

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton) Case No. 20-1651-EL-AIR
Power and Light Company for an Increase in)
Electric Distribution Rates.)

In the Matter of the Application of The Dayton) Case No. 20-1652-EL-AAM
Power and Light Company for Accounting)
Authority.)

In the Matter of the Application of The Dayton) Case No. 20-1653-EL-ATA
Power and Light Company for Approval of)
Revised Tariffs.)

**JOINT MOTION FOR CONTINUANCE
OR, IN THE ALTERNATIVE,
INTERLOCUTORY APPEAL
BY
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
AND
THE KROGER CO.**

Pursuant to Ohio Adm.Code 4901-1-12 and 4901-1-13, the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger) (collectively, the Joint Movants) respectfully request, for good cause shown, a continuance of the evidentiary hearing scheduled in the above-captioned case for October 4, 2021.

In the alternative, pursuant to Ohio Adm.Code 4901-1-15, the Joint Movants respectfully submit this interlocutory appeal to the Public Utilities Commission of Ohio (Commission) for its consideration. The Joint Movants respectfully request that, pursuant to Ohio Adm.Code 4901-1-15(E), the Commission modify the Attorney Examiner's July 30, 2021 Entry, issued in the above-captioned case, which scheduled an evidentiary hearing for October 4, 2021, to schedule the evidentiary hearing for a later date. Given the unavailability of counsel, Joint Movants' request a brief extension of the evidentiary hearing to October 25, 2021.

The reasons for granting the Joint Movants' motion, or the alternative, the Joint Movants' interlocutory appeal, are more fully stated in the following memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPPORT

The Dayton Power & Light Company, d/b/a AES Ohio, Inc. (AES) seeks approval from the Public Utilities Commission of Ohio (Commission) to increase its rates for electric distribution service.¹ As demonstrated in their respective motions to intervene, intervenors the Ohio Manufacturers' Association Energy Group (OMAEG)² The and Kroger Co. (Kroger),³ each have a real and substantial interest in this proceeding that may be adversely affected by the outcome herein, and which cannot be adequately represented by any other party. OMAEG members and Kroger facilities consume significant amounts of electricity throughout AES' service territory, and the outcome of this proceeding will directly impact their electric service and the costs associated with obtaining such service from AES.

Accordingly, the Joint Movants intervened in this proceeding pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, due to the nature and extent of their interest in the case, and the

¹ Pursuant to R.C. 4909.17 and R.C. 4909.18.

² See Motion to Intervene of the Ohio Manufacturers' Association Energy Group (Nov. 25, 2020).

³ See Motion to Intervene of The Kroger Co. (Nov. 25, 2020).

fact that their intervention will significantly contribute to full development and equitable resolution of the factual issues,⁴ and the fact that no other party will adequately represent those interests. As such, the Commission granted OMAEG's and Kroger's motions to intervene in its April 7, 2021 Entry.

An application to increase rates may be set for hearing, where the Commission is "to take all the testimony with respect to the application and objections which may be offered by any interested party."⁵ "At such hearing the [Commission] shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable."⁶ In a July 30, 2021 Entry, the Attorney Examiner stated that "the evidentiary hearing in this proceeding will commence on October 4, 2021, at 10:00 a.m." at the offices of the Commission in Columbus, Ohio.⁷

Additionally, pursuant to Commission regulations, any party that is "adversely effected" by a procedural ruling issued under Ohio Adm.Code 4901-1-14 "may take an immediate interlocutory appeal to the commission" of that ruling when the ruling "terminates a party's right to participate in a proceeding."⁸ The party "must file the interlocutory appeal with the commission within five days after the ruling is issued."⁹ Upon consideration of the appeal, the Commission may reverse or modify the ruling.¹⁰

⁴ See R.C. 4903.221(B)(1), (4).

⁵ R.C. 4909.19(C).

⁶ *Id.*

⁷ See Entry at ¶ 8 (July 30, 2021).

⁸ Ohio Adm.Code 4901-1-15(A)(2). Unlike an interlocutory appeal taken pursuant to Ohio Adm.Code 4901-1-15(B), an appeal taken pursuant to Ohio Adm.Code 4901-1-15(A) does not require certification by the legal director, deputy legal director, attorney examiner, or presiding hearing officer.

⁹ Ohio Adm.Code 4901-1-15(C).

¹⁰ Ohio Adm.Code 4901-1-15(E)(1).

Pursuant to Ohio Adm.Code 4901-1-15, the Joint Movants seek an immediate appeal by the Commission as the July 30, 2021 Entry will effectively terminate Joint Movants' rights to participate because Joint Movants' choice of counsel will be unable to meaningfully participate in the evidentiary hearing if it proceeds as scheduled on October 4, 2021. Counsel for both of the Joint Movants are scheduled to appear in a separate trial located in Cleveland, Ohio, which will begin on that date and proceed for approximately two weeks. As such, counsel for the Joint Movants will be unable to prepare for or appear at the evidentiary hearing as currently scheduled. Without the availability of their respective choice of counsel, the Joint Movants will be unable to meaningfully participate in the evidentiary hearing by offering and placing into evidence "testimony with respect to the application" or objections to testimony offered by any other party.¹¹

In turn, without the ability to meaningfully participate in this proceeding, the Joint Movants will be unable to protect their direct, real, and substantial interests in the outcome of this proceeding, or contribute to full development and equitable resolution of the proceeding.¹² Furthermore, as the Joint Movants stated in their respective motions to intervene, no other party in this proceeding will adequately protect that interest. Without the participation of all interested parties, the hearing will not fulfill its purpose of allowing the Commission to consider the matters set forth in the application to increase rates and reach just and reasonable conclusion.¹³ As such, the July 30, 2021 Entry, which scheduled the evidentiary hearing for October 4, 2021, will effectively terminate the Joint Movants' "right to participate in [the] proceeding."¹⁴ To avoid the

¹¹ See R.C. 4909.19(C) ("the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party.").

¹² See R.C. 4903.221 and Ohio Adm.Code 4901-1-11.

¹³ See R.C. 4909.19(C).

¹⁴ Ohio Adm.Code 4901-1-15(A)(2).

termination of Joint Movants' rights to participate, good cause exists to continue the hearing and grant a brief extension, which will enable the Joint Movants to fully participate in the proceedings while preventing prejudice to any party involved therein.

Granting the Joint Movants' request for a continuance of the evidentiary hearing or, in the alternative, modifying the recently established procedural schedule will not unduly delay this proceeding, substantially prejudice any party, or interfere with any deadlines. R.C. 4909.42 establishes two deadlines in rate case proceedings. The first deadline will have already passed regardless of the Joint Movants' requested extension, while the second deadline is unlikely to be impacted by a brief extension of the hearing date.

First, R.C. 4909.42 establishes a 275-day procedural deadline for proceedings on applications to increase rates filed pursuant to R.C. 4909.18, which states that if the proceeding not concluded at that point, the utility may provisionally implement the proposed increase upon a filing of a bond. The October 4, 2021 hearing date is already after the 275-day procedural deadline. DP&L filed its Application on November 30, 2020, and the Commission deemed it filed as of that date.¹⁵ Accordingly, the 275-day procedural deadline will have passed as of September 1, 2021, a full month before the hearing. A brief extension will not further impact compliance with this deadline. Second, R.C. 4909.42 establishes a 540-day deadline, which states that if a final order is not issued within that time frame, rates collected under the provisional increase cannot be refunded. Again, as the Joint Movants seek only a brief extension of a few short weeks, this deadline will not be impacted.

Therefore, pursuant to Ohio Adm.Code 4901-1-12 and Ohio Adm.Code 4901-1-13, the Joint Movants respectfully request that the Commission grant, for good cause shown, a brief

¹⁵ See Entry at ¶ 1 (Apr. 7, 2021).

continuance of the evidentiary hearing and extension of the procedural schedule in the above-captioned case. Alternatively, the Joint Movants respectfully request that pursuant to Ohio Adm.Code 4901-1-15, the Commission modify the July 30, 2021 Entry issued in the above-captioned case, and establish a new procedural schedule with an evidentiary hearing scheduled for a later date, October 25, 2021. Doing so will allow for the full participation of all interested parties, allow the Joint Movants to contribute to the full development and equitable resolution of the proceeding, and enable the Joint Movants to protect their real, direct, and substantial interests in the outcome of this proceeding which will not be adequately represented by any other party.¹⁶

Respectfully submitted,

/s/ Kimberly W. Bojko

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¹⁶ See R.C. 4903.221 and Ohio Adm.Code 4901-1-11.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the parties of record via electronic mail on August 4, 2021.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/4/2021 5:27:22 PM

in

Case No(s). 20-1651-EL-AIR, 20-1652-EL-AAM, 20-1653-EL-ATA

Summary: Motion Joint Motion For Continuance Or, In The Alternative, Interlocutory Appeal
By The Ohio Manufacturers' Association Energy Group And The Kroger Co. electronically filed
by Mrs. Angela Whitfield on behalf of OMAEG and The Kroger Co.