time.

(Emphasis sic.) *Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 25.

{¶ 212} Nonetheless, OCC relies on the testimony of Mr. Fortney who recommended that the Commission should view these provisions solely in the short-term and from the customers' perspective. Mr. Fortney believes that, from the customers' perspective, higher rates, in the form of riders, makes the ESP less favorable. Mr. Fortney contends that these costs would not be recovered in the next three years under an MRO, implicitly assuming that there will be no distribution rate case during the three-year term of the ESP. Mr. Fortney

[20] OCC waived cross-examination of Mr. Malinak and did not object to the admission of his testimony (Tr. I at 12-13).

acknowledges that his testimony in this case contradicts his previous testimony before the Commission, when he testified that the costs of a distribution investment rider, similar to the DIR in this case, and the costs of a distribution rate case would simply be a "wash." *FirstEnergy ESP III Case*, Opinion and Order (July 18, 2012) at 56. However, according to Mr. Fortney, the circumstances of the last three years, including COVID and inflation, have changed his mind (OCC Ex. 2 at 17; Tr. II at 336). Mr. Fortney now believes that "in the short term the residential customer would be better off not paying today, and we'll just have to see what happens when the rate case is filed in – whenever" (Tr. II at 336).

{¶ 213} We are not persuaded by Mr. Fortney's testimony that taking only a short-term perspective is sound regulatory policy. We are mindful of the recent increases in the market prices of energy, particularly with respect to increases in SSO prices across the state. We continue to urge customers to use all tools available to reduce the impact of the cost of electricity. Nonetheless, it would be irresponsible for the Commission to adopt only a short-term perspective given the need to maintain reliability for this essential service and to modernize the grid.

{¶ 214} Moreover, OCC's approach would turn the principle of gradualism on its head. The evidence in the record is clear that the accelerated recovery riders "smooth out" increases in distribution rates because the accelerated recovery of investments, with annual caps, will mitigate the amount of any subsequent increase in base distribution rates resulting from a future distribution rate case (Tr. I at 83-84). OCC's approach would allow no increase in the short-term at the cost of a much larger increase, all other things being equal, at some uncertain point in the future. This would be the opposite of gradualism. Accordingly, we find that the evidence demonstrates that the relative price between the proposed ESP and a hypothetical MRO is not affected by the fact that the proposed ESP contains provisions for the accelerated recovery of certain distribution costs. Those same costs would be recovered through a distribution rate case under a hypothetical MRO; as we have previously held, it would simply be a "wash." *FirstEnergy ESP III Case*, Opinion and Order (July 18, 2012) at 56.

{¶ 215} Further, in addition to consideration of the relative price between the proposed ESP and a hypothetical MRO, the evidence in the record demonstrates that there are additional benefits contained in the Stipulation that make the proposed ESP more favorable in the aggregate than the expected results under R.C. 4928.142.

{¶ 216} The proposed ESP has quantitative benefits for consumers which would not be available under an MRO. The proposed ESP contains $5.7 million annually for low-income customer programs which would provide weatherization and bill assistance to low-income customers. The ESP contains a residential off-peak incentive program to encourage off-peak EV charging. The proposed ESP eliminates reconnect fees for customers who can be reconnected remotely and switching fees for customers who switch to and from CRES providers. (AES Ohio Ex. 1 at 12-15.)

{¶ 217} However, the most significant quantitative benefit under the proposed ESP is AES Ohio's agreement to withdraw its application to recover $51 million in deferred decoupling expenses in the *Distribution Decoupling Case (*Staff Ex. 6 at 8). As this case is pending before the Commission, this provision is not strictly a $51 million economic benefit to customers, but this provision does eliminate a $51 million litigation risk for customers. The proposed ESP contains two other provisions which limit future litigation risk for ratepayers: a cap, at the currently authorized amount, on the return on equity in AES Ohio's next distribution rate case; and a stipulated threshold of 13 percent for the SEET during the term of the ESP.

{¶ 218} The proposed ESP has qualitative benefits that would not be available under an MRO. The proposed ESP provides for investments intended to improve reliability (Staff Ex. 6 at 8). We agree with OCC witness Fortney that the benefits from increased investments are difficult to quantify due to the numerous factors which impact reliability; however, the Stipulation provides strong incentives to AES Ohio to meet reliability standards set forth in the Stipulation, or the caps on distribution investments will be reduced substantially (Signatory Parties Ex. 1 at 7-9). The proposed ESP also has provisions for economic

development, including an Economic Development Incentive Tariff and a Green Energy Alternative Tariff to offer customer-sited renewable energy resources (Staff Ex. 6 at 8-9). Staff witness Messenger also identifies the low-income customer assistance programs as a qualitative benefit of the proposed ESP (*Id*.).

{¶ 219} Finally, the proposed ESP provides qualitative benefits to customers by promoting rate certainty, predictability, and stability. OCC witness Fortney conceded that the DIR promotes rate certainty, predictability, and stability (Tr. II at 349-350). Further, the Stipulation includes a strong incentive to AES Ohio to continue to regularly file distribution rate cases by setting a deadline by which a distribution rate case must be filed or the DIR will sunset (Signatory Parties Ex. 1 at 10).

E. CBP Arguments

{¶ 220} The terms of the Stipulation provide that AES Ohio will fully maintain competitive bidding for its SSO load by conducting two auctions annually through the term of ESP IV. It further states that AES Ohio shall follow the CBP described in the testimony of AES Ohio witness Lee or as modified by any process proposed by a Signatory Party and approved by the Commission. Importantly, the Signatory Parties carved out the possibility of the Commission modifying the Stipulation by adopting a newly proposed process for conducting the auctions such that the parties could litigate this narrow issue. Specifically, the Stipulation provides that any Commission decision regarding any Signatory Party's proposal that changes AES Ohio's CBP or Master Service Agreement for its SSO shall not be considered a modification of the Stipulation. (Signatory Parties Ex. 1 at 4.)

{¶ 221} During the hearing, Constellation introduced the testimony of Mr. Indukuri to comment on AES Ohio's proposed CBP and recommend improvements to that process for the term of ESP IV as contemplated by the Stipulation (Constellation Ex. 4 at 4-5). In its initial post-hearing brief, Constellation urges the Commission to adopt two proposals in Mr. Indukuri's testimony that Constellation believes will result in less risk, lower prices, and fewer cross-subsidies to create more accurate price signals while aligning the Company's

default service with successful CBP procedures in other PJM states. Specifically, Constellation states that the Commission should modify AES Ohio's auctions for SSO load so that default service is procured by class rather than the traditional slice-of-system approach used only in Ohio. Second, Constellation states that the Commission should modify AES Ohio's Master SSO Supply Agreement to establish upper and lower thresholds on SSO supplier tranches to mitigate the risk of customer migration and provide more certainty for SSO suppliers bidding on tranches, which would translate to lower auction prices for customers. In urging its position, Constellation avers that the proper standard for review of Constellation's proposed changes to the CBP is whether the changes are just and reasonable and consistent with state policy.

{¶ 222} Constellation asserts that its proposals will achieve better results for customers than the status quo as set forth in the Stipulation. Preliminarily, Constellation alleges that the current CBP structure has never been analyzed to ensure it presents the best outcome for customers. In fact, other than modifying auction timing due to unforeseen PJM base residual auction delays, the Commission has not analyzed the use of the slice-of-system approach or whether improvements could be made. Instead, the same system has been used by Ohio's regulated EDUs due to familiarity. Constellation says now is the time for change.

{¶ 223} Constellation remarks that the current process includes risk that can be mitigated to lower prices. Currently, only SSO suppliers bear the risk of migration in and out of the SSO (Tr. III at 479). In the past, SSO suppliers have managed this risk because load has been sufficiently predictable. Constellation believes, however, that unprecedented volatility in the wholesale electric and natural gas commodity markets will lead to the risk being borne by customers in the form of higher prices. (Constellation Ex. 4 at 11-12.) This increased risk is highlighted with the increased shift in large commercial and industrial customers to the SSO in recent years, which results in SSO suppliers having to serve a significantly higher and more unpredictable load than expected based on historical figures (Constellation Ex. 4 at 14-15). Constellation states that, under the current structure, the only way to address this risk is to build in additional risk premiums that raise the price for the

entire slice-of-system auction, regardless of customer class (*Id.*). Constellation further contends that the current slice-of-system structure, which includes all classes of customers, also exacerbates risks to SSO suppliers, who pass that risk along in the form of higher prices (Constellation Ex. 4 at 13). Combining the vastly different load shapes of each customer class, or even within a single class, dramatically increases risk because an SSO supplier does not have any reasonable assurance as to what the overall load volume or shape will be, and estimations create inefficiencies, risk, and additional cost. Constellation submits that its proposal to modify the auctions so that default service is procured by class rather than the traditional slice-of-system approach will mitigate that risk. (Constellation Ex. 4 at 13-16.) Here, Constellation notes that other states in the PJM footprint have experienced the same volatility and high commodity price environments but have not seen the symptoms of increased risk, i.e., lower bidder participation and higher auction clearing prices (ACPs).[21] This data indicates that the risks are higher in Ohio. Constellation states that higher bidder turnout was also seen in Pennsylvania, Maryland, and New Jersey, likely due to different procurement structures and/or contractual mitigation provisions. (Constellation Ex. 4 at 17-18.)

{¶ 224} Constellation opines that the Commission's minimum stay order, issued in Case Nos. 22-1127-EL-ATA, et al., will not address the migration risk as well as Constellation's proposed changes. Constellation notes that the new tariff provisions only temporarily prevent governmental aggregators from re-enrolling customers that were dropped en masse to default service. They do not, however, change the SSO suppliers' obligation to serve the customers that migrated to SSO service or address instances in which a non-governmental aggregator drops its customers to default service or when a new governmental aggregator takes customers away from default service. Additionally, AES Ohio's tariff revision would solely affect aggregations within a 12-month period.

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[21] For clarity, Constellation concedes that there were increases in ACPs in other PJM default service auctions, but AES Ohio's conducted near the same time was substantially higher (Constellation Ex. 4 at 17-18, Fig. 3).

(Constellation Ex. 4 at 27). On the other hand, states Constellation, its proposals directly address the risks created through the slice-of-system auction approach in addition to the risk of customer migration to and from the SSO while preserving competitive markets and customer choice.

{¶ 225} Constellation further submits that this proceeding is the proper forum to address improving AES Ohio's CBP. Constellation avers that R.C. 4928.141 speaks directly to what the Commission must do in SSO proceedings and indicates that any changes to the SSO auction process must occur in an SSO case. Additionally, the rules the Commission has promulgated to implement R.C. 4928.141, found in Ohio Adm.Code 4901:1-35-08, indicate that material changes to a CBP can only be proposed in an ESP or MRO proceeding. As such, Constellation reasons that any change to the CBP must be considered within the confines of an SSO filing.

{¶ 226} Having identified the alleged failures of the current process, Constellation offers that its proposals will mitigate the risks for suppliers and customers. Mr. Indukuri's proposal to abandon the slice-of-system methodology and procure by class would result in the following classes grouping customers with similar load characteristics: Residential, Commercial, and Large Commercial/Industrial. (Constellation Ex. 4 at 18.) In addition, Mr. Indukuri proposes that the Commission adopt contractual provisions in the Master SSO Supply Agreement that limit the exposure of a single supplier to a specific peak load contribution (PLC) increase and specific PLC decrease from a baseline load level. Constellation states that these upper and lower mitigation thresholds, proposed at five percent and three percent, respectively, would allow for natural changes in load volume, thus eliminating the need for SSO suppliers to embed the risk of dramatic load changes into their bids. (Constellation Ex. 4 at 23-24.) Importantly, the mitigation thresholds are based on PLC values and not volumetric load (Tr. III at 450-453). As such, the thresholds would be affected by changes in customer counts and the associated PLC values, not individual load shape, weather variability, or changes in customer usage (Tr. III at 473). Additionally, contends Constellation, the upper and lower mitigation thresholds would be simple to

implement (Constellation Ex. 4 at 24-25; Tr. III at 478). The mitigation thresholds will mitigate risk by allowing SSO suppliers to eliminate higher-priced hedges that would never need to be recovered and suppliers can better plan for load requirements (Constellation Ex. 4 at 25-26).

{¶ 227} Constellation further argues that Mr. Indukuri's proposals benefit the public interest. The proposals would benefit customers through potentially lower ACPs and prices by class, which results in more transparency to aid in customer choice. Reducing supplier risk would also result in lower prices. (Tr. III at 498-499; Constellation Ex. 4 at 20.) Class auctions also provide for better and more accurate allocation of costs and eliminate cross-subsidies among differing customer classes. This, in turn, supports the evolution of competitive markets. (Constellation Ex. 4 at 21.) Another benefit would be prices that appropriately allocate risk to the entity that is causing that risk (Tr. III at 500, 505-506). Additionally, Constellation believes that Mr. Indukuri's proposals would stimulate auction participation (Tr. III at 466).

{¶ 228} Constellation submits that, by adopting the proposals, the Commission will remove risk embedded in default auctions, resulting in increased bidder participation and decreased prices. Constellation further submits that, although the proposals could be adopted separately, the anticipated benefits warrant the adoption of both. As such, Constellation urges the Commission to adopt them together. Moreover, Constellation states that the Commission can do so with confidence by looking at the empirical evidence from other states that have adopted CBPs similar to Mr. Indukuri's proposals. For example, all Pennsylvania and Maryland utilities procure supply for default service by class, and New Jersey procures supply for residential and small commercial customers together, with large commercial and industrial customer supply being procured separately (Constellation Ex. 4 at 19). Constellation maintains that Mr. Indukuri presented data from other states to support this contention and provided detailed explanations of the differences and similarities. Beyond Mr. Indukuri, Constellation contends that the Commission can look to

the order of other state utilities commissions for support of his proposals (Constellation Ex. 4 at 85).

{¶ 229} OCC addresses Constellation's proposals within its analysis of the Stipulation, asserting that the Stipulation is unjust and unreasonable because it fails to provide a stand-alone SSO auction for residential consumers. OCC contends that both Mr. Wilson and Mr. Indukuri testified that a stand-alone auction for residential consumers could mitigate recent price increases. Specifically, Mr. Wilson explained that residential customers are less likely to switch in and out of SSO service, which reduces the risk premium for wholesale market suppliers, and opined that a stand-alone auction for residential (and possibly small commercial) customers would likely lead to lower costs and more efficient outcomes. OCC characterizes Mr. Indukuri's testimony as being "of the same general tenor." (OCC Br. at 69-70.) As such, OCC submits that, based on the evidence, it would be just and reasonable to modify the CBP to hold a stand-alone auction for residential customers.

{¶ 230} OCC also agrees with Constellation's assertion that any change to the CBP should occur within an SSO proceeding. Thus, argues OCC, should the Commission approve AES Ohio's ESP IV without changing the CBP, at least three more years will pass before the Commission could address the issue again (in the context of the Company's next ESP). Given these circumstances, OCC posits that it is just and reasonable to approve a residential-only auction for AES Ohio.

{¶ 231} OEG and IGS, however, disagree with Constellation's proposals. OEG states that the proposals are flawed and the impacts of adopting them have not been sufficiently examined. To this point, OEG remarks that the parties lacked sufficient time to fully explore Mr. Indukuri's proposals, and no other party presented a formal position on the extent to which the current SSO auction structure should be modified, if at all. Similarly, IGS posits that the record is devoid of evidence sufficient to convince the Commission to alter the current blended declining clock auction presented in the Stipulation.

{¶ 232} With respect to the proposal to conduct the auctions by customer class, OEG and IGS point to Staff witness Benedict's testimony that all customers within AES Ohio's service territory introduce risks for suppliers, and it may be that not segregating those risks actually serves to mitigate the idiosyncrasies of serving any one class in isolation (Staff Ex. 2 at 8). IGS highlights Mr. Benedict's statement that "there is no guarantee that separating products out by customer class will produce a lower auction price" (Staff Ex. 2 at 7).

{¶ 233} OEG believes that Constellation's proposal to break AES Ohio's auctions into Residential, Commercial, and Large Commercial/Industrial is particularly flawed, as there is no "small commercial" or "commercial-only" rate schedule (Tr. III at 489-490). Further, the proposed rate schedule groupings would not properly address the unique risks to suppliers within each rate class. For example, a residential class does not account for the difference in migration risk between individual residential customers and government aggregation customers (Tr. III at 488). Additionally, OEG states that splitting the auction by class may result in non-competitive auctions or substantial SSO price increases for some rate schedules. Higher voltage customers, for example, would be subjected to higher risk with PJM market pricing, and an industrial-only auction could lead to potentially higher prices than the status quo methodology (Tr. III at 507-508; 512). Moreover, OEG remarks that there is insufficient evidence in the record to adopt Constellation's recommendations. Instead, the quantitative evidence fails to provide an apples-to-apples comparison of the proposal's impacts (Tr. III at 454).

{¶ 234} As to mitigation thresholds, OEG emphasizes Mr. Benedict's testimony that a load cap would not act to diminish supplier risks; it would only serve to reallocate those risks to SSO customers if they exceed a certain threshold (Staff Ex. 2 at 8). IGS also surmises that Constellation's proposed mitigation thresholds could shift risk away from market participants and directly onto customers. Both OEG and IGS further support Mr. Benedict's testimony that any cap to be considered should be set such that SSO suppliers are still responsible for the regular turnover of customers shopping and returning to the SSO while still providing insurance against low probability but potentially high magnitude market

disruption (Staff Ex. 2 at 9). IGS states that companies bidding into auctions should bear the risk associated with volumetric change and any other risk factors inherent in the marketplace—not customers.

{¶ 235} In closing OEG opines that the Commission should continue to address what, if any, SSO auction changes should be adopted in the *SSO Procurement Case*, which involves a greater number of stakeholders. OEG urges the Commission to further explore minimum stay provisions for a variety of customer types in order to mitigate volumetric supplier risk without introducing the problems associated with Constellation's multi-auction structure.

{¶ 236} AES Ohio affirms that the parties agree that the SSO should be structured to achieve the lowest possible prices for customers. That said, the Company believes that any significant changes to the SSO procurement process would be better addressed in the *SSO Procurement Case*.

{¶ 237} In further support of its arguments, OCC states in its reply brief that it supports Constellation's recommendation for separating the SSO auction by customer class. OCC additionally dismisses AES Ohio's argument that any change to the SSO CBP should be addressed in the *SSO Procurement Case* as failing to recognize that the Commission approves a CBP through an SSO case and its own witness's testimony that it is reasonable to consider improvements to the CBP in this case. OCC acknowledges IGS and OEG's arguments against holding auctions by customer class, but states that IGS and OEG present no evidence to support their conclusions. OCC further condemns OEG's argument as self-serving and asserts that commercial and industrial customers are better situated than residential consumers to mitigate price risk.

{¶ 238} In its reply brief, Constellation reiterates its argument that modifications to the CBP should take place in this proceeding, and not the pending *SSO Procurement Case*. This is not only because governing statutes mandate that material changes to a CBP take place in an SSO proceeding, but also because the pending general investigation is specific to

two issues and does not present the opportunity for development of a comprehensive record.

{¶ 239} Continuing, Constellation contends that criticisms of its proposals are unsupported by the record and without merit. First, Constellation avers that, contrary to argument, customers will not have volumetric risk under Constellation's proposals. Constellation states that OEG and IGS missed the benefit of removing risk premium from the ACPs, as well as Mr. Indukuri's clarification that mitigation thresholds were based on PLC values and not volumetric load (Tr. III at 450-453). Constellation explains that its banding proposal is based on the aggregate PLC values of the SSO load won at auction and the aggregate PLC values of the SSO load subsequently being served, not the kilowatt load being served each day. Thus, only customer migration would trigger the thresholds, not severe weather events. Constellation also states that OEG and IGS ignore Mr. Indukuri's testimony that, absent the customer class proposal, SSO supplies will include additional risk premiums in their ACP prices (Constellation Ex. 4 at 24-25). Therefore, Constellation's proposal eliminates risk associated with material increase in SSO load from the date of any given auction.

{¶ 240} Constellation further avers that the Commission has sufficient record evidence to adopt its proposals. Constellation touts the credentials of its witness, Mr. Indukuri, who it states is the witness with the most experience and the greatest breadth of knowledge. Constellation also asserts that the Commission can rely on AES Ohio's auction manager's answers to interrogatories and requests for admission, which support the success of class auctions in other PJM states and were admitted into evidence as Constellation Exhibits 1, 2, and 3.

{¶ 241} Constellation also defends its position that the SSO auction could be held by tariff schedule if the groupings are properly aligned. Constellation affirms that Mr. Indukuri's groupings of Residential, Commercial (Secondary and Street Lighting), and Large Commercial/Industrial (Primary, Primary substation, and High Voltage) results in

classes of customers with similar load characteristics. Constellation asserts that OEG's criticism regarding what risks an SSO supplier may need to address in its pricing misses the point. There is no way to fully eliminate all risk for an SSO supplier, but Constellation believes its proposals eliminate or mitigate risks that cannot be accurately modeled or hedged against presents an achievable reduction. Moreover, states Constellation, OEG's claims that large commercial and industrial customers will be harmed are not supported by the evidentiary record in this proceeding. Indeed, Constellation argues that Mr. Indukuri's testimony directly contradicts the assertion (Tr. III at 464, 466, 468, 506-507, 524-525). Evidence also supports the conclusion that large commercial and industrial customers have the ability to elect from numerous service options available from CRES suppliers to meet their needs, budget requirements, environmental and sustainability initiatives, and price hedging strategies (Constellation Ex. 4 at 22). Constellation similarly pans OEG's claims that SSO auctions by class will be non-competitive or result in substantial SSO price increases.

{¶ 242} Finally, Constellation submits that neither potential market price reductions nor the Commission's investigation in the *SSO Procurement Case* or minimum stay provisions will effectively remove or mitigate risk built into CBP pricing. As argued initially, Constellation stresses that corrections to the market do not equate to decreasing risk. Instead, the costs of procuring a greater supply of energy than what was previously believed to be needed and procured simply become the future cost of doing business and are reflected in SSO prices (Constellation Ex. 4 at 12). And the Commission's investigation is limited to specific issues that do not address the underlying SSO risk premiums and existing cross-subsidies. Constellation reiterates that the minimum stay provisions do not address the migration risks that its proposals seek to remedy. Furthermore, Constellation believes that the minimum stay provisions restrict customer choice in violation of state policy.

{¶ 243} In its reply, OEG reiterates its position that Constellation's proposal to separate the current SSO auction into three rate-schedule groupings is flawed and not yet

properly vetted. OEG states that the proposal would result in arbitrary divisions among AES Ohio customers, would fail to address the migration risk associated with residential government aggregation customers, and could result in non-competitive auctions or substantial SSO price increases for some rate schedules. Additionally, says OEG, just because different states have different auction structures does not mean that Ohio should change its current practices.

{¶ 244} Although silent in its initial brief, RESA does comment on the SSO auction process on reply. RESA urges the Commission to adopt the Stipulation without modification and, noting the CBP carve-out, states that it takes no position on the proposed SSO auction process modifications. RESA does, however, address issues it identifies as not properly before the Commission because, although raised in testimony, they were not advanced on brief. First, RESA speaks to the topic of future capacity auction delays. RESA states that, although no arguments to alter the current process of handling delays in the PJM capacity auctions were raised in initial briefs, RESA did cross-examine Mr. Benedict about alternative auction proposals on that issue. RESA indicates that it would support working with AES Ohio and Staff to discuss resolutions to the problems associated with auction delays so long as any changes do not alter the ultimate responsibility of the PJM costs currently assessed to SSO auction winners. Otherwise, RESA supports the current practice of delaying any SSO auctions that are affected by future delays in the PJM capacity auctions. Second, RESA asserts that OCC waived two "anticompetitive" items covered in testimony by not raising the same in its initial brief. Specifically, RESA submits that OCC has waived Mr. Wilson's references or suggestions to place limitations on customers' right to switch in and out of the SSO and to implement standby service rules (OCC Ex. 1 at 22, 24-25; Tr. II at 201, 207-208, 217).

{¶ 245} In support of its original arguments, on reply, IGS states that the Commission should allow appropriate risks and potential costs to be borne directly by the auction participants that are sophisticated enough to appropriately hedge and manage risk without subsidizing the SSO. IGS also concludes that OCC waived any arguments related

to limitations on customer shopping or standby charges by failing to properly establish the arguments in its case-in-chief or raise them in initial brief. Finally, IGS submits that adopting any changes to the stipulated SSO auction process would go against the weight of the evidence.

{¶ 246} At the hearing, testimony was presented by OCC, Constellation, and Staff regarding additional proposed modifications to the CBP. OCC witness Wilson recommends: (1) holding separate SSO auctions for different customer classes; (2) establishing a provision which places limits on customers' rights to switch into and out of the SSO; and (3) establishing a provision to reduce the quantity and price risk perceived by wholesale suppliers for the SSO, including a potential standby service charge (OCC Ex. 1 at 5, 19-24). Constellation witness Indukuri also supports holding separate SSO auctions for different customer classes (Constellation Ex. 1 at 18-23). Further, Mr. Indukuri supports measures to limit wholesale suppliers' customer migration risk. (Constellation Ex. 1 at 23-26).

{¶ 247} The Commission continues to be concerned by the volatility in SSO prices, particularly the impact of increases in wholesale energy prices in 2022 on the SSO price experienced by customers (Staff Ex. 2 at 4). Moreover, the Commission very much appreciates the ideas for modifying the CBP proposed by the parties at the hearing in this proceeding. At this time and based upon the record of this proceeding, the Commission is not persuaded that the additional modifications to the CBP proposed by the parties are necessary or appropriate. Specifically, based upon the evidence in this case, we are not persuaded that separating the auctions into auctions for residential customers and non-residential customers will result in aggregate savings to consumers in this state (Staff Ex. 2 at 6-8). Further, we are not prepared, at this time, to adopt any mechanism that shifts migration risk from wholesale suppliers to consumers in this state (Staff Ex. 2 at 8-9).

{¶ 248} Nonetheless, in approving this ESP, the Commission will retain continuing jurisdiction to make modifications in the CBP in order to reduce price volatility and to

ensure consistency between the EDUs' CBPs. This continuing jurisdiction includes, but is not limited to, the proposed modifications to the auction product currently under review in *In re the Proposed Modifications to the Elec. Distribution Utilities' Std. Service Offer Procurement Auctions,* Case No. 23-781-EL-UNC, Entry (July 26, 2023).

III. CONCLUSION

{¶ 249} Accordingly, the Commission finds that the Stipulation submitted by the Signatory Parties should be adopted. Further, the Commission finds that AES Ohio should be authorized to establish its fourth ESP pursuant to the terms of the Stipulation and that AES Ohio should be authorized to file final tariffs to implement its fourth ESP, effective September 1, 2023 and subject to final review by the Commission.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

{¶ 251} On September 26, 2022, AES Ohio filed an application for an SSO in accordance with R.C. 4928.141. More specifically, AES Ohio's Application was filed pursuant to R.C. 4928.143, which authorizes the Company to file its SSO as an ESP.

{¶ 252} A Stipulation was filed on April 10, 2023. The signatory parties to the Stipulation are Staff, AES Ohio, OEG, OMAEG, Kroger, UD, OELC, IGS, OPAE, Walmart, OHA, ChargePoint, Dayton, Armada, Constellation, and RESA. Additionally, One Energy, OEC, and the CUB signed the Stipulation as non-opposing parties.

{¶ 253} Pursuant to published notice, the public hearing was held in Dayton, Ohio on February 2, 2023.

{¶ 254} The evidentiary hearing in this proceeding commenced on May 2, 2023, and concluded on May 5, 2023.

{¶ 255} The Commission finds that the Stipulation meets the three criteria for approval of a stipulation, is reasonable, and should be adopted.

{¶ 256} The proposed ESP, as modified by the Stipulation, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

V. ORDER

{¶ 257} It is, therefore,

{¶ 258} ORDERED, That ESP IV, as set forth in the Stipulation, be adopted and approved. It is, further,

{¶ 259} ORDERED, That the Company shall file final tariffs consistent with this Opinion and Order and that the revised final tariffs shall be approved effective September 1, 2023, subject to final review by the Commission. The new tariffs shall be effective the later of the date of filing or September 1, 2023. It is, further,

{¶ 260} ORDERED, That the Company file in final form two complete copies of tariffs consistent with this Opinion and Order. One copy shall be filed in this case docket, and one shall be filed in the Company's TRF docket. AES Ohio shall also update the Company's respective tariffs previously filed electronically with the Commission's Docketing Division. It is, further,

{¶ 261} ORDERED, That the Company shall notify their customers of the changes to the tariff via bill message or bill insert within 30 days of the effective date. A copy of this notice shall be submitted to the Commission's Service Monitoring and Enforcement Department at least 10 days prior to its distribution to customers. It is, further,

{¶ 262} ORDERED, That AES Ohio take all steps necessary to implement the ESP, as proposed in the Stipulation and adopted by the Commission. It is, further,

{¶ 263} 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/GAP/CES/LJB/dr

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

Summary: Opinion & Order adopting the Stipulation filed by various parties and authorizes The Dayton Power and Light Company d/b/a AES Ohio to establish its fourth electric security plan electronically filed by Debbie S. Ryan on behalf of Public Utilities Commission of Ohio.