

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	Case No. 20-650-EL-AAM
	)	
	)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency.	)	Case No. 20-651-EL-UNC
	)	
	)	
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Tariffs and Rules Related to the COVID-19 State of Emergency.	)	Case No. 20-652-EL-WVR
	)	
	)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Contract with Certain Customers and Reasonable Arrangement Related to the COVID-19 State of Emergency	)	Case No. 20-755-EL-AEC
	)	

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**MOTION TO INTERVENE  
AND COMMENTS  
BY  
THE KROGER CO.**

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The Kroger Co. (Kroger) hereby respectfully submits its motion to intervene in the above-captioned matter to the Public Utilities Commission of Ohio (Commission), with the full powers and rights granted to intervening parties, pursuant to R.C. 4903.221 and Ohio Adm. Code 4901-1-11, 4901:1-38-03(E), and 4901:1-38-05(F). As demonstrated in the attached Memorandum in Support, Kroger has a real and substantial interest in this proceeding which may be adversely affected by the outcome herein, and which cannot be adequately represented by any other existing

parties. Accordingly, Kroger satisfies the standard for intervention set forth in Ohio statutes and regulations.

By entry dated April 24, 2020, the Commission established May 4, 2020 as both the deadline to intervene and the deadline to file comments to assist the Commission in its review of The Dayton Power and Light Company's (DP&L) Plan, as supplemented, which includes approval of a reasonable arrangement.<sup>1</sup> In accordance with the Commission's Entry, Kroger submits this timely motion to intervene and files its comments to DP&L's Plan, as supplemented.

Therefore, Kroger respectfully requests that the Commission grant its motion to intervene and incorporate its comments on DP&L's proposals as set forth herein. A memorandum in support is attached hereto.

Respectfully submitted,

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*Counsel for The Kroger Co.*

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<sup>1</sup> See Entry at ¶ 12 (April 24, 2020).

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On March 23, 2020, The Dayton Power and Light Company (DP&L) filed an Application proposing a plan<sup>2</sup> to implement the Commission’s mandates in its March 12, 2020 Entry directing utilities to review requirements and policies imposing a “service continuity hardship on residential and non-residential customers” during the COVID-19 emergency.<sup>3</sup> In its Application, DP&L

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<sup>2</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency*, Case Nos. 20-0651-EL-UNC, et al., Application (March 23, 2020) (Plan).

<sup>3</sup> *In the Matter of the Proper Procedures and Process for the Commission’s Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry at ¶ 7 (March 12, 2020) (State of Emergency Proceeding).

requested accounting authority to track all costs associated with its Plan and to establish a regulatory asset for future recovery of those costs.<sup>4</sup> DP&L also proposed to defer foregone charges and fees (foregone revenue) as a regulatory asset for subsequent recovery.<sup>5</sup> Thereafter, on April 15, 2020, DP&L filed its Supplemental Application, which revised demand charges for commercial and industrial customers during the emergency.<sup>6</sup> For Primary and Secondary class customers whose demand meters are temporarily not being read, DP&L proposed to charge those customers an energy-only rate equivalent to the County Fair Rate.<sup>7</sup> For Primary and Secondary class customers whose meters can be read, DP&L proposed to reduce the current maximum charge rate to reflect the current County Fair Rate.<sup>8</sup> For all non-residential customers subject to DP&L's minimum demand provisions, DP&L proposed to waive the minimum demand provisions and instead bill only according to an actual read of customers' current monthly demand.<sup>9</sup> DP&L sought to defer the resulting costs that it is not charging customers during the COVID-19 Emergency.<sup>10</sup> DP&L is requesting recovery of those deferred costs through either its previously proposed decoupling mechanism or, alternatively, through Rider EDR upon approval of an economic development and/or a unique reasonable arrangement.<sup>11</sup> The Commission Staff filed its review and recommendation of the Plan on April 22, 2020.<sup>12</sup>

As explained in more detail below, given that this proceeding may directly or indirectly impact the provision of electric service to Kroger's facilities in DP&L's service territory and the costs of those services, Kroger has a real and substantial interest in the outcome of these

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<sup>4</sup> Application at 8.

<sup>5</sup> Id. at 4-5.

<sup>6</sup> Supplemental Application at 3.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. at 4.

<sup>10</sup> Id.

<sup>11</sup> Id. at 4-5.

<sup>12</sup> See Staff Recommendation (April 22, 2020) (Staff Report).

proceedings, including, but not limited to, the amount of costs being deferred and the future allocation and recovery of such costs. Kroger's interests cannot be adequately represented by any other party.

In its April 24, 2020 Entry, the Commission established May 4, 2020 as both the deadline to intervene and the deadline to file comments on DP&L's Plan.<sup>13</sup> In accordance with the Commission's Entry, Kroger submits this timely motion to intervene and its comments to the Plan, as supplemented.

## **II. INTERVENTION**

R.C. 4903.221 and Ohio Adm. Code 4901-1-11 and Chapter 4901:1-38 establish the standards for intervention in Commission proceedings. R.C. 4903.221 provides, in pertinent part, that any person "who may be adversely affected" by a Commission proceeding is entitled to seek intervention in that proceeding. R.C. 4903.221(B) further requires the Commission to consider the nature and extent of the prospective intervenor's interest, the legal position advanced by the prospective intervenor and its probable relation to the merits of the case, whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding, and the prospective intervenor's potential contribution to a just and expeditious resolution of the issues involved. Ohio Adm. Code 4901-1-11 permits intervention to a party who demonstrates a real and substantial interest in the proceeding and who is so situated that the disposition of the proceeding may impair or impede its ability to protect that interest and whose interest is not adequately represented by an existing party. Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F) permit intervention by a party affected by the reasonable arrangement application.

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<sup>13</sup> See Entry at ¶ 12 (April 24, 2020).

Kroger is one of the largest grocers in the United States, with numerous facilities served by DP&L. The facilities operated by Kroger use electricity for food storage, lighting, heating, cooling, and distribution, often 24 hours a day, 7 days a week. Kroger's electric distribution needs associated with its facilities in DP&L's service territories are considerable, and its electric service and the costs associated with obtaining such service from DP&L will be impacted by the outcome in this proceeding. Indeed, Kroger has been a participant in other cases before the Commission involving rates charged by DP&L and costs recovered from customers.<sup>14</sup> The costs associated with DP&L's request for deferral authority and a reasonable arrangement, including the allocation and recovery mechanism of those costs and foregone revenue, directly implicate the interests Kroger seeks to protect.<sup>15</sup> Kroger recognizes that the Commission will address requests for deferral authority and cost recovery on a case-by-case basis, unlike other proposals directly responding to the State of Emergency Proceeding Entry.<sup>16</sup>

### III. COMMENTS

On March 9, 2020, Governor DeWine declared a state of emergency as a result of the COVID-19 pandemic.<sup>17</sup> In response to that declaration of a state of emergency, the Commission acted swiftly in directing all public utilities to review their service disconnection policies and practices and otherwise act to minimize any service continuity hardship on residential, commercial, and industrial customers throughout the State of Ohio as a result of the pandemic.<sup>18</sup>

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<sup>14</sup> See e.g., *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Plan for 2018-2020*, Case No. 17-1398-EL-POR, et al., Entry at ¶ 5 (September 29, 2017); *In the Matter of Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, Case No. 16-395-EL-SSO, et al., Entry at ¶ 5 (August 16, 2016); *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates, et al.*, Case No. 15-1830-EL-AIR, et al, Entry at ¶ 4 (April 30, 2018).

<sup>15</sup> See Supplemental Application.

<sup>16</sup> See State of Emergency Proceeding, Entry at ¶ 13 (March 20, 2020).

<sup>17</sup> See State of Emergency Proceeding, Entry at ¶ 5 (March 12, 2020).

<sup>18</sup> Id. at ¶ 7.

DP&L instituted this proceeding in accordance with the Commission's directive.<sup>19</sup>

As an initial matter, Kroger applauds the Commission for acting quickly during this state of emergency. In these unprecedented times, everyone -- public utilities, companies, and individuals alike -- should all do their part to minimize the impact of the pandemic. Indeed, Kroger has been on the "front lines" of this pandemic crisis in remaining open and operational to provide essential food, pharmacy, toiletries, disinfectants, and other items to the public. In doing so, Kroger has initiated social distancing guidelines, installed protective barriers, enhanced cleaning and disinfecting protocols, offered exclusive shopping hours for higher-risk customers, and offered "hero pay" of a \$2.00 per hour premium above the standard base rate of pay for all hourly frontline grocery, supply chain, manufacturing, pharmacy, and call center associates.<sup>20</sup> In addition to the foregoing, Kroger's Zero Hunger/Zero Waste Foundation has committed more than \$6 million to support its neighbors during the COVID-19 pandemic to fund local food banks and ensure children with school closures have access to nutritious meals.<sup>21</sup> Kroger has taken all of these actions without a guarantee that its revenue would cover all of these expenses or that it would maintain its pre-pandemic profits because these were the right things to do.

The same holds true for DP&L and all of the electric utilities. Electric utilities should be expected to bear a significant portion of the costs and burdens associated with the pandemic in the same manner as customers will have to bear its share of costs and burdens. A utility is authorized to "earn" up to a defined rate of return on its investment, but such returns are not guaranteed. Just as other business segments will feel the financial burden of the pandemic, so too must utilities. Utility customers are not insurers of utility profit; utilities cannot simply revise its rates or add

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<sup>19</sup> See Supplemental Application at 2.

<sup>20</sup> See <https://www.kroger.com/i/coronavirus-update>.

<sup>21</sup> Id.

charges (“riders”) to recover all costs when customers do not have that same ability. The pass-through of all utility costs onto its customers will have a detrimental economic impact to customers, many of whom are already struggling with personal safety and economic recovery.

Nonetheless, as public utilities, Kroger agrees that utilities should be permitted to recover the one-time reasonable and prudently incurred costs associated with ensuring its employees were safe (i.e., minimizing the chance of disease) while delivering service reliability during the pandemic, much in the same manner as the utility would recover reasonable costs associated with extraordinary weather events and other “one-time” issues. As the Staff of the Commission (Staff) recognized, it is the right thing for DP&L to suspend its disconnections and remove financial barriers to reconnection or continuity of service and to expand its customer assistance program.<sup>22</sup> And, Kroger applauds DP&L for taking these actions in accordance with the Commission’s directives.

However, Kroger does not support DP&L’s use of a “reasonable arrangement rider” to recover its costs or foregone revenues associated with responding to the COVID-19 pandemic. As Staff noted, “this is not a typical reasonable arrangement, but rather, is a result of the current COVID-19 Emergency.”<sup>23</sup> Allowing DP&L to use a reasonable arrangement rider under R.C. 4905.31 would create bad precedent and a slippery slope where utilities could seek a reasonable arrangement any time their revenues may not be as anticipated. This is not the purpose and intent of reasonable arrangements.

Moreover, Kroger has significant concerns regarding the level and type of operating costs and foregone revenue for which DP&L is seeking deferral authority. Here, DP&L is seeking cost recovery for foregone discretionary revenue that it would not have received but for the pandemic.

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<sup>22</sup> See Staff Report at 3 (April 22, 2020).

<sup>23</sup> Id. at 6.

A utility should not be allowed to tout its efforts to discontinue disconnections and/or waive late fees as goodwill and simultaneously seek to recover the costs of those efforts. Indeed, the Supreme Court of Ohio and the Commission have previously ruled that utilities cannot get cost recovery for discretionary expenses incurred to bolster the company's image, without showing that customers paying for it receive a direct and primary benefit.<sup>24</sup>

Kroger also is concerned as to how those costs and foregone revenue will be allocated and recovered from customers in the future. While DP&L's proposal appears to reduce the financial burden for some commercial and industrial customers by charging an energy-only rate equivalent to the County Fair Rate for those customers, reducing the current maximum charge rate to reflect the County Fair Rate, and/or waiving minimum demand provisions during the pandemic,<sup>25</sup> it will not provide assistance to all commercial and industrial customers and in fact could increase costs in the future. Indeed, commercial customers, like Kroger, who have maintained 24/7 operations during the COVID-19 pandemic may not have lower usage levels, and thus, their utility costs will not have decreased. While DP&L's proposal may be reasonable and appropriate for those customers facing lower usage levels, it may not be appropriate to recover the costs associated with the proposal from all other customers through the reasonable arrangement rider or some other mechanism.

DP&L also has requested deferral authority for future recovery of other categories of foregone revenue. It is not appropriate to collect foregone revenue (e.g., late fees and

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<sup>24</sup> See *Lima Tel. & Tel. Co. v. Pub. Util. Comm.*, 98 Ohio St. 110, 124, 120 N.E. 330, 333 (1918); *Cleveland v. Pub. Util. Comm.*, 63 Ohio St. 2d 62, 72–73, 406 N.E.2d 1370, 1379 (1980); *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Opinion and Order at 13 (January 11, 2011); *In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, Case No. 88-716-GAAIR, Opinion and Order at 27 (April 2, 2014).

<sup>25</sup> Supplemental Application at 2-4.

disconnection/reconnection fees) that is discretionary and often times waived under normal circumstances through the reasonable arrangement rider or some other mechanism. Each electric utility's ability to recover pandemic-related revenue shortfalls is parallel to the same challenge possessed by nearly every business, large or small. As with the entire economy, full utility revenue recovery is more a matter for State and Federal policy to address. The Commission should defer to the General Assembly or Congress on the issue of a utility's recovery of revenue shortfall associated with the pandemic through non-rate options. As Staff explained, there are other recovery options available that may be more appropriate, including a repayment of the relief received by those who received the relief.<sup>26</sup>

Kroger is further concerned with the uncertainty associated with these foregone revenues that DP&L will seek to recover in the future and the impact on Kroger as DP&L has not projected or estimated the level of foregone revenues that it anticipates deferring for future recovery.

In addition, Kroger shares Staff's concerns about the potential for double recovery by DP&L of expenses incurred as part of the Plan.<sup>27</sup> It is unclear at this time whether and which costs that DP&L is seeking deferral authority are already covered in base rates. Staff noted that "some expenses incurred in implementing the plan may represent costs currently collected in rates, and thus not incremental to rates."<sup>28</sup> Staff went on to explain that it is unclear what expenses have been incurred as part of the Plan that are above and beyond what is already included in base rates.<sup>29</sup> Staff explained the importance of ensuring that double-recovery does not occur as a result of the deferral.<sup>30</sup> Kroger agrees that it is important to protect customers from paying twice for the same

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<sup>26</sup> Staff Report at 6.

<sup>27</sup> Id. at 4-6.

<sup>28</sup> Id. at 4.

<sup>29</sup> Id.

<sup>30</sup> Id. at 5.

costs. Therefore, the Commission should review all the costs for which DP&L is seeking deferral authority to ensure they are not already covered in base rates because DP&L is not entitled to double recovery and customers should not have to absorb costs not incremental to base rates that they already are paying.

Finally, if recovery of pandemic-related costs through a rider is permitted, the Commission should ensure that the rider bears the same demand charge/energy charge composition as the utility's underlying base rates for that type and kind of revenue (i.e., revenue/costs normally recovered in a demand charge should still be recovered in a demand charge). Additionally, the Commission should examine each utility's pre-pandemic earnings and rate of return to determine if excess earnings exists that can be used to offset any alleged revenue shortfalls. Adherence to these principles will provide for a fair and reasonable share of cost responsibility in a socially conscious manner for all stakeholders and provide for a stable and effective re-start of the economy.

The Commission should recognize the financial pressures being exerted on customers during the pandemic and the potential impact that utility rate increases will have on customers at this time and after the emergency. As such, Kroger requests that the Commission consider and incorporate its comments in addressing DP&L's Plan, as supplemented, to ensure that only just, reasonable, and prudent costs are deferred for potential future recovery.

#### **IV. CONCLUSION**

For the foregoing reasons, Kroger has a direct, real, and substantial interest in the issues raised in this proceeding and is so situated that the disposition of the proceeding may, as a practical matter, impair or impede its ability to protect that interest. Kroger's interests will not be adequately represented by other parties to the proceeding. Finally, Kroger's intervention is timely and will

not unduly delay or prolong the proceeding. Accordingly, Kroger respectfully requests that its motion to intervene be granted and that its comments on DP&L's Plan, as supplemented, be considered for adoption by the Commission.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on May 4, 2020 upon the parties listed below.

/s/ Angela Paul Whitfield  
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Summary: Motion To Intervene And Comments By The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.