

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 08-1094-EL-SSO
The Dayton Power and Light Company for
Approval of Its Electric Security Plan. :

In the Matter of the Application of : Case No. 08-1095-EL-ATA
The Dayton Power and Light Company for
Approval of Revised Tariffs. :

In the Matter of the Application of : Case No. 08-1096-EL-AAM
The Dayton Power and Light Company for
Approval of Certain Accounting Authority :
Pursuant to Ohio Rev. Code § 4905.13. :

In the Matter of the Application of : Case No. 08-1097-EL-UNC
The Dayton Power and Light Company for :
Approval of Its Amended Corporate
Separation Plan. :

**MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY D/B/A
AES OHIO IN OPPOSITION TO APPLICATION FOR REHEARING BY OFFICE
OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION AND SUMMARY

In its latest application for rehearing, The Office of the Ohio Consumers Counsel again asserts that the Commission erred by refusing to order The Dayton Power and Light Company d/b/a/ AES Ohio to refund all amounts collected under the Rate Stabilization Charge ("RSC") between the Commission's August 11, 2021 Sixth Entry on Rehearing and the filing of a final version of the RSC tariff pursuant to the Commission's June 15, 2022 Seventh Entry on Rehearing. The Commission should deny OCC's application for rehearing for the following reasons.

First, for the second time in this rehearing process, OCC seeks rehearing upon rehearing, in violation of R.C. 4903.10. The Commission already rejected OCC's demand for such a refund in its August 10, 2022 Eighth Entry on Rehearing, and held in its Ninth Entry on Rehearing that OCC improperly sought rehearing upon rehearing on that issue. OCC's latest application for rehearing seeks rehearing upon rehearing for the second time.

Second, in its August 10, 2022 Eighth Entry on Rehearing (§ 25), the Commission concluded that AES Ohio had "mistakenly fail[ed] to timely file final tariffs" in response to the Sixth Entry and refused to "ascribe bad faith to AES Ohio or its counsel without evidence." OCC again cites no evidence that AES Ohio or its counsel acted in bad faith. As the Commission found, the failure to file a final version of the RSC tariff, which was already filed in redline, was a mistake.

Third, in its July 15, 2022 application for rehearing (pp. 5, 11), OCC asked the Commission to make the updated RSC tariff be effective August 11, 2021. The *only* change to the RSC tariff was the addition of refundability language; the various rates set forth in that tariff

remain unchanged. AES Ohio's July 25, 2022 response (p. 2) stated that it would not oppose an order clarifying that the effective date of the refundability language was August 11, 2021, and the Commission's Eighth Entry on Rehearing (§ 25) did exactly that. OCC received the relief that it asked for, and customers have suffered no prejudice; they are in the same position today as if AES Ohio had filed a final version of the RSC tariff last year.

Fourth, AES Ohio has substantially complied with the Commission's orders.

Fifth, in any event, refunds are barred by law, and OCC has not established that AES Ohio violated any statutes or that the violations alleged by OCC would entitle OCC to the remedy it seeks.

Sixth, OCC's reliance on an exception to the mootness doctrines for matters that are capable of repetition yet evading review is misplaced because: (1) the Commission in fact reviewed the issues in this rehearing process; and (2) it is not probable that similar issues will arise in the future.

Seventh, the Commission has not violated the rehearing statute when it issued orders in this case because that statute allows the Commission to reconsider "any part" of an original order on rehearing. R.C. 4903.10.

II. BACKGROUND FACTS

In 2019, AES Ohio terminated its then-existing ESP and reverted to ESP I. Dec. 18, 2019 Second Finding and Order, § 27. Since the RSC was a term of ESP I, the Commission reinstated it. *Id.* at § 29.

In response to arguments from OCC, the Commission affirmed that the RSC was lawful and further held that it did not have authority to make the RSC subject to refund. June 16, 2021 Fifth Entry on Rehearing, ¶¶ 42-60. The Commission nevertheless ordered AES Ohio to propose additional language in its RSC tariff that would make amounts collected under the rider subject to refund "to the extent permitted by law." *Id.* at ¶ 64. AES Ohio filed a proposed, redline tariff with that language on July 16, 2021.¹

In the Commission's August 11, 2021 Sixth Entry on Rehearing, ¶¶ 48, 52, the Commission approved the redline tariff. However, AES Ohio inadvertently did not file a final version of the updated tariff. The Commission later found that AES Ohio's failure to file the tariff was a result of a "mistake[.]" August 10, 2022 Eighth Entry on Rehearing, ¶ 25.

On June 15, 2022, the Commission again approved the applicable tariff, and stated that the tariff would be effective as of filing. Seventh Entry on Rehearing, ¶¶ 23, 28, 29. On June 22, 2022, AES Ohio filed a final version of the tariff as ordered by the Commission.

OCC sought rehearing from the Seventh Entry on Rehearing and asserted that "[a]t a minimum, the PUCO should require DP&L to change the effective date of the stability charge tariffs (with the consumer refund language) to August 11, 2021, consistent with the PUCO's Sixth Entry on Rehearing that DP&L ignored." July 15, 2022 Application, p. 11. In its response to that application, AES Ohio stated that it would not oppose a Commission order that

¹ AES Ohio disputes that refunds are authorized under Ohio laws, and that the Commission had authority to order AES Ohio to include such language in its tariffs.

clarified that the tariff was effective as of August 11, 2021. July 25, 2022 Memorandum in Opposition, p. 2.

In the Eighth Entry on Rehearing, ¶ 25, the Commission gave OCC what it requested – it ordered that the tariff be effective as of August 11, 2021. The Commission concluded that making the tariff effective as of that date "will eliminate any and all prejudice claimed by OCC in its application for rehearing." *Id.*

III. OCC SEEKS REHEARING ON REHEARING

As the Commission held in its Ninth Entry on Rehearing, ¶ 27, the issues raised in OCC's September 9, 2022 Application for Rehearing were raised in OCC's July 15, 2022 Application for Rehearing and rejected by the Commission in its Eighth Entry on Rehearing. The Commission held that R.C. 4903.10 does not allow parties to seek rehearing on the same issues that were raised in a prior application for rehearing. *Id.* Accord: *Ormet Primary Aluminum Corp., et al. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, et al., Second Entry on Rehearing (Sept. 13, 2006), at 3-4; *In re The East Ohio Gas Co. d.b.a. Dominion East Ohio and Columbia Gas of Ohio, Inc.*, Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006), at 4; *In re AES Ohio ESP III*, Case No. 16-0395-EL-SSO, Fourth Entry on Rehearing (Nov. 8, 2018), at 17. OCC's most recent application seeks the same relief and should be rejected because OCC now seeks rehearing upon rehearing upon rehearing.

IV. AES OHIO ACTED IN GOOD FAITH

AES Ohio again stresses that it did not and would not deliberately disobey a Commission order, or knowingly make a false statement.

OCC has claimed (September 19, 2022 Application , p. 15) that undersigned counsel "lied" to the Supreme Court when we stated that "AES Ohio filed a 'proposed' tariff with the Commission on July 16, 2021, but that tariff has not been approved and is not currently operative." March 8, 2022 Fourth Merit Brief of Cross-Appellant The Dayton Power and Light Company d/b/a AES Ohio, p. 1 (Supreme Ct. Case No. 2021-1068). OCC's claim that undersigned counsel "lied" is categorically false. When we made that statement, we believed it to be true.

It is also significant that OCC does not and cannot identify any prejudice that it suffered as a result of counsel's statement to the Supreme Court. OCC's appeal was dismissed as premature. 04/13/2022 *Case Announcement*, 2022-Ohio-1156. Moreover, OCC claims (pp. 14-15) that investigating counsel's statement to the Court is how OCC discovered that AES Ohio had failed to file a final tariff in response to the Commission's Sixth Entry on Rehearing.

In any event, the Commission found that "there is no evidence of bad faith or the deliberate failure to perform a duty on the part of AES Ohio or its counsel" (Eighth Entry on Rehearing, ¶ 28), that AES Ohio had "mistakenly fail[ed] to timely file final tariffs" in response to the Sixth Entry (*id.* at ¶ 25), and that any delay was "inadvertent" (*id.*).

The Commission further stated (Eighth Entry on Rehearing, ¶ 25) that it "will not ascribe bad faith to AES Ohio or its counsel without evidence." In its application, OCC does not cite any evidence that AES Ohio or its counsel deliberately failed to comply with a Commission order or that they deliberately made any misstatement. The reason, of course, that OCC cites no such evidence is that there is none.

V. **THERE IS NO PREJUDICE TO CUSTOMERS**

In its July 15, 2022 Application for Rehearing (pp. 4, 7), OCC identified its alleged prejudice from AES Ohio's failure to file a final tariff after the Commission's Sixth Entry on Rehearing as follows:

"Coincidentally, note that for every day the tariff refund language was not in effect, that is a day DP&L would claim in the Supreme Court that it cannot be ordered to provide a refund to its 495,000 consumers in the event the Court reverses the PUCO on the stability charge. So DP&L benefits by delays in the effective date of refundability (to consumers detriment).

The tariffs contain the effective date of June 22, 2022, which erases ten months of refundability ordered in the PUCO's earlier tariff approval. Unless the effective date of the tariffs is corrected, reverting back to the prior PUCO effective date of August 11, 2021, DP&L consumers will be denied almost a year of refund protection. That's about \$60 million in lost consumer protection."

Further, in that same application, OCC stated (p. 5) that "[at] a very minimum, the PUCO should order [AES Ohio] to make its stability charges refundable as of August 11, 2021, as the PUCO originally ordered." OCC repeated that request on page 11 of its application: "[a]t a minimum, the PUCO should require DP&L to change the effective date of the stability charge tariffs (with the consumer refund language) to August 11, 2021, consistent with the PUCO's Sixth Entry on Rehearing that DP&L ignored."

The Commission did what OCC asked. Specifically, in its July 25, 2022 opposition to OCC's application, AES Ohio stated (p. 2) that it "would not object to any clarification by the Commission on rehearing that the effective date of the current RSC Tariff dates back to August 11, 2021, consistent with the Sixth Entry on Rehearing." The Commission ordered that the tariff with updated refundability language be effective as of the date of the Sixth

Entry on Rehearing and stated that doing so "will eliminate any and all prejudice claimed by OCC in its application for rehearing." Eighth Entry on Rehearing, ¶ 25.

Significantly, OCC does not claim that customers are in a different position now than they would have been had AES Ohio filed the tariff immediately after the Commission's Sixth Entry on Rehearing. The Commission's Order that the tariff be effective as of that date eliminates any prejudice that customers may have suffered.

VI. AES OHIO SUBSTANTIALLY COMPLIED WITH THE COMMISSION'S ORDERS

AES Ohio has substantially complied with the Commission's orders. Specifically, on July 16, 2021, AES Ohio filed redline tariffs with subject to refund language in them, as ordered by the Commission in its Fifth Entry on Rehearing; on June 22, 2022, AES Ohio filed tariffs with the subject to refund language as ordered by the Commission in its Seventh Entry on Rehearing; and on July 25, 2022, AES Ohio agreed not to oppose an order that clarified that the tariff was effective August 11, 2021, the date of the Commission's Sixth Entry on Rehearing. AES Ohio has thus substantially complied with the Commission's orders.

The Commission has held that a violation has not occurred if a party substantially complies with the applicable requirement. *E.g., In the Matter of the Application of the AEP Ohio Transmission Co.*, Case No. 17-2085-EL-BTX, Opinion, Order and Certificate (Sept. 20, 2018), ¶¶ 12, 83 (finding that substantial compliance with a Commission rule had occurred when the utility inadvertently failed to provide notice of particular deadlines, when the utility had otherwise complied with the notice requirements). *Accord: Valley Greyhound Lines, Inc. v. Pub. Utils. Comm.*, 148 Ohio St. 603, 606-07, 76 N.E.2d 608 (1947) (affirming Commission's finding

that appellee applicants' joint application to amend certificate of public convenience to substitute successor company was in "substantial compliance" with applicable statute).

VII. A REFUND WOULD NOT BE LAWFUL

As the Commission knows, refunds are ordinarily barred in Ohio. R.C. 4905.32; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2. OCC has asserted (Sept. 9, 2022 Application, p. 3) that AES Ohio violated R.C. 4905.54, 4905.22 and 4905.32, and argued that those statutes authorize the Commission to issue refunds. Note that OCC does not quote any of those statutes, does not identify any provision in those statutes that AES Ohio allegedly violated, and does not demonstrate that those statutes authorize refunds. As demonstrated below, AES Ohio did not violate any of those statutes, and even if it did, they do not authorize refunds.

A. Section 4905.54 is Not Applicable

Section 4905.54 states:

"Every public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force. Except as otherwise specifically provided in section 4905.95 of the Revised Code, the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense. All forfeitures collected under this section shall be credited to the general revenue fund." (Emphasis added.)

That section is not applicable here for two reasons.

First, AES Ohio complied with the Commission's orders "after due notice" by filing tariffs that had an effective date of the Commission's Sixth Entry on Rehearing, August 11, 2021. August 11, 2022 Final Tariff Filing.

Second, nothing in that statute authorizes the Commission to require refunds.

B. R.C. 4905.22 is Not Applicable

R.C. 4905.22 states:

"Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission." (Emphasis added.)

That section is not applicable here for two reasons.

First, there is no dispute that AES Ohio charged the rates that were included in the RSC tariff that the Commission approved in its August 11, 2021 Sixth Entry on Rehearing. AES Ohio thus did not charge "more than the charges allowed by law or by order of the public utilities commission," and complied with R.C. 4905.22.

Second, R.C. 4905.22 does not authorize refunds.

C. Section 4905.32 is Not Applicable

R.C. 4905.32 states in relevant part:

"No public utility shall charge, demand, exact, receive, or collect a different rate . . . for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund . . . any rate . . . except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service." (Emphasis added.)

That section is not applicable here for two reasons.

First, as discussed above, there is no dispute that AES Ohio charged the RSC rates that were contained in the tariff that the Commission approved in its Sixth Entry on Rehearing. Further, those exact same rates were contained in a tariff that AES Ohio filed on December 19, 2019. AES Ohio is thus in compliance with that statute since it charged the Commission-approved rates in its tariffs.

Second, that section does not grant power to the Commission to order utilities to issue refunds. The Commission's limited authority to require a utility to issue refunds comes from other sections of the Revised Code. *E.g.*, R.C. 4909.42 (a utility may implement rates subject to refund if the Commission does not decide a rate case within 275 days); R.C. 4928.143(F) (excessive utility earnings shall be "return[ed]" to customers).

OCC has asserted in this case that the second paragraph of that section authorizes the Commission to issue refunds. However, the second paragraph of that section begins with the phrase "No public utility shall" That paragraph is plainly a restriction on what a utility can do. It is *not* a grant of power to the Commission to order utilities to issue refunds. *Accord*: Fifth Entry on Rehearing, ¶ 52 ("We find that the Commission has no statutory authority to make rates and charges subject to refund at our discretion.").

If the General Assembly had intended to grant to the Commission the power to order utilities to issue refunds, then it would have done so in express language (as it did in R.C.

4909.42 and R.C. 4928.143(F)). The fact that the second paragraph in R.C. 4905.32 begins with the phrase "No public utility shall" establishes that it is a restriction on utility conduct and not a grant of power to the Commission.

D. OCC's Reliance on Mootness Doctrines is Misplaced

In the Commission's Ninth Entry, ¶ 32, it held that OCC's request for rehearing was "moot" because OCC had not suffered "any prejudice":

"The Commission finds that rehearing on this assignment of error should be denied as moot. On August 11, 2022, AES Ohio filed revised tariffs for the RSC which included the refund language and an effective date of August 11, 2021. Accordingly, all RSC charges collected since August 11, 2021 have been collected under a tariff which includes the refund language directed by the Commission. Moreover, OCC cannot demonstrate any prejudice under this assignment of error because, as stated above, OCC is in the same position today as if AES Ohio had immediately filed revised final tariffs, including the refund language, on August 11, 2021, the date the Commission issued the Sixth Entry on Rehearing."

OCC (pp. 2-4) argues that the issue is not moot because it is "capable of repetition, yet evading review."

The Supreme Court of Ohio has held that the "capable of repetition, yet evading review" exception to the mootness doctrine applies only in "exceptional circumstances" and requires that two factors be present:

"This exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."

State ex rel. Calvary v. City of Upper Arlington, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000) (per curiam) (emphasis added) (citation omitted).

To establish the first factor, the Court has held that a party must establish that the challenged action "is always so short as to evade review." *Id.* (emphasis added). *Accord: Spencer v. Kemna*, 523 U.S. 1, 18, 118 S.Ct. 978 (1998) (exception to mootness doctrine does not apply because party "has not shown . . . that the time between parole revocation and expiration of sentence is always so short as to evade review.") (emphasis added).

Here, OCC cannot establish that the challenged action "is always so short as to evade review" because OCC in fact has raised the issue in *three* applications for rehearing (filed on July 15, September 9, and November 4), and the Commission reviewed the issue (and rejected OCC's argument) in its August 10, 2022 Eighth Entry on Rehearing and October 5, 2022 Ninth Entry on Rehearing. The challenged action has thus in fact been reviewed, and OCC cannot establish that it "is always so short as to evade review."

Nor can OCC establish a "reasonable expectation" that it will be "subject to the same action again." *State ex rel. Calvary*, 89 Ohio St.3d at 231. (citation omitted). The circumstances giving rise to OCC's request for refunds in this matter are unique – OCC does not cite any examples of similar situations – and OCC cannot establish a "reasonable expectation" that it will be "subject to the same action again."

VIII. THE COMMISSION'S ENTRIES DO NOT VIOLATE THE REHEARING STATUTE

OCC has asserted that the Commission erred in the Seventh Entry on Rehearing by approving AES Ohio's tariffs. The Commission rejected that argument:

"In determining that OCC's assignment of error was moot, the Commission did not concede that OCC's characterization of the Seventh Entry on Rehearing was correct. Although the order was plainly styled "Seventh Entry on Rehearing," the order consisted of three distinct parts: (1) acceptance of the withdrawal of applications for rehearing; (2) the now-vacated approval of the proposed tariffs; and (3) granting a stay requested by OCC. Only the first part of the order was done pursuant to the Commission's authority under R.C. 4903.10. Under the second part, the Commission proceeded with its authority to approve proposed tariffs, independent of the rehearing statute. Further, in the Sixth Entry on Rehearing, the Commission did the exact same thing. The Commission denied the applications for rehearing filed by OCC and AES Ohio, and the Commission approved AES Ohio's proposed tariffs which included the refund language. Sixth Entry on Rehearing at ¶ 48, 51-53."

Ninth Entry on Rehearing, ¶ 36, n.1.

OCC now asserts (p. 5) that "there appears to be no authority (the PUCO does not cite any) for the proposition that an entry 'plainly styled' as an entry on rehearing has been, or can be, made independent of the rehearing statute – R.C. 4903.10." OCC's argument proves too much.

Specifically, the Commission's August 11, 2021 Sixth Entry on Rehearing was also "plainly styled" as an entry on rehearing. Most of that order is directed at rejecting OCC's Application for Rehearing. *Id.* at ¶¶ 1-47. However, in the last paragraph, the Commission ordered AES Ohio to file tariffs. *Id.* at ¶ 48.

Under OCC's new theory that a document "plainly styled" as an entry on rehearing must only address rehearing applications, the Order in paragraph 48 would be invalid. To be clear, AES Ohio does not assert that the order in ¶ 48 is invalid. AES Ohio is merely pointing out that OCC is making contradictory arguments, and that its latest argument is plainly flawed.

In any event, the rehearing statute authorizes the Commission to reconsider "any part" of its original order. R.C. 4903.10.

Respectfully submitted,

/s/ Christopher C. Hollon

Christopher C. Hollon (0086480)
AES OHIO
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7358
Telecopier: (937) 259-7178
Email: christopher.hollon@aes.com

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
FARUKI PLL
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: jsharkey@ficlaw.com
djireland@ficlaw.com

Counsel for AES Ohio

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of The Dayton Power and Light Company d/b/a AES Ohio in Opposition to Application for Rehearing by Office of The Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 14th day of November, 2022:

Jodi Bair
Office of Ohio Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215
jodi.bair@ohioattorneygeneral.gov

Counsel for Staff of the Commission

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com

Counsel for The Ohio Manufacturers'
Association Energy Group

Maureen R. Willis
William J. Michael
The Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215
maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov

Counsel for The Office of the Ohio
Consumers' Counsel

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Mkurtz@BKLawfirm.com
Kboehm@BKLawfirm.com
Jkylercohn@BKLawfirm.com

Counsel for Ohio Energy Group

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com

Counsel for The Kroger Company

Stephanie M. Chmiel
Kevin D. Oles
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for the University of Dayton

Matthew R. Pritchard
Bryce A. McKenney
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215
mpritchard@mcneeslaw.com
bmckenney@mcneeslaw.com

Counsel for Industrial Energy Users-Ohio

Robert Dove
KEGLER BROWN HILL +
RITTER CO., L.P.A.
65 East State Street, Suite 1800
Columbus, OH 43215-4295
rdove@keglerbrown.com

Counsel for Ohio Partners for
Affordable Energy

Carrie H. Grundmann
SPILMAN THOMAS & BATTLE, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
cgrundmann@spilmanlaw.com

Derrick Price Williamson
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com

Counsel for Walmart Inc.

Chris Tavenor
ENVIRONMENTAL LAW & POLICY
CENTER
1145 Chesapeake Avenue, Suite 1
Columbus, OH 43212-3449
ctavenor@elpc.org

Counsel for Environmental Law & Policy
Center

Michael Nugent
Evan Betterton
IGS ENERGY
6100 Emerald Parkway
Dublin, OH 43016
michael.nugent@igs.com
evan.betterton@igs.com

Counsel for IGS Energy and Interstate
Gas Supply, Inc.

Frank P. Darr
6800 Linbrook Boulevard
Columbus, Ohio 43235
fdarr2019@gmail.com

Counsel for Retail Energy Supply
Association

Steven D. Lesser
N. Trevor Alexander
Mark T. Keaney
Kari D. Hehmeyer
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
41 South High Street, Suite 2600
Columbus, OH 43215-6164
slesser@beneschlaw.com
talexander@beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@beneschlaw.com

Counsel for The City of Dayton
and Honda Development &
Manufacturing of America, LLC

Kara Herrnstein
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
kherrnstein@bricker.com

Counsel for ChargePoint, Inc.

Mark A. Whitt
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com

Counsel for Direct Energy Business LLC
and Direct Energy Services, LLC
Drew Romig
ARMADA POWER, LLC
230 West Street, Suite 150
Columbus, OH 43215
dromig@armadapower.com
dromig@nationwideenergypartners.com

Counsel for Armada Power, LLC
and Nationwide Energy Partners, LLC

Michael J. Settineri
Gretchen L. Petrucci
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
Columbus, OH 43215
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Armada Power, LLC
Constellation NewEnergy, Inc.
Constellation Energy Commodities
Group, Inc.
and Nationwide Energy Partners, LLC

Dylan F. Borchers
Devin D. Parram
Rachael N. Mains
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
dborcher@bricker.com
dparram@bricker.com
rmains@bricker.com

Counsel for The Ohio Hospital
Association

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com

Marion H. Little, Jr.
Christopher J. Hogan
ZEIGER, TIGGES & LITTLE LLP
41 South High Street
3500 Huntington Center
Columbus, OH 43215
little@litohio.com
hogan@litohio.com

Katie Johnson Treadway
James Dunn
ONE ENERGY ENTERPRISES LLC
Findlay, OH 45840
ktreadway@oneenergyllc.com
jdunn@oneenergyllc.com

Counsel for One Energy Enterprises,
LLC

Christina Wieg
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
cwieg@fbtlaw.com

Darren A. Craig (pending Pro Hac Vice)
Robert L. Hartley (pending Pro Hac Vice)
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
Indianapolis, IN 46204

Attorneys for Nationwide Energy
Partners LLC

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

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UNC**

Summary: Memorandum MEMORANDUM OF THE DAYTON POWER AND LIGHT
COMPANY D/B/A AES OHIO IN OPPOSITION TO APPLICATION FOR
REHEARING BY OFFICE OF THE OHIO CONSUMERS' COUNSEL electronically
filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company