

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The AES)	
Corporation, Dolphin Sub, Inc., DPL Inc. and)	Case No. 11-3002-EL-MER
The Dayton Power and Light Company for)	
Consent and Approval for a Change of)	
Control of The Dayton Power and Light)	
Company)	

REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

On May 18, 2011, AES Corporation ("AES"), DPL Inc. ("DPL"), and The Dayton Power and Light Company ("DP&L") (collectively "Applicants") filed an Application for Consent and Approval for a Change of Control of The Dayton Power and Light Company ("Application") that would result in DPL surviving as a wholly-owned subsidiary of AES. The Public Utilities Commission of Ohio ("Commission") suspended the matter so that the Application would not be deemed approved by operation of law. The Commission further established a comment cycle. The Industrial Energy Users-Ohio ("IEU-Ohio") filed a motion to intervene on May 20, 2011 and a revised motion to intervene on May 23, 2011.

The Applicants must demonstrate that the change of control will promote the public convenience and result in the provision of adequate service at a reasonable rate, rental, toll, or charge.¹ On July 18, 2011, IEU-Ohio and several other interested parties²

¹ Section 4905.402(B), Revised Code.

² In addition to IEU-Ohio, comments were filed by Ohio Partners for Affordable Energy ("OPAE"), the City of Dayton ("City"), Commission Staff ("Staff"), First Energy Solutions Corp. ("FES"), OMA Energy Group ("OMA"), and Ecos Energy LLC ("Ecos").

filed comments in response to the Commission's directive. The commenters generally agree that the Commission should be concerned with the rates and service after the proposed change of control. They also raise concerns about the commitments made by the buyer to the community.³ Further, many of the parties identified the Applicants' lack of commitment to flow through any benefits that result from the merger.⁴ Thus, the filed Comments addressed traditional concerns raised by utility mergers.

Although the initial comments reveal several common concerns and a high degree of consensus that the proposed change of control as presented by the Application fails to satisfy the statutory requirements for approval, they also suggest that the Application raises a broader issue. The broader issue is framed by the influence that the highly leveraged merger-related financing will likely have on Applicants' willingness to provide proactive support (after any merger approval) for customer-focused opportunities to reduce electric bills through competitive sourcing of generation supply.⁵ As the Commission knows, State policy requires the Commission to, among

³ OPAE Comments at 5-7; City Comments at 3-4.

⁴ OPAE Comments at 7; Staff Comments at 6-7 (some of the shared savings should be used to implement a new billing system); OMA Comments at 3.

⁵ Policy makers and regulators can sometimes be distracted by stakeholders who attempt to frame the debate as involving a choice between "regulation" and "competition" as though these words have some certain or necessary definition. But the core purpose of economic regulation has always been to act as a "substitute for the discipline of competitive markets," not to protect utilities from such discipline or to make captive customers responsible for supporting utilities in the lifestyle to which they have become accustomed. William Steinhurst *The Electric Industry at a Glance* 16-17 (2008) (available via the Internet at http://www.nrri.org/pubs/electricity/electricity_at_a_glance.pdf (viewed Aug. 17, 2008)). Technological advances accompanied by changes in laws and regulations that define the relationship between energy suppliers and their customers provide opportunities to allow competitive markets to do directly what regulation and regulators can, at best, only do indirectly. Therefore, reliance on competition is a tool for protecting and advancing the public interest in reliable service, reasonable prices, continuous improvement and innovation. It is a means to these ends. A proper understanding of the purpose of economic regulation is a foundation for embracing appropriate reliance on competition to advance and protect the public interest, not a reason cast competition and regulation as opposing forces.

other things, “[e]nsure diversity of electricity supplies and suppliers by giving consumers effective choices over the selection of those supplies and suppliers.”⁶

In evaluating the claims and commitments made by the Applicants, the Commission is bound to recognize that the Applicants are fiduciaries for their shareholders and that this fiduciary obligation will remain if the Commission approves the merger. It is the Commission, in this instance, that must ensure that this fiduciary obligation neither results in nor enables a structure more likely to produce an unreasonable or excessive transfer of wealth from consumers to the Applicants acting as agent for their owners.

The concerns expressed in IEU-Ohio’s initial comments with regard to competitive retail electric services are rooted in the Applicants’ failure to make any commitments by which the Applicant’s fiduciary obligations to their shareholders will be held in check by “effective choices” exercisable by consumers. Ohio law promotes the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service.⁷ To that end, state policy seeks to ensure the diversity of electric supplies and suppliers⁸ and that retail electric consumers are protected from market deficiencies and market power.⁹ Based on these policy goals and the failure of the Applicants to proactively advance commitments directed to these goals, the Commission should require the Applicants to show how the proposed change

⁶ Section 4928.02(C), Revised Code.

⁷ Section 4928.02(A), Revised Code.

⁸ Section 4928.02(C), Revised Code,

⁹ Section 4928.02(I), Revised Code.

of control, if approved, will advance the state policies encompassed in Section 4928.02, Revised Code.

The need to ensure that effective consumer choices are not compromised by the proposed change in control is real in this case because pressure to protect revenues will likely be substantial. Under its current electric security plan ("ESP"), DP&L already has secured significant financial benefits that are not subject to discipline, for example, by the Significantly Excessive Earnings Test ("SEET"). Moreover, the Commission's own "apples to apples" information on electric suppliers indicates that the "price to compare" in DP&L's current residential SSO rates are above market.¹⁰ As the Initial Comments also showed, a DPL subsidiary, DPL Energy, LLC ("DPLE"), has participated in efforts to block proposals in New Jersey to lower rates for customers, and issues raised by FES regarding barriers to the entry of competition in the DPL service territory raise serious concerns about DP&L's compliance with state policy regarding competitive supplies and suppliers.¹¹ Because the proposed merger is to be financed through a highly leveraged capital structure with the required total capital including a premium, it would be imprudent to assume that this capital structure and capitalization amount will not impose financial pressure on AES, the buyer, or that AES fiduciary obligations to its owners will not result in plans, proposals or strategies that are designed to block revenue and market share erosion that might otherwise occur if consumers have effective choices over supplies and suppliers.

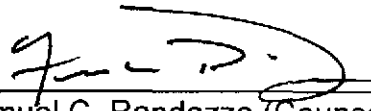
¹⁰ <http://www.puco.ohio.gov/puco/index.cfm/apples-to-apples/electric-apples-to-apples-chart/> (viewed Aug. 17, 2011).

¹¹ FES Comments at 3-8.

Conditioning the merger to protect customers' access to competitive supplies and suppliers is a necessary first step in assuring that customers do not become the default source of funding to support the highly leveraged capital structure and the premium-enriched total capitalization that are core components of the Applicants' change in control plans.

Based on the concerns raised by the Application, IEU-Ohio renews its recommendation that the Commission grant the pending intervention requests, find that the relief requested in the Application may be unreasonable and establish a procedural schedule so that contested issues can be addressed by the Commission based on the evidence and the law. It is also IEU-Ohio's position that the Commission must impose conditions on the proposed change of control so as to, among other things, ensure that the consumers have full and unencumbered access to Competitive Retail Electric Service ("CRES") suppliers and that the debt service obligations associated with the proposed highly-leveraged transaction are not funded through non-bypassable charges, unduly prejudicial capacity charges that apply to shopping customers or their CRES suppliers, or other restrictions on shopping. Such conditions can be best considered and addressed by requiring the Applicants to file an application to establish DP&L's successor SSO and consolidating the SSO application with the Application filed in this proceeding.

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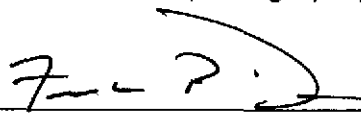
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 18th day of August 2011, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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