IN THE SUPREME COURT OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan, *et al.*	**:**	**Case Nos. 2023-0111**
	:	**Appeal from the Public Utilities Commission of Ohio**
	:	**Pub. Util. Comm. Case Nos. 08-1094-EL SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, & 08-1097-EL-UNC**

MERIT BRIEF OF AMICUS CURIAE OHIO POWER COMPANY IN SUPPORT OF AES OHIO

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STATEMENT OF INTEREST OF OHIO POWER COMPANY AMICUS CURIAE IN SUPPORT OF AES OHIO

Amicus Curiae, Ohio Power Company ("AEP Ohio"), is an electric distribution utility subject to regulation by the Public Utilities Commission of Ohio ("Commission"). The rates AEP Ohio may charge customers for distribution or generation service are determined by the Commission in accordance with Ohio Revised Code Title 49 and are set out in tariffs filed with the Commission. Retroactive ratemaking is impermissible regardless of whether it favors the utility or the ratepayers and both AEP Ohio and its customers have long been afforded the protections and stability provided by the filed-rate doctrine, a rule of law embedded in that statutory law under which AEP Ohio is extensively regulated. In Ohio Supreme Court Case Nos. 2023-0111 & 2023-0130, which have been consolidated for briefing (and also consolidated with Case No. 2021-1473 for oral argument and decision), the contentions of both appealing parties directly implicate that doctrine.

In the instant appeal, Case No. 2023-0111, Appellant Dayton Power and Light Company d/b/a AES Ohio asserts, in part, that it was unlawful and unreasonable for the Commission's Fifth Entry on Rehearing and Sixth Entry on Rehearing to require AES Ohio to include language in its tariff making the Rate Stabilization Charge ("RSC") refundable "to the extent permitted by law" because the RSC cannot and should not be made refundable. For its part, in Case No. 2023-0130, Appellant Office of the Ohio Consumers' Counsel ("OCC") asserts that the Commission erred in concluding that it does not have authority to order refunds of charges that are subsequently determined to be unlawful. In Ohio Supreme Court Case No. 2021-1473, *In re Application of Dayton Power & Light Co. for Significantly Excessive Earnings Test* (a previously pending appeal that this Court consolidated with Case

Nos. 2023-0111 & 2023-0130 for oral argument and decision only), OCC's Second and Third Propositions of Law and requested refund remedy also implicate the RSC.

Because these contentions by the parties directly implicate the filed-rate doctrine, AEP Ohio's interest in these cases is to ensure that the Court fully appreciates the significance and centrality of that doctrine and its corollary, the rule against retroactive ratemaking, and the important role these rules of law play in ensuring that public utility rates in Ohio are predictable and stable and that public utility rate regulation remains a legitimate legislative function.

LAW AND ARGUMENT

Proposition of Law:

> **THE FILED-RATE DOCTRINE AND ITS COROLLARY, THE RULE AGAINST RETROACTIVE RATEMAKING, ARE PRINCIPLES FIRMLY ESTABLISHED IN FEDERAL AND STATE LAW AND TOGETHER PROVIDE PREDICTABILITY AND STABILITY IN RATEMAKING, PROTECT BOTH THE REGULATED ENTITY AND ITS CUSTOMERS, AND RESPECT THE UNIQUE ROLE OF PUBLIC UTILITY RATEMAKING AS A LEGITIMATE LEGISLATIVE FUNCTION.**

A. Introduction and relevant background

As briefly noted above, the RSC and the filed-rate doctrine are common threads linking Case No. 2021-1473 (the "AES Ohio SEET case") and Case Nos. 2023-0111 & 2023-0130 (collectively, the "AES Ohio ESP cases").

In the AES Ohio SEET case, OCC argues in its Second and Third Propositions of Law that the Commission should not have approved a settlement allowing the RSC to continue, and that the RSC is not permitted under R.C. 4928.143. In the "Remedy" section of its merit brief, OCC then argues that "[s]tability charge refunds should be ordered to consumers for amounts paid, beginning June 2021." (AES Ohio SEET Case, OCC Br. at 50.)

In response, AES Ohio notes that OCC signed the 2009 stipulation that established the RSC and that, in any event, the *Keco* doctrine bars refunds of RSC charges. (*Id.*, AES Ohio Second Br. at 42-44.)

In the AES Ohio ESP cases, the parties continue to disagree with respect to the RSC and the potential for refunds of what OCC characterizes as unlawful charges. In Case No. 2023-0111, AES Ohio argues that the Commission acted unreasonably and unlawfully by requiring AES Ohio to include language in its tariff making the RSC refundable "to the extent permitted by law" because the RSC cannot and should not be made refundable pursuant to the filed-rate doctrine. (Case No. 2023-0111, AES Ohio Notice of Appeal.) And in its separate appeal from the same ESP case, OCC asserts that the Commission erred in concluding that it does not have authority to order refunds of charges that are subsequently determined to be unlawful. (Case No. 2023-0130, OCC Notice of Appeal.)

If these cases were discretionary appeals, it seems unlikely that this Court would have accepted them for review. The lengthy procedural history of the AES ESP case is unique and unlikely to recur, and the arguments regarding refunds of prior charges mainly re-tread well-worn legal ground. Because the Court must resolve these direct appeals pursuant to Article IV, Section 2(B)(2)(d) of the Ohio Constitution and R.C. 4903.13, however, AEP Ohio respectfully submits this amicus brief to provide additional information and background to the Court regarding the filed-rate doctrine. First, AEP Ohio addresses the origin of the doctrine in decisions of the United States Supreme Court, and the doctrine's application in the federal courts. Next, AEP Ohio demonstrates that the doctrine is also firmly embedded in the law of nearly every state. AEP Ohio then shows how this Court has repeatedly confirmed Ohio's adherence to the doctrine, even in the modern era of the Electric Security Plan statute

enacted in 2008. Finally, AEP Ohio urges this Court to enforce the filed-rate doctrine in these consolidated cases and other appeals from the Commission, unless or until the Ohio General Assembly modifies the statutory law which codifies the doctrine.

B. The filed-rate doctrine applies across the spectrum of regulated utilities and has withstood the test of time as a salutary rule of law.

The filed-rate doctrine is rooted in more than a century of United States Supreme Court precedent dealing with rate-regulated industries, including common carriers, telecommunication providers, gas companies and electric companies. "The classic statement of the 'filed rate doctrine,' as it has come to be known, is explained in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915)," in which the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent claim by the railroad for the higher tariff rate. *Maislin v. U.S. Primary Steel*, 497 U.S. 116, 127, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). The Court interpreted the Interstate Commerce Act to mean that:

> the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the [Interstate Commerce] Commission to be unreasonable.

Id. (quoting *Louisville & Nashville R. Co*., 237 U.S. at 97). *See also Keogh v. Chicago & Northwestern R. Co*., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed.2d 183 (1922) (holding that the filed-rate doctrine means that a private shipper may not recover treble damages under § 7 of the Sherman Act in connection with ICC-filed tariffs).

Although it originated in the Supreme Court's cases interpreting the Interstate Commerce Act, over the years the Court extended the filed-rate doctrine "'across the spectrum' of regulated utilities," to "forbid[] a regulated entity to charge rates for its services

other than those properly filed with the appropriate federal regulatory authority." *NSTAR Elec. & Gas Corp. v. FERC,* 481 F.3d 794, 800 (D.D.C. 2006) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)). *See also Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) ("[T]he century-old 'filed rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well."), *superseded on other grounds by statute as recognized in Beach v. Atlas Van Lines, Inc. (In re Household Goods Movers Antitrust Litigation)*, D.S.C. Nos. 2:07-cv-764-DCN *et al.*, 2009 U.S. Dist. LEXIS 131302 (Sep. 10, 2009); *Ark. La. Gas Co. v. Hall*, 453 U.S. at 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (finding that the filed-rate doctrine is embedded in the Natural Gas Act and bars the Federal Energy Regulatory Commission from imposing a rate increase for gas already sold at the tariffed rate); *Simon v. KeySpan Corp.*, 694 F.3d 196, 205 (2d Cir.2012) (finding the doctrine has "been extended across the spectrum of regulated utilities"); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co*., 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed.2d. 912 (1951) (finding the doctrine embedded in the Federal Power Act).

The filed-rate doctrine has withstood the test of time and is as important today as it was throughout the last century. Though beyond its centennial year, the doctrine is still routinely invoked as a necessary rule of law designed to protect customers from discriminatory pricing. *See, e.g.*, *Cogentrix Energy Power Mgt., LLC v. FERC*, 24 F.4th 677, 683 (2022) (noting that "the Supreme Court ha[s] recognized repeatedly that the filed-rate doctrine and the rule against retroactive ratemaking play an important role in helping the Commission fulfill its statutory responsibility to ensure that regulated entities charge only rates that are just and reasonable); *Sancom, Inc. v. Qwest Comm. Corp*., 643 F.Supp.2d 1117,

1131 (D.S.D. 2009) ("The filed rate doctrine bars claims that would result in some customers paying different rates than the rates filed with the FCC."); *Curtis v. Cenlar FSB*, S.D.N.Y No. 13 CIV 3007, 2013 U.S. Dist. LEXIS 161687, *10 (Nov. 12, 2013) (holding that the filed-rate doctrine barred plaintiff's claim that defendant charged inflated rates because resolving that issue would implicate rate-discrimination concerns underlying the doctrine).

It is also invoked to protect regulated entities from expensive antitrust claims and other tort claims based on the rates charged. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bur.*, 476 U.S. 409, 415, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (filed-rate doctrine bars claim that shippers colluded to fix rate subsequently approved by ICC), *superseded on other grounds by statute*, 49 U.S.C. 13702, *as recognized in Beach v. Atlas Van Lines, Inc. (In re Household Goods Movers Antitrust Litigation)*; *Simon v. KeySpan Corp*., at 206-207 (2nd Cir. 2012) (applying doctrine to bar antitrust and tort claims attacking market based rates charged by an producer of electricity); *In re Title Ins. Antitrust Cases*, 702 F.Supp.2d 840, 864 (N.D. Ohio 2010) (recognizing that the doctrine necessarily bars private civil claims in order to protect against discrimination and to preserve the regulating agency's authority to determine the reasonableness of the rates).

And, most importantly, the filed-rate doctrine continues to be an important rule of law for ensuring predictability and stability in rates for the benefit of both the regulated entity and its customers by prohibiting retroactive ratemaking to compensate for over-or-under recoveries of costs in prior periods. *See, e.g., Consol. Edison of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) ("By authorizing only prospective rate changes, [the filed rate doctrine and the corollary rule against retroactive ratemaking] ensure rate predictability * * * ."); *NSTAR Elec. & Gas Corp. v. FERC,* 481 F.3d at 800 (noting the two rules work together and

serve the dual purposes of "ensur[ing] rate predictability" for purchasers of regulated electricity and promoting equity among customers by "preventing discriminatory pricing") (quoting *Consol. Edison of N.Y.* at 969-70); *In re PJM Interconnection, LLC*, Docket Nos. ER23-729-000, *et al*., 2023 FERC LEXIS 234 at *142 (Feb. 21, 2023) ("While, the courts have over the years emphasized different purposes of the filed rate doctrine—primary jurisdiction, predictability, consumer protection, equity—they have consistently held that those purposes are secured by the 'cardinal principal of ratemaking,' which prohibits a public utility from changing the rates collected for services rendered.") (citations omitted).

Federal courts applying the filed-rate doctrine appreciate that the doctrine is "rigid and unforgiving" and sometimes can work a seemingly harsh result. *Simon v. KeySpan*, 694 F.3d 196, 205 (2d Cir.2012). *See also Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 223, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (acknowledging that the doctrine's application "may seem harsh in some circumstances"); *Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829-30 (D.C. Cir. 2021) ("When it applies, the filed rate doctrine is 'a nearly impenetrable shield' and does not yield, 'no matter how compelling the equities.'"). Yet, the federal courts have consistently concluded that the benefits of enforcing the doctrine outweigh any harshness and that, given the longevity and centrality of the doctrine in the law of ratemaking, it should not be judicially abrogated or narrowed. The United States Supreme Court addressed these issues directly in *Square D Co. v. Niagara Frontier Tariff Bureau*, in response to a direct request by both the petitioners and the Solicitor General of the United States that the Court overrule *Keogh v. Chicago & Northwestern R. Co*. Although the Court acknowledged that there were valid arguments that developments in the law over time may have lessened the need for a rigid application of the filed-rate doctrine, it concluded that:

> the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades. The emergence of subsequent procedural and judicial developments does not minimize *Keogh*'s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area.

Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 423, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). The Court was adamant that any change in the filed-rate doctrine as applied in *Keogh* was within the exclusive purview of the legislative branch. *Id*. at 424 ("If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.").

In the more than three decades since the re-affirmation and continued application of the filed-rate doctrine in *Square D*, the lower federal courts have expanded, rather than contracted, the doctrine. The longevity of the doctrine referenced by the *Square D* Court now extends beyond a century. In expanding the filed-rate doctrine, the courts have recognized that it applies with equal force in the new era, when rates are not actually fixed by the administrative agency through evidentiary adversarial proceedings but rather are market-based. *See, e.g.*, *Simon v. KeySpan Corp*., 694 F.3d 196. And, the courts have extended the doctrine to other areas of the law where rates are filed with an administrative agency, such as insurance regulation. *See, e.g., In re Title Ins. Antitrust Cases*, 702 F.Supp.2d 840 (N.D. Ohio 2010). Thus, despite the passage of over a century and the sometimes inequitable consequences resulting from the application of the filed-rate doctrine and rule against retroactive ratemaking, the federal courts are in virtual unanimity on three points: that the salutary purposes of the doctrine outweigh any harshness; that the doctrine continues to have application in the modern rate regulation environment; and that any pruning of the doctrine should be left to the legislative shears.

C. The filed-rate doctrine and rule against retroactive ratemaking are firmly embedded in law of virtually every state.

The filed-rate doctrine and the prohibition against retroactive ratemaking are also firmly embedded in the law of other states. *See, e.g.*, *Taffet v. Southern Co.*, 967 F.2d 1483, 1491 (11th Cir.1992) ("The rate-setting schemes in both Alabama and Georgia are incompatible with a rate-payer's cause of action to recover damages measured by the difference between the filed rate and the rate that would have been charged absent some alleged wrongdoing. Allowing consumers of the Utilities' services to recover damages for 'fraudulent' rates or otherwise 'erroneous' rates would disrupt greatly the state's regulatory schemes and, in the end, would cost consumers dearly."); *Alexander v. Global Tel Link Corp.,* 816 F.App'x 939, 943 (5th Cir.2020) (finding courts have "uniformly held * * * that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies"); *Saguaro Power Co. v. PUC*, Nev. S.Ct. No. 56682, 2012 Nev. Unpub. LEXIS 523, *15 (May 2, 2012) ("retroactive ratemaking bars amendment of rates—if they were in error at all—set by the 2005 and 2006 orders"); *Southern Union Co. v. Dept. of Pub. Util*., 458 Mass. 812, 823, 941 N.E.2d 633 (2011) (noting that the retroactive ratemaking rule is "well established" and that the "public would be 'disserved by constant tinkering' with a faulty 'past rate prediction.'"); *Brooks v. Empire Dist. Elec. Co.,* 420 S.W.3d 586, 592 (Mo.App.2013) (finding that utility customers' refund request sought "retroactive rulemaking" that is "directly contrary to the filed rate which 'prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.'"); *In re Providence Water Supply Board's Application*, 989 A.2d 110, 115 (R.I.2010) (rule precludes public utilities from "requiring

current ratepayers to pay for costs of past expenses"); *Cincinnati Bell Tel. Co. v. Ky. P.S.C.*, 223 S.W.3d 829, 837 (Ky.App.2007) (rule against retroactive ratemaking is incorporated and recognized in Kentucky statutory and case law); *In re Appeal of Investigation into the Existing Rates of Central Vermont Public Serv. Corp*., 180 Vt. 563, 2006 VT 70, 905 A.2d 616, ¶ 4 ("The Board may not require a utility to refund to customers a portion of its previously earned profits because 'the Board has no statutory authority to make whole either the utility company or its customers for inequities that existed in the past.'"); *Lloyd v. Pa. PUC*, 904 A.2d 1010, 1019, n.16 (Pa.2006) (noting that "gradualism" is permitted in implementing large rate increases as long as it does not violate the principle of retroactive ratemaking); *Office of Consumer Counsel v. Dept. of Pub. Util. Control*, 279 Conn. 584, 601, 905 A.2d 1 (2006) ("[A]s a general rate-making principle, retroactive rate making and single issue rate making are not permissible."); *Penpac, Inc. v. Passaic Cty. Utilities Auth*., 367 N.J.Super. 487, 500-01, 843 A.2d 1153 (2004) ("'[R]etroactive ratemaking is impermissible regardless of whether it favors the utility or the ratepayers.'") (internal quotation omitted); *AG v. Mich. PSC,* 262 Mich. App. 649, 656, 686 N.W.2d 804 (2004) ("[T]he essential principle of the rule against retroactive ratemaking is that when the estimates [of costs on which rates are based] prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the MPSC can take is to prospectively revise rates in an effort to set more appropriate ones.") (quoting *Detroit Edison Co. v. Pub. Serv. Com*., 416 Mich. 510, 523, 331 N.W.2d 159 (1982)); *Pacificorp v. PSC*, 2004 WY 164, 103 P.3d 862, 874-75 ("Put simply, the rule against retroactive ratemaking prohibits the Commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits * * * . PacifiCorp's request

for the surcharges to recover past purchased power costs falls squarely within the ambit of retroactive ratemaking."); *Cent. Power & Light Co. v PUC of Texas*, 36 S.W.3d 547, 554 (Tex.App.2000) ("Utility rates generally may have only prospective effect, and the Commission may not set rates that allow a utility to recoup past losses or refund excess utility profits to consumers."); *In re Request by Minn. Power*, Mn. App. No. C2-00-456, 2000 Minn. App. LEXIS 1288, * 14 (Dec. 19, 2000) (holding that by denying lost margin recovery to true-up 1998 earnings, the PUC engaged in impermissible retroactive ratemaking in excess of its statutory authority); *Indiana Office of Util. Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266, 269 (Ind.2022) (applying principle that "[p]ast losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which appear excessive"); *Schmidt v. N. States Power Co.*, 305 Wis.2d 538, 2007 WI 136, 742 N.W.2d 294, ¶ 56 (noting that Wisconsin has "applied the filed rate doctrine in a number of different contexts since 1911"); *Archer Daniels Midland Co. v. Dept. of Commerce, Util. Div.*, 485 N.W.2d 465, 467 (Iowa 1992) (noting that rule against retroactive ratemaking is a logical extension of the filed-rate doctrine and "ensures the predictability and stability of utility rates and generally prevents utility companies from recovering losses that stem from 'past company mismanagement or improper forecasting'"); *S. Branch LLC v. Commonwealth Edison Co.*, 46 F.4th 646, 649-50 (7th Cir.2022) ("Effectively, a filed rate has the force and effect of a legislative statute * * * Illinois state courts cannot adjust rates that have been filed with the appropriate regulator for any reason."); *Maine Public Advocate v. Pub. Utilities Comm*., 476 A.2d 178, 183 (1984) (holding that the state commission "cannot amend, via the fuel cost adjustment provisions * * * what it perceived to have been an error in the calculation of the utility's base rates"

because "implementation of the offset proposal, no matter how ingeniously it might be characterized, would necessarily involve a reconsideration of the calculations made in the base rate proceeding").

The fact that the filed-rate doctrine and its corollary, the rule against retroactive rate making, are so firmly entrenched in the statutory law of virtually all states, and continue to be rigorously applied by the state courts, is a compelling affirmation of the vitality of these principles across the country and their continuing importance for ensuring rate predictability and stability for both the regulated entity and the consumer.

D. The filed-rate doctrine and rule against retroactive ratemaking are embedded in Ohio statutory law and are well-established through this Court's precedents.

The prohibition against retroactive ratemaking has long been recognized and applied in Ohio as well. It is not an anachronistic judge-made law; it is firmly rooted in, and central to, the statutory law that continues to govern public utility ratemaking in Ohio. Under R.C. 4905.32, the rates established by the Commission are the only rates a public utility may lawfully charge. R.C. 4905.32 expressly prohibits the utility from charging any rate different than the rate established in its tariff, or from refunding any part of the charge except pursuant to its tariff. A Commission order establishing rates becomes immediately effective and remains in effect pending appeal unless stayed. R.C. 4903.15 and R.C. 4903.16. These statutes are the codification of the filed-rate doctrine in Ohio and the foundation for the prohibition against retroactive ratemaking. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 256-57, 141 N.E.2d 465 (1957).

The statutory law creating the filed-rate doctrine in Ohio has been held constant by the General Assembly, and enforced by this Court consistent with the legislative intent, over

the decades, notwithstanding the fact that the statutes and the doctrine they codify sometimes seem to work an inequity. As this Court noted in *Keco* at 259:

> In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes, a utility may not charge increased rates during proceedings before the Commission seeking the same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the Commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

The filed-rate doctrine and the retroactive ratemaking prohibition have been applied numerous times by this Court under different facts since *Keco. In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 49. *See also In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23; *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 15; *In re Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 16; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21, *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27; *Lucas Cty. Commrs. v. Pub. Util. Comm*., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997); *Office of Consumers' Counsel v. Pub. Util. Comm*., 61 Ohio St.3d 396, 409, 57 N.E.2d 157 (1991).

In applying the filed-rate doctrine, the Court has faithfully upheld the constitutional doctrine of separation of powers, recognizing that the doctrine is firmly incorporated into Ohio's statutory law and cannot be abrogated, in whole or in part, by judicial fiat. *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co*., 2018-Ohio-229, at ¶

18 ("We have recognized that * * * the no-refund rule has been perceived as unfair[,] * * * [b]ut we have also recognized that it is the statutory scheme that requires this result and therefore, it is a matter for the General Assembly to remedy, not this court."); *In re Columbus S. Power Co.,* 128 Ohio St.3d at 517 ("Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation.").

Specifically with respect to electric utility ratemaking, the statutes that comprise the foundation for the rule against retroactive ratemaking survived the regulatory restructuring provisions of 2008 Am.Sub.S.B. No. 221 and are as much a part of Ohio law as they were when *Keco* was decided. Had the General Assembly intended to abandon either the filed-rate doctrine or the prohibition against retroactive ratemaking, it would have done so expressly in its omnibus legislative review of Title 49 as applied to the electric utility industry and major overhaul of electric utility ratemaking in S.B. 221. Instead, the General Assembly made only narrow exceptions to the prohibition against retroactive ratemaking: (1) in R.C. 4928.143(F), which authorizes the Commission to require an electric distribution utility to refund to customers, by way of prospective adjustments, any earnings determined to be "significantly excessive"; and (2) in R.C. 4909.42, which allows refunds if the Commission fails to decide a rate case in 275 days, and the utility implements the proposed rates. There is nothing in S.B. 221 to suggest an intent to negate the prohibition against retroactive ratemaking outside these contexts, or to call into question the continued validity and soundness of the filed-rate doctrine in any other respect. The General Assembly know how to create such an exception where it intends that result – and it did not do so here.

E. The filed-rate doctrine and rule against retroactive ratemaking apply to adjustable cost recovery mechanisms included in ratemaking orders.

As noted previously, the filed-rate doctrine continues to apply in the modern era, even when alternative ratemaking paradigms have supplanted traditional rate base formulas and proceedings. *See, e.g.*, *Simon v. KeySpan*, 694 F.3d 196, 205 (2d Cir.2012) (holding that the doctrine applies to market-based rates determined through an auction process and merely reviewed by a regulatory body for reasonableness); *Simon v. KeySpan*, S.D.N.Y. No. 10-5437, 2011 U.S. Dist. LEXIS 57142, at *2 n.21 (May 27, 2011) (collecting other similar cases from the federal circuit and district courts); *Wholesale Electricity Antitrust Cases I & II*, 147 Cal. App.4th 1293, 1317, 55 Cal. Rptr.3d 253 (Cal.2007) ("While market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine") (quoting *Pub. Util. Dist. No. 1 v. IDACORP,* 379 F.3d 641, 651 (9th Cir.2004)); *Breiding v. Eversource Energy*, 344 F.Supp.3d 433, 447 (D.Mass.2018) ("'Rather, under the principles of the [f]iled [r]ate [d]octrine, [FERC-authorized rates] are just and reasonable as a matter of law,' even where the rates at issue are 'market-based.'") (internal quotation omitted).

The doctrine also applies to mechanisms incorporated into ratemaking orders for the purpose of adjusting or reconciling rates to reflect actual, approved costs and expenses, such as fuel adjustment clauses or other cost recovery riders. *See, e.g.*, *Cogentrix Energy Power Mgt., LLC v. FERC*, 455 U.S.App.D.C. 364, 24 F.4th 677 (2022) (applying filed-rate doctrine to mandatory reliability standards cost recovery riders); *State ex rel. AG Processing v. PSC*, 340 S.W.3d 146, 153 (MO. Ct. App. 2011) (holding that the rule against retroactive remaking applies to fuel adjustment clauses). The doctrine requires that such mechanisms be

used only in a prospective manner, and not to recover prior costs or refund rates already collected. *Id*. at 153. *See also Natl. Fuel Gas Distrib. Corp. v. Pub. Serv. Comm*., 97 A.D. 674, 675, 469 N.Y.S.2d 171 (N.Y. App. 1983) ("[W]here the formula to compute the [fuel] clause changes, the change approved by respondent must be limited to future rates only.").

This Court also has recognized the continued applicability of the filed-rate doctrine and rule against retroactive ratemaking in the post-S.B. 221 era, in which electric distribution utility ratemaking no longer follows the traditional rate base formula and sometimes employs flexible cost recovery mechanisms. It did so in *In re Columbus S. Power Co*., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶ 12-16, in which it held that the Commission violated the rule against retroactive ratemaking by authorizing additional rates in an electric security plan to make up for regulatory delay but also held that, because the retroactive increase was fully recovered, there could be no refund to customers of the amount collected. It did so again more recently in *In re Ohio Edison Co*., 157 Ohio St.3d 73 at ¶ 18, in which it held that R.C. 4905.32 prohibited the Commission from later ordering a disallowance or refund of renewable energy credit costs because the utility already recovered the costs under a "filed" rate schedule. As these cases make clear, the rule against retroactive ratemaking prohibits using a cost-recovery mechanism to recoup costs incurred, or refund charges collected, prior to the effective date of the order.

F. The filed-rate doctrine and rule against retroactive ratemaking should be enforced in Ohio unless or until the Ohio General Assembly modifies the statutory law that codifies the doctrine.

As demonstrated above, the filed-rate doctrine is not a judicially created rule or a rule that has out-lived its useful time. Quite to the contrary. It is a principle that is embedded in the statutory law governing regulated utilities across the spectrum, at both the federal and

state level. Legislatures and courts across the country continue to recognize the doctrine as an important rule of law that ensures rate predictability and stability, guards against discriminatory pricing and stranded costs, and preserves the uniquely legislative role of public utility ratemaking. The doctrine is even-handed, in that it protects both consumers and utilities against retroactive ratemaking. Underpayments due to regulatory lag are not subject to recoupment and overpayments due to regulatory error are not subject to refund.

It would be unwise for the Court to abrogate or narrow the doctrine now. To do so would violate the Court's strong commitment to the separation-of-powers doctrine embedded in the Ohio Constitution. The Court reaffirmed that commitment – and particularly that branch of the doctrine that protects the right of the Legislature to legislate – in *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 34 -35, stating:

> "A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch of government is 'the ultimate arbiter of public policy.'" *Arbino* at ¶ 21, quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21. In fulfilling that role, the legislature is entrusted with the power to continually refine Ohio's laws to meet the needs of our citizens. *Id*.
>
> It is not the role of the courts "to establish legislative policies or to second-guess the General Assembly's policy choices. '[T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices.'" *Groch v. Gen. Motors Corp*., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212, quoting *Arbino* [*v. Johnson & Johnson*], 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 113.

There is no question that setting public utility rates falls squarely within the legislative domain and requires the General Assembly to establish the rules of law that will best protect the needs of Ohio citizens. The General Assembly concluded that the filed-rate

doctrine, as codified in R.C. 4905.32, R.C. 4903.15 and R.C. 4903.16, is a proper and necessary rule of law and has stood firm with that conclusion over half a century. The United States Congress and virtually every other state legislature agree. If Ohio is to now decide that the doctrine has out-lived its time or is too harsh, and should be abandoned or diminished, that is a decision to be made by the General Assembly after due consideration of all the consequences of such a drastic departure from a law that has existed here and across the land for decades. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17 ("Any apparent unfairness [in the retroactive ratemaking prohibition], however, remains a policy decision mandated by the larger legislative scheme.").

Any abrogation of the filed-rate doctrine or rule against retroactive ratemaking also would be a marked departure from the Court's high respect for the doctrine of *stare decisis*. This Court has long held that "[t]he doctrine of stare decisis 'is designed to provide continuity and predictability in our legal system' and is 'of fundamental importance to the rule of law.'" *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 44. While the Court recognized in *Galatis* that it might properly overrule prior precedent when certain conditions exists, *id*. at ¶ 49, those conditions are not met when it comes to any reconsideration of the filed-rate doctrine. There is nothing to suggest that *Keco* was wrongly decided in 1957 or that changes in circumstances no longer justify adherence to *Keco*. *Keco* has been continuously followed by this Court and is consistent with the law across the land at both the federal and state level. *Keco* does not "def[y] practical workability," *id*.; it has proven to be workable, balanced and fair for well more than a half a century. And abandoning the filed-rate doctrine and rule against retroactive ratemaking

would work "undue hardship," *id*., in that it has been relied upon by utilities and ratepayers alike to protect against rate discrimination and to ensure rate predictability.

Moreover, while the standard announced in *Galatis* may be a proper standard when the Court is considering overruling a prior judicially created rule of law, in the context of adhering to prior decisions interpreting statutes, the *Galatis* test fails to give sufficient deference to the General Assembly. *Stare decisis* is rightfully more rigorously applied when the question is whether a prior interpretation of a statute should be overruled. *See In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, ¶ 11 ("[W]e presume that if the General Assembly disagreed with the rule set forth in [a prior precedent], it would have responded to it at some point in the past 30 years."); *Shay v. Shay,* 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591, ¶ 28 ("'Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.'") (citing *Square D Co. v. Niagara Frontier Tariff Bur., Inc.* 476 U.S. 409, 424, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986)) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)).

Abrogating the rule against retroactive ratemaking also would be inconsistent with the fact that filed tariffs are substantive legislative enactments and, as such may not be applied retroactively. "There is no question that tariff schedules and the statutes that authorize tariffs are part of a comprehensive statewide enactment concerning the regulation of public utility rates, charges, and services." *Complaint of City of Reynoldsburg v. Columbus S. Power Co*., 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 42 (citing *Kazmaier Supermarket,*

Inc. v. Toledo Edison Co., 61 Ohio St.3d 147, 151, 573 N.E.2d 655 (1991)). As a legislative enactment, a public utility tariff is subject to Ohio Constitution, Article II, Section 28, which prohibits the passage of retrospective laws. Allowing the Commission to make retroactive changes to tariffs, or requiring tariffs to be applied retroactively by allowing utilities to recover past costs or lost profits or allowing refunds to utility customers, would violate the constitutional prohibition against retroactive laws.

Finally, abandoning the filed-rate doctrine could have any number of unintended consequences. For example, by disavowing the rule against retroactive ratemaking, the Court would foist considerable added risk upon investors in Ohio public utilities because of the loss of rate predictability. This added risk could actually increase the cost of service and rates in Ohio, by requiring Ohio utilities to offer a higher rate of return to investors in order to secure necessary capital. The necessary increase in rates to account for this added risk, in turn, could disadvantage Ohio businesses vis-à-vis competitors in other states that continue to ensure rate stability and predictability by following the filed-rate doctrine. Increased rates due to the greater risk also will affect Ohio consumers and require the State to expand state programs designed to protect low-income consumers. Allowing retroactive adjustments to rates inevitably also will foster more appeals by utilities and by their customers alike, because there would be so much more at stake in any appeal. Utilities would have a financial incentive to challenge every rate order from the Commission that did not grant the utility's request in full (which is virtually all rate orders) – because they could achieve an outcome that would not only provide for full recovery on a prospective basis, but would enable recovery covering the time period of the appeal, thereby exacerbating the rate impact on customers of a successful utility challenge before this Court. As these few examples of the

unintended consequences demonstrate, any change in the current law evokes a seismic change in public policy that should not be made without first fully exploring all the potential ramifications, and finding a suitable regulatory mechanism to provide the protections and predictability that have been provided by the filed-rate doctrine for more than half a century.

CONCLUSION

As this Court addresses the Propositions of Law in the AES Ohio SEET and ESP appeals that implicate the filed-rate doctrine, AEP Ohio urges the Court to recognize and reaffirm that these long-standing rules of law remain essential and central to public utility ratemaking in Ohio.

Respectfully submitted,

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