

**BEFORE THE  
OHIO POWER SITING BOARD**

In the Matter of the Letter of Notification of	)	
The Dayton Power and Light Company	)	
For a Certificate of Environmental Compatibility	)	Case No. 21-973-EL-BLN
and Public Need for the Miami to Airport	)	
138 kV Expansion	)	

**Memorandum Contra of  
The Dayton Power and Light Company dba AES Ohio  
In Opposition to Interlocutory Appeal and Application for Review of  
Raymmond and Angela Davis**

This memorandum contra is filed by The Dayton Power and Light Company dba AES Ohio (“AES Ohio”) in opposition to the interlocutory appeal and Application for Review of Raymmond and Angela Davis filed in this proceeding on March 1, 2022. AES Ohio recognizes that the Rules of the Ohio Power Siting Board (“OPSB” or the “Board”) governing interlocutory appeals at Ohio Administrative Code (“OAC”) 4906-2-29 do not explicitly identify the form or the time period for such a filing in opposition. Therefore, AES Ohio is filing within the five day period specified by the Public Utilities Commission of Ohio’s rules at OAC 4901-1-15(D). It is further noted that the Board has previously accepted such a filing in opposition to an interlocutory appeal in a very similar proceeding involving a transmission line application and an interlocutory appear of a ruling that had denied a request for intervention.<sup>1</sup> .

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<sup>1</sup> *In Re Application of Columbus Southern Power Company and Ohio Power Company*, Case No. 06-309-EL-BTX, Entry at ¶¶ 3-5, 9 (Nov. 20, 2006) (discussing interlocutory appeal of ruling denying motion to intervene, memorandum contra in opposition to interlocutory appeal, and ruling affirming the denial of request for intervention.

## I. Procedural History.

On December 2, 2021, in Case No. 21-973-EL-BLN, The Dayton Power and Light Company dba AES Ohio (“AES Ohio”) filed a Letter of Notification (“LON”) for a 1.2 mile “Miami – Airport 138 kV transmission line starting from an interconnection point on an existing 138 kV transmission line and extending south down Peters Road and then west on Ginghamburg-Frederick Road to the Airport substation. The LON was comprised of some 130 pages describing the project, the need for the project, and all the data, surveys, environmental and historic data required pursuant to the Letter of Notification requirements and accelerated procedures as authorized in Ohio Revised Code (ORC) 4906.03(F) and the Board’s Rules set forth at Ohio Administrative Code (OAC) Chapter 4906-6.

On December 13, 2021, a filing was made through counsel on behalf of Raymmond and Angela Davis (the “Davises”), accompanied by a Memorandum in Support, seeking to intervene and making other motions in this proceeding and in a separate proceeding also involving a LON filed the same day, Case No. 21-972-EL-BLN.

On December 20, 2021, AES Ohio filed a Memorandum Contra opposing the intervention of the Davises and the other motions made in both of the proceedings.

On December 27, 2021, the Davises filed a Reply Memorandum in support of their petition to intervene and motions in both of the proceedings.

On February 24, 2022, an Administrative Law Judge (“ALJ”) issued an Entry (hereinafter the “Entry”) that denied the Davises intervention in Case No. 21-973-EL-BLN while granting intervention in Case No. 21-972-EL-BLN.<sup>2</sup>

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<sup>2</sup> *In the Matter of the Notification of The Dayton Power and Light Company for a Certificate of Environmental Compatibility and Public Need for the Miami to Airport 138kV Expansion*, Case No. 21-973-EL-BLN, Entry at ¶ 14 (Feb. 24, 2022).

On March 1, 2022, the Davises submitted an Application for Review and interlocutory appeal to the Ohio Power Siting Board (“OPSB”) of the portion of the Entry that denied intervention in Case No. 91-973-EL-BLN, seeking a ruling on an expedited basis for reversal and the granting of the intervention.

AES Ohio respectfully submits that the ALJ’s ruling in this regard was correct and should be upheld.

AES Ohio does not oppose the OPSB’s consideration on this matter on an expedited basis. As set forth in detail in earlier pleadings made in this proceeding, it is important that all aspects of this Case be resolved expeditiously in order to meet a pressing need for increased power transfer capabilities within this fast growing area near the Dayton airport. In 2022, Amazon will complete and make operational a 3.1 million square foot fulfillment center that will employ 1,500 people and add 6 MW of load, which will exceed the rated capacity of existing facilities in the area. That project will join logistics operations that are already in operation in the area for Procter & Gamble, Crocs, Frito-Lay, Legrand North America and Chewy Inc. Additional demand straining existing transmission resources in the area are also expected from planned major corporate expansions or new facilities in the area including new airplane repair and maintenance facilities to be constructed by Sierra Nevada Corp., Energizer, Innovative Plastic Molder, Frito-Lay, a yet-to-be-officially announced Dayton Freight facility, a distribution center to be built by Meijer Inc. near Tipp City and a White Castle plant in Vandalia.<sup>3</sup> It is also AES Ohio’s understanding that in addition to the Amazon fulfillment center, Amazon is planning to build a significantly large electric auto charging facility at their site.

## II. The Standard for Intervention.

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<sup>3</sup> <sup>3</sup> See <https://www.daytondailynews.com/local/10-building-projects-helping-build-up-the-dayton-area/JQKYOPBW3BFYXNUFLJZVXCFL3U/>

The Entry ¶ 6 correctly notes that the standard for intervention is as set forth in Ohio Administrative Code (OAC) 4906-2-12(B)(1) and consists of four criteria:

- “(a) The nature and extent of the person’s interest.
- (b) The extent to which the person’s interest is presented by existing parties.
- (c) The person’s potential contribution to a just and expedition resolution of the issues involved in the proceeding.
- (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.”

The application of these criteria to the facts at hand is a matter of judgment. Of note, there is no “bright-line” rule that says that if a person owns property within some specified distance of a project, that person should automatically become a party.

III. The ALJ Correctly Balanced the Criteria and Determined that the Davises Did Not Have a Sufficient Interest in the Miami-Airport Transmission Line to Warrant Party Status.

Perhaps the most telling indicator of the ALJ's careful balancing of these criteria is that the Entry actually grants the Davises party status in Case No. 21-972-EL-BLN while denying it in this Case No. 21-973-EL-BLN. The Entry did not just dismiss the Davises participation in both cases out-of-hand or on arbitrary grounds. The Entry at ¶ 14 instead presents a reasoned basis for distinguishing between the two projects:

“As the corner of the Davises’ property abuts a corner turn in the proposed line route [in Case No. 21-972-EL-BLN], the ALJ determines that the Davises have a real interest in that proceeding. . . . The ALJ will deny the Davises intervention in Case No. 21-973-EL-BLN. As their property is over 1,000 feet away from the proposed route, the ALJ finds they do not have a real interest in the proceeding.

The Davises, with full party status in Case No. 21-972-EL-BLN, are free to advance any argument that they care to present with respect to the transmission line that is close to their property. There is no incremental benefit that they would receive or that the Board would receive from their making essentially identical arguments in Case No. 21-973-EL-BLN for a transmission line that is, at its closest point, over 1000 feet away from their property.

AES Ohio further notes that the Davises have already submitted two sets of Public Comments that are on file in this proceeding.<sup>4</sup> Nothing in the ALJ's ruling removes those Public Comments from the Case. Additionally, these rulings are made in the context where the Township of Monroe was granted party status in this proceeding. Entry at ¶ 13. The Township of Monroe's petition for intervention notes that the project in this proceeding is located within its township borders and that it is authorized to represent the interests of residents within its

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<sup>4</sup> Public Comments of Ray and Dr. Angela Davis, dated Dec. 11, 2021, and filed Dec. 13, 2021; and Public Comments of Dr. Angela Davis, dated Aug. 17, 2021, and filed Aug. 19, 2021.

borders.<sup>5</sup> According to the map on Monroe Township's web-site, the Davises live in Monroe Township.<sup>6</sup> Denial of party status is consistent with the second intervention criteria set forth above. That is: the Davises have no particular or unique interest in the Miami-Airport transmission line separate from or distinct from the interest of any other nearby resident and the Township of Monroe can adequately represent the interests of its residents, including the Davises, going forward.

IV. Cases Cited by the Davises In Support of the Appeal Do Not Support a Reversal.

The Davises, through counsel, have cited two cases in support of a reversal. In both instances, however, the Application for Review starts from an erroneous premise that there is some bright-line test that says if your property abuts property that contains even the tail-end of a mile-long transmission line, party status should be guaranteed.

The Davises Application for Review at 7 cites *Black Fork Wind*,<sup>7</sup> noting that there a landowner with property abutting land with a project even 3,000 feet away has been granted party status. And that was true, but additional context is necessary. The ALJ in *Black Fork Wind* did not establish a test that says every landowner or every abutting landowner within 3,000 feet gets party status. The ruling was made in the context of a large wind turbine generation project where intervention status was granted to two landowners including one where a wind turbine was being placed 3,000 feet from his property line and over 100 other wind turbines were planned for the area and “[each of the landowners granted intervention status] has claimed to

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<sup>5</sup> Petition to Intervene of Board of Monroe Township Trustees, Case Nos. 21-972-EL-BLN and 21-973-EL-BLN (unconsolidated) (filed Dec. 12, 2021) at ¶¶ 1-2.

<sup>6</sup> [https://www.monroetwpohio.com/Services/monroe\\_twp\\_maps.php](https://www.monroetwpohio.com/Services/monroe_twp_maps.php)

<sup>7</sup> *In the Matter of the Application of Black Fork Wind LLC for a Certificate of Environmental Compatibility and Public Need for the Siting of a Wind-Power Electric Generating Facility in Richland and Crawford Counties, Ohio*, Case No. 09-546-EL-BGN, Entry (Mar. 2, 2010) (“*Black Fork Wind*”).

have rejected contract offers with regard to this project made to him by Gary Energetics. This, in itself, is an indication that each has more individual, direct interests at stake in the outcome of this case than do other residents within the two affected counties who are not situated within such close proximity to the project.”<sup>8</sup>

In AES Ohio’s view, this ruling supports the proposition that intervention status is provided to a landowner who has a particular and significant interest separate from that of the general populace nearby. In *Black Fork Wind*, there were over 100 wind turbines planned that were described as having blades reaching 424 feet high and the application required, among other things, evaluations of noise levels and light flickering effects.<sup>9</sup> The effects on an abutting landowner, even one 3,000 feet away, were understandably viewed as potentially significant and because the landowner was also asked to sign a contract with the developer, the interests were more unique than the interests of other nearby residents.

In contrast, here, the Memorandum of Appeal appears to rely on a non-existent bright-line rule based on property lines without regard to whether there are any actual effects from the tail end of a transmission line 1,000 feet away. And there are no such actual effects – or at least none that are particular to the Davises. The only actual “effect” alleged by the Davises is raised in the Memorandum of Appeal at 8 and states that: “the Davises will drive by the line every time they leave their home, turn right out of their driveway, and drive as far as the next cross street.” That is a perfect illustration of a generalized effect felt by any member of the general public who happens to be driving down Peters or Ginghamburg-Frederick Roads. And it is worth recalling that these are single pole structures – they are not significantly visually obtrusive.

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<sup>8</sup> *Black Fork Wind* Entry at ¶ 12 (emphasis supplied).

<sup>9</sup> Application of Black Fork Wind LLC, sections 2.1.1, 7.1.2, 7.1.6, Case No. 09-546-EL-BGN (filed Aug. 31, 2009).

The Application for Review at 7 also cites an Entry involving a transmission line proposed by American Transmission Systems, Inc.,<sup>10</sup> and stating there that the intervention status was granted to a landowner who “*might* be along an alternate route” (emphasis in Application for Review). This phraseology reflects a fundamental misunderstanding of what an “alternate route” is as that term is used by the Board and electric utilities. The Board’s Rules for major transmission projects require that both a “Preferred Route” and an “Alternative Route” be included in a filing.<sup>11</sup> And while the Preferred Route is usually the final route approved, there are often adjustments made so that some portions of the Alternative Route are approved. In that ATSI case, the Alternative Route would have directly and significantly affected the intervenor in a way different from members of the general public. As set forth in that intervention petition:

“Stokes Farms supports the Preferred Route. However, Stokes Farms remains concerned inasmuch as Route 16 was selected as the Alternate Route, which bisects Stokes Farms' fields in segment H to I of the Alternate Route. . . . Stokes Farms seeks to intervene in this proceeding to support the site selection process's overriding goal of minimizing the adverse effects of this transmission line project on agricultural lands - and specifically to avoid the harm to Stokes Farms that would be caused by bisecting its fields with the transmission line.”<sup>12</sup>

Again, in AES Ohio’s view, this ATSI case supports the proposition that intervention status is to be granted when there would be actual effects on a landowner that are distinguishable from those of the general public. Here, the effects on the Davises of the Miami-Airport line in Case No. 21-973-EL-BLN are no different than for any other member of the public or for any other resident represented in this proceeding by Monroe Township who drives down Peters Road or Ginghamburg-Frederick Road.

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<sup>10</sup> *Re American Transmission Systems, Inc.*, Case No. 12-1636-EL-BTX, Entry at pp. 1-2 (May 21, 2014) (hereinafter “ATSI case”).

<sup>11</sup> OAC 4906-3-05.

<sup>12</sup> Petition to Intervene of Stokes Farm, Inc., Case No. 12-1636-EL-BTX (filed Mar. 12, 2014) at 2.



V. Conclusion

For the foregoing reason, AES Ohio respectfully urges the Board to reject the interlocutory appeal of the Davises and affirm the ruling of the Administrative Law Judge.

Respectfully submitted,  
The Dayton Power and Light Company  
dba AES Ohio

ss:/ *Randall V. Griffin*

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Dated: March 4, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I have on this day, March 4, 2022, served via e-mail, a copy of the foregoing on the attorney for Mr. and Dr. Davis and each Party of Record listed in the most recent Service Notice filed in this proceeding.

On behalf of The Dayton Power and Light Company  
dba AES Ohio

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