BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan.	)	Case No. 22-900-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Revised Tariffs.	)	Case No. 22-901-EL-ATA
In the Matter of the Application of Dayton Power and Light Company d/b/a AES Ohio for Approval of Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	)	Case No. 22-902-EL-AAM

ONE ENERGY ENTERPRISES INC.'S MOTION TO DISMISS

Respectfully submitted on behalf of
ONE ENERGY ENTERPRISES INC.

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On September 26, 2022, The Dayton Power & Light Company (d/b/a AES Ohio, hereinafter "DP&L") filed an application in the above referenced cases (the "ESP IV Application") seeking various types of accelerated relief. More specifically, the ESP IV Application seeks approval by the Public Utilities Commission of Ohio ("Commission" or "PUCO") of a proposed electric security plan ("ESP IV") with a three-year term, authorization for certain accounting authority and approval of proposed tariff schedules. The ESP IV Application also requests that the Commission adopt an accelerated procedural schedule causing rates to become effective on or before July 1, 2023. DP&L filed its direct testimony on September 27, 2022.[1]

On November 28, 2022, One Energy Enterprises Inc. ("One Energy") moved to intervene in the above referenced cases.

[1] Ohio Administrative Code (O.A.C.) 4901:1-35-03(C) states that an ESP application shall be accompanied by testimony "… explaining and supporting each aspect of the ESP."

For the reasons set forth in the attached supporting memorandum, One Energy hereby requests that the Commission dismiss the ESP IV Application without prejudice.

Respectfully submitted on behalf of
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ONE ENERGY ENTERPRISES INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

BACKGROUND AND INTRODUCTION

On April 7, 2004, the Public Utilities Commission of Ohio ("Commission" or "PUCO") initiated an investigation in Case No. 04-486-EL-COI to review the financial condition of The Dayton Power and Light Company ("DP&L") because of concerns that actions by its parent company might negatively affect DP&L and its customers. In that proceeding, DP&L was directed to develop and submit to the Commission a comprehensive plan to insulate the regulated utility's operations and ratepayers from any untoward impacts of the relationship between DP&L and its parent company or any non-regulated affiliate. The Commission required that the plan include specific actions that would be taken to, among other things, maintain and improve the financial integrity of the regulated utility and ensure the quality and reliability of DP&L's regulated utility service.

On February 4, 2005 and February 14, 2005, respectively, DP&L filed the Commission-ordered plan of protection and a supplement to the plan of protection in Case No. 04-486-EL-COI. On page 5 of its proposed plan of protection, DP&L represented that it: (1) "upgraded the Manager of Operations position to specifically deal with reliability issues and Commission reporting compliance"; (2) "…continues to provide safe and reliable electric services, and consistently meets its reliability targets"; and (3) "…committed to significant capital investment over the next three years to maintain and enhance system reliability."[2] In its supplement to the protection plan, DP&L assured the Commission that its parent company (DPL, Inc.) had agreed to sell its interests in 46 private equity funds, and that the sale would strengthen "DP&L's financial condition and DP&L's continued ability to provide safe and reliable service."[3]

On May 19, 2011, AES Corporation ("AES") and several related entities filed an application in Case No. 11-3002-EL-MER seeking the Commission's consent and approval for a change of control over DP&L resulting in DPL Inc. (DP&L's immediate parent) becoming a wholly-owned subsidiary of AES.[4] AES, DPL Inc. and DP&L represented in its application in Case No. 11-3002-EL-MER that approving the change in control application would provide long term advantages including scale and scope benefits that would improve investment in distribution facilities and provide beneficial access to AES' managerial and technical expertise.[5] Specifically, on pages 6-8 of its application in Case No. 11-3002-EL-MER, AES explained:

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[2] *In the Matter of the Commission's Investigation of the Financial Condition of The Dayton Power and Light Company*, Case No. 04-486-EL-COI.

[3] *Id*.

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

[5] *Id.*, Application of the AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company dated May 18, 2011.

The merger will create an organization with significantly greater scale and scope than is the case for DPL Inc/DP&L prior to the merger. The merger would result in DPL Inc. becoming part of an organization with more than a tenfold increase in aggregate retail customers, megawatts in operation and employees. That greater scale and scope will improve DPL Inc.'s ability to continue investing in DP&L's plant, equipment and other assets, all of which will be beneficial to DPL Inc. and DP&L's customers and employees, and it will also improve DP&L's ability to purchase equipment and commodities on favorable terms.

***

In addition, AES, with $40.5 billion of assets on its balance sheet, is a much larger corporation than is DPL Inc. As an AES subsidiary, DP&L will benefit from AES's access to capital markets and its broad experience and strong relationships with the financial community. For example, AES raised approximately $1.6 billion in new equity in 2010. Under AES ownership, IPL has made substantial investments in plant in service, including over $500 million in environmental investments in its coal-fired generation units.

The merger will also result in DP&L having access to AES's significant managerial, operational and technical expertise. Access to those resources will assist the operation of DP&L's business, including with regard to economical purchases of fuel and other commodities, enhanced management of the risks of environmental compliance, and utilization of emerging technology.

Further, AES, DPL Inc. and DP&L represented to the Commission in its application in Case No. 11-3002-EL-MER that the proposed merger would result in reasonable rates. More specifically, AES, DPL Inc. and DP&L represented that: "The Commission is required to determine whether the merger will result in service at a 'reasonable rate.' Ohio Rev. Code § 4905.402(B). In the Application (p.10), Applicants demonstrated that the merger would not affect DP&L's rates because DP&L has an established Electric Security Plan ("ESP") from Case No. 08-1094-EL-SSO that extends through December 31, 2012."[6]

[6] Applicants' Reply Comments at 11 (August 18, 2011). The ESP approved in Case No. 08-1094-EL-SSO is the current ESP, commonly referred to as ESP I.

Unsurprisingly, AES' proposal was contested. The stakeholders that unsuccessfully contested the requested change of control warned the Commission about the risks embedded in AES' highly leveraged acquisition package.

> *According to the press release presented by AES on the announcement of the proposed merger, '[p]ermanent financing will include a combination of non-recourse debt, the re-issuance of corporate debt at AES that was temporarily paid down in 2010 and cash on hand.' The highly-leveraged transaction will potentially pressure AES to use its control over DPL to assure that DP&L and other DPL subsidiaries generate adequate cash flow to service the newly issued debt and that debt service can be expected to be drawn from the customers of DP&L. Given the exceptional returns on equity that DP&L has achieved under its current ESP, it is reasonable to assume (for purposes of evaluating the proposed transaction) that AES may have interests that cause it to direct that DP&L advance proposals that work against adequate service, reasonable rates and the policy set forth in Section 4928.02, Revised Code.*
>
> *DP&L already has secured substantial financial benefits that have not been subject to any Commission or customer interference because DP&L is not subject to Significantly Excessive Earnings Test ('SEET) proceedings. Given the financial pressure that the merger may cause and the already hefty returns earned by DPL under its current ESP, the suggestion that applying the current ESP rates for the remainder of the current ESP presents a benefit to customers fails to provide any support that the merger 'promote[s] public convenience,' as the Commission must find if it is to approve the Application.*[7]

The stakeholder warnings were brushed aside with the approval of the strongly contested change in control request. The Commission did so, in part, because of commitments by AES, DPL Inc. and DP&L to, among other things, maintain a capital structure for DP&L that included an equity ratio of at least 50 percent, and to not allow DP&L to realize negative retained earnings. As documented by the most recent merger-related annual report filed by DP&L on March 31, 2017

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[7] Initial Comments of the Industrial Energy Users of Ohio, July 18, 2011 at pages 7-8 (footnotes omitted).

in Case No. 11-3002-EL-MER,[8] and prior such annual reports, DP&L did **<u>not</u>** maintain the required capital structure[9] or comply with the prohibition against negative retained earnings.

Then, in 2013, the Commission heightened the risks foreshadowed above through its concession that allowed DP&L's infamous "rate stabilization charge" to continue beyond December 31, 2012[10] in the wake of DP&L's claims that ending the charge would threaten DP&L's financial integrity.[11]

Some 17 years have passed since DP&L assured the Commission that its parent company's financial condition would not negatively impact DP&L's operations or the ability of DP&L to maintain and enhance system reliability; and, over a decade has passed since the AES change in control. Yet, DP&L continues to assert, on behalf of its parent company, that its financial condition is threatening service quality and system reliability. DP&L's and its parent company's history of actions, inactions and demands connect to reveal a disturbing pattern of utter disregard for its electric distribution utility obligations. As the Commission knows, Case No. 11-3002-EL-MER is still open. To this point, DP&L and its parent have not been held accountable for their myriad of missteps, failed assurances and commitment breaches.

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[8] *See* Annual Compliance Report dated March 31, 2017 (with a certificate of service stating that service was completed by electronic mail on March 31, 2016 – one year prior to the Commission filing date).

[9] Pursuant to a strongly contested request by DP&L, the Commission permitted DP&L to temporarily deviate from the capitalization ratio commitment. In doing so, the Commission said that the commitment need not be met until January 1, 2018, and directed DP&L to file an application by January 1, 2017 if unable to achieve the required capital structure. In doing so, the Commission held that DP&L remained obligated to abide by its commitment to maintain positive retained earnings. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-240-EL-UNC (PUCO Finding and Order, September 17, 2014 beginning at page 16). On March 31, 2017, DP&L filed an application in Case No. 13-240-EL-UNC seeking authorization to maintain an adjusted and non-compliant capitalization ratio. That March 31, 2017 application by DP&L has not been addressed by the Commission, and the case remains open.

[10] Entry on Rehearing dated February 19, 2013, Case No. 11-3002-EL-MER *et al*.

[11] The Dayton Power and Light Company's Memorandum in Opposition to Application for Rehearing dated January 28, 2013, Case No. 11-3002-EL-MER et al. (referencing the Declaration of William Chambers at 2).

Looking back, there were many red flags that could have been, and perhaps should have been, collectively taken as a call to action for the Commission to intervene to protect consumers, the economy in DP&L's service area and DP&L's investors from permanent damage. But this disturbing history elicits a more important and pressing question moving forward. Is what's past prologue?

Here is what we know.

> 1. DP&L remains a for-profit electric light company and regulated monopoly. It is "…engaged in the business of supplying electricity for light, heat, or power purposes to consumers within [Ohio]."[12] It is an "electric supplier" with an affirmative obligation to furnish, within its certified territory, necessary and adequate services and facilities and to provide, through the operation of its business, instrumentalities and facilities that are adequate to meet the reasonable needs of consumers and inhabitants located in its service territory.[13]
>
> 2. DP&L's obligation to provide necessary and adequate service and facilities is not voluntary and, as noted below, Ohio law does not permit the Commission to award DP&L financial incentives to induce DP&L to do what it is already required to do under Ohio law.[14] In the event DP&L fails to meet these clear and longstanding obligations that arise as a matter of law, the Commission may, among other remedies, direct that such a failure be cured within a reasonable time and, if not so cured, the Commission may authorize another electric supplier to furnish electric service.[15]
>
> 3. As a public utility, DP&L is required, under the Commission's supervision, to carry a proper and adequate depreciation reserve or deferred maintenance account with the allowed charge for depreciation funding efforts

[12] R.C. 4905.03.

[13] R.C. 4933.83(B) and R.C. 4905.22.

[14] On December 15, 2022 the Federal Energy Regulatory Commission ("FERC") rescinded the regional transmission organization ("RTO") participation "incentive" it previously authorized for Ohio Power Company and AEP Ohio Transmission Company, Inc. because Ohio law makes such participation mandatory not voluntary, which followed a ruling by the Ninth Circuit Court of Appeals that an incentive cannot induce behavior that is already legally mandated. *See Office of Ohio Consumers' Counsel v. American Electric Power Service Corporation, American Transmission Systems, Inc. and Duke Energy Ohio, LLC*, Docket No. EL22-34-000 (Order on Complaint, December 15, 2022). At the Commission's urging, FERC previously denied DP&L's request for the RTO participation incentive for the same reason. *See The Dayton Power & Light Co.*, 176 FERC ¶61,025 (2021), order on reh'g, 178 FERC ¶61,102 (2022).

[15] R.C. 4933.83(B).

to keep public utility property "…in a state of efficiency corresponding to the progress of the art or industry."[16]

4. Ohio law requires the Commission to establish rules that include "…prescriptive standards for inspection, maintenance, repair, and replacement of the transmission and distribution systems of electric utilities…" that apply "…to each substantial type of transmission and distribution equipment or facility…" and "…otherwise provide for high quality, safe and reliable electric service…" These rules obligate each electric distribution utility to annually and publicly inform the Commission about the utility's compliance with the "minimum requirements for non-competitive services". The Commission has authority to enforce such compliance.[17]

5. Both distribution system and transmission system operators (including DP&L) are required to "establish, maintain, and comply with written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of [their] transmission and distribution circuits and equipment." There are seven required maintenance plans: (i) poles and towers, (ii) circuit and line inspections, (iii) primary enclosures and secondary enclosures, (iv) line reclosers, (v) line capacitors, (vi) right of way vegetation control, and (vii) substations.[18] These required plans are filed with the Commission and are subject to review by its Staff.

6. The Commission must consult with electric distribution utilities to review the distribution infrastructure in Ohio and with regional transmission organizations where such organizations own or control transmission infrastructure in Ohio.[19]

7. No Ohio EDU may supply noncompetitive retail electric distribution service except pursuant to a schedule that is consistent with the state policy in R.C. 4928.02 ***and*** filed with the Commission under R.C. 4909.18. By default, rates and charges for such distribution service shall be established in accordance with Chapters 4905 and 4909 of the Ohio Revised Code. The distribution service schedule that shall be on file with the Commission at the direction of the General Assembly must include an EDU obligation to build distribution facilities when necessary to provide adequate distribution service.[20]

[16] R.C. 4905.18.

[17] R.C. 4928.11(A).

[18] O.A.C. 4901:1-10-27. DP&L's most recent certified annual report was filed in Case No. 22-1000-EL-ESS on March 31, 2022 and shows, at page 20, **actual distribution system reliability-specific capital expenditures consistently and significantly below 2021 budgeted levels**. Because DP&L's annual performance covered by this report did not meet the EDU's performance standards, DP&L was required to submit an action plan, and DP&L did so saying that is committed to maintaining reliability despite decades of evidence to the contrary.

[19] R.C. 4928.111.

[20] R.C. 4928.15.

Given the General Assembly's directives, the duties imposed on electric distribution utilities in Ohio (including DP&L) and the Commission's duties, plus the reliability-related requirements that are amplified by the Commission's rules, the risk of distribution service reliability problems should not arise by surprise or be allowed to increase through procrastination or, bluntly stated, through non-compliance.

The ESP statute provides the Commission with discretionary authority to authorize distribution rates and charges without satisfying otherwise applicable requirements in Title 49 of the Ohio Revised Code.[21] However, the exercise of that discretion must be supported by evidence, respect Commission precedent, not grant incentives for performance already required by Ohio law, and not offend the other limitations imposed on the Commission by such things as the benefit-in-the-aggregate test and rulings by the Ohio Supreme Court.

In this context, DP&L has filed its ESP IV Application that, on the surface, seeks Commission approval of its ESP IV and other relief including authorization to provide, at the expense of its captive customers, non-utility goods and services. The ESP IV Application and supporting testimony acknowledge DP&L's persistent failures to meet standard measures of

[21] R.C. 4928.143(B).

distribution utility service reliability.[22] DP&L's ESP IV boldly proposes to hold the unmet electric facilities and service needs of its customers hostage until the Commission satisfies DP&L's financial and other demands measured by AES through the exercise of its sole discretion. Accordingly, the core relief requested by DP&L's fool-the-Commission-again ESP IV Application is incompatible with the letter and spirit of Ohio law.

Make no mistake, the ESP IV Application submitted by DP&L delivers a direct threat from AES. The application states, in unmistakable language, that any needed investment in DP&L's territory will <u>**not**</u> be forthcoming from AES or DP&L unless and until AES determines, in its sole discretion, that the Commission has satisfied certain subjectively-measured conditions.

> *The AES Corporation is **considering** making these investments in AES Ohio despite not receiving any distributions from AES Ohio since 2013. These equity investments will not only provide significant benefits to AES Ohio's customers by allowing it to improve its reliability and resiliency, but they will also help AES Ohio to improve its credit rating, which will allow it to raise debt at beneficial rates for customers. **The equity investment by The AES Corporation is predicated on a stable regulatory framework for Ohio, providing a predictable, timely and reasonable level of return. The Company expects that (i) various riders, including the proposed revenue requirements, requested in this case are approved, (ii) AES Ohio's pending request to defer***

[22] An investigation of DP&L's noncompliance with reliability standards is currently pending in Case No. 21-1220-EL-UNC. Meanwhile, in pending Case No. 21-956-EL-ESS, DP&L is proposing to relax or degrade the current reliability standards even though it has committed to seek Commission approval of more aggressive minimum reliability standards as a result of a Commission-approved settlement in its grid modernization case. *See* Case No. 18-1875-EL-GRD. In Case No. 18-1875-EL-COI, the Commission-approved smart grid plan ("SGP") Phase I was premised on a positive cost-benefit ratio <u>**with approximately 65 percent of the asserted customer benefits tied to improvements of 15 percent for the safe average interruption frequency index ("SAFI") and an improvement of 14 percent for system average interruption duration index ("SAIDI") when compared to baseline data reported for 2015-2019**</u>. DP&L is obligated to file an application modifying its minimum reliability standards to reflect these reliability improvements so that customers get the reliability value for which they are being charged for DP&L's grid modernization. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Plan to Modernize the Grid*, Case No. 18875-EL-GRD *et al*, Opinion and Order at 51-52 (PUCO, June 2, 2021). Thus far, increases in rates and charges to modernize DP&L's electric system seem to have no correlation with improvements in DP&L's system reliability.

decoupling amounts is approved[23], and (iii) AES Ohio's pending distribution rate case[24] is approved in-line with the Company's financial projections.[25]*(emphasis added).*

In other words, DP&L's proposed ESP IV weaponizes AES' arrogance; the proposed ESP IV is absurd, offensive to law and equity, unlawfully violative of the policy of Ohio,[26] and not offered in pursuit of any normative definitions of the public good. And, the claims of financial distress run contrary to AES' own words.

Based on AES's November 4, 2022 presentation provided in conjunction with its third quarter financial review of 2022[27], AES claimed to have approximately $1.6 billion in

[23] The hotly contested decoupling deferral proposal is before the Commission in Case No. 20-0140-EL-AEM because of an application filed by DP&L on January 23, 2020, almost three years ago.. The evidentiary hearing and briefing phase of that proceeding are complete. As correctly asserted in the Staff Report and briefs filed by the Commission Staff, DP&L's application proposes to improperly defer the collection of revenue (not expense) without the required compliance with Accounting Standards Codification ("ASC") 980-605, flunks the "six factor" test considered as a whole, is without precedent and is not warranted based on DP&L's benefit of the bargain claim. The decoupling rider in question was part of DP&L's ESP III, which DP&L unilaterally terminated when the Commission ultimately refused to authorize DP&L to continue yet another unlawful utility-financial-support rider. As the Commission has said, "issues raised by this deferral application are best addressed in the context of a base rate proceeding, where the Commission can evaluate not only revenues, but also … expenses, rate of return, and rate design…." *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval to Change Accounting Methods Associated with the Heating Value of the Natural Gas on its System*, Case No. 15-1238-GAAAM, Finding and Order (July 6, 2016) at p. 7. The pre-filed direct testimony of DP&L's Witness Hale in this case states (at page 4) that DP&L's financial projections included with the ESP IV Application assume that the decoupling deferral application is approved by the Commission.

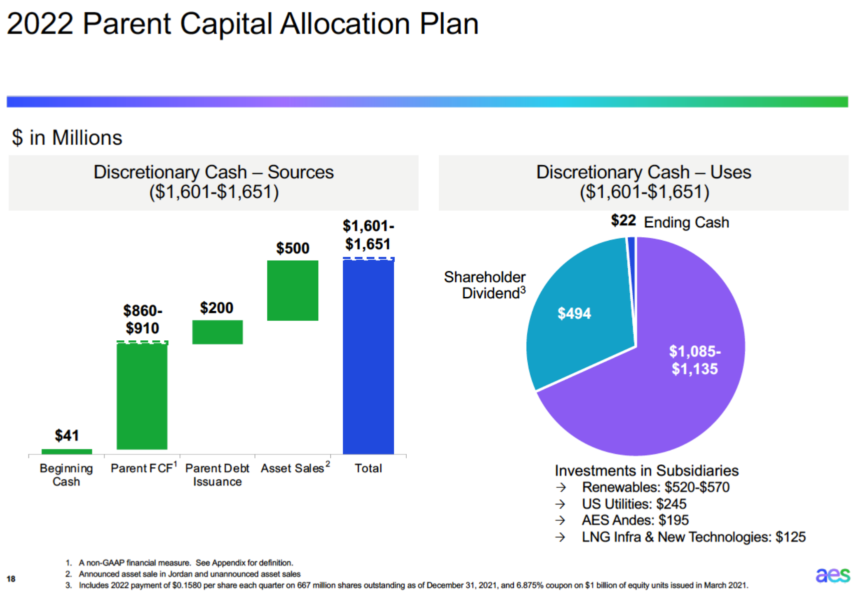
[24] The Commission issued its Opinion and Order in DP&L's most recent distribution rate case (Case No. 20-1651-EL-AIR) on December 14, 2022. While the Commission's decision authorized DP&L to increase its annual distribution revenue requirement by some $58 million (¶ 245), it also found, over DP&L's objection, that the effective date of the increase must be deferred because of the rate freeze commitment which DP&L made as part of the Commission-approved settlement in DP&L's current ESP (ESP I). Whether the Commission's distribution rate increase authorization is "in line with the Company's financial projections" is unknown and, perhaps, unknowable.

[25] See ESP IV Application at 2. AES' threat effectively deprives the Commission and interested parties of any opportunity to consider the potential merits (if any) of the ESP IV proposal relative to those resulting from the application of R.C. 4928.142 by interposing vague and subjective conditions and criteria explicitly reserved by AES (d/b/a DP&L) to determine if and when it will veto any ESP IV that is modified and approved by the Commission. As the Commission knows, this ESP "veto" right is not available if a standard service offer is approved pursuant to R.C. 4928.142. Effectively, these vague and subjective criteria make AES (the parent company) the *de facto* regulator by attaching beauty-in-the-eye-of-AES strings that prevents the Commission from justly and reasonably balancing the interests of customers and those of a utility's owners.

[26] R.C. 4928.02.

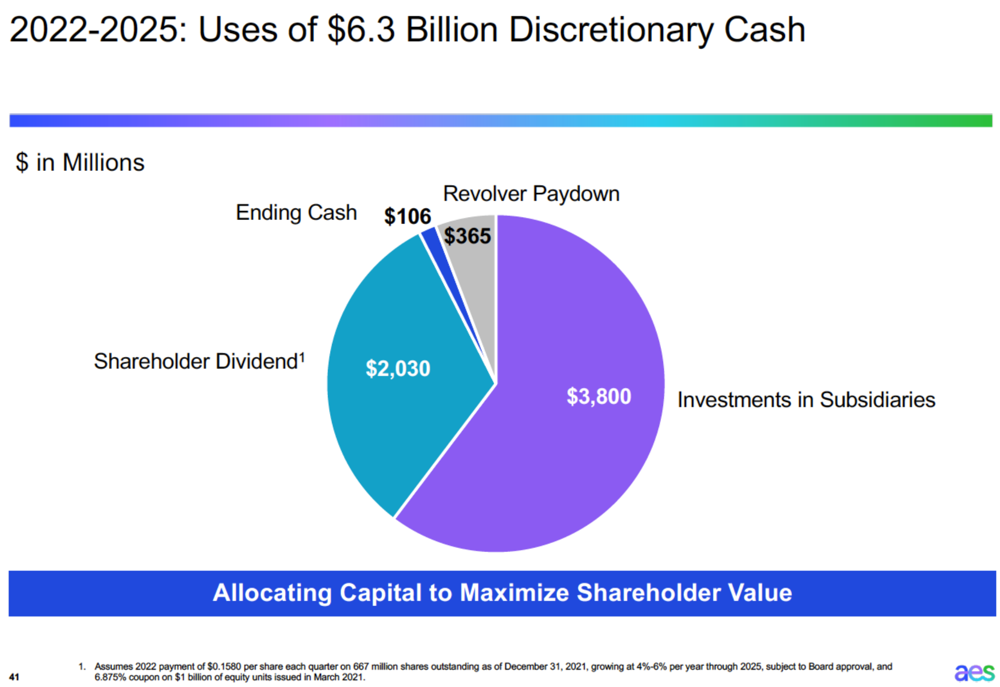
[27] The AES Corporation Third Quarter 2022, Financial Review, November 4, 2022::https://s26.q4cdn.com/697131027/files/doc_financials/2022/q3/11-03-22-Third-Quarter-2022-Financial-Review_FINAL.pdf

discretionary cash with $245 million allocated to US utilities and $494 million in cash allocated to pay dividends.



[28]

For the 2022-2025 time period, AES projected that it would accumulate $6.3 billion in discretionary cash, with over $2 billion used to pay dividends.



Despite DP&L's repeated claims of financial stress and potential limits on its access to capital if its proposed ESP IV is not approved to AES' liking, AES' latest financial review contains no hint of any financial difficulties or regulatory risks to AES or DP&L. In fact, here is what that presentation says (slide 8), about ESP IV:

[29]

[29] The AES Corporation Third Quarter 2022 Financial Review , November 4, 2022: https://s26.q4cdn.com/697131027/files/doc_financials/2022/q3/11-03-22-Third-Quarter-2022-Financial-Review_FINAL.pdf

The threat presented by DP&L's proposed ESP IV must not be underestimated or tolerated; it must be proactively addressed to prevent captive Ohio customers from being held hostage by AES' control of DP&L. What's past does not need to be prologue.

Among other things, AES must not be allowed, acting through DP&L, to leverage a threat of doing harm to captive customers and, accordingly, Ohio by continuing to litter history with stark examples of non-compliant inaction or breaches of commitments, and then be permitted to further exploit its relationship with captive customers to fund entry into new lines of business. It must not be enabled by the Commission to fortify the barriers erected and maintained by DP&L's incumbency in ways that might block or slow customer access to the innovation, continuous improvement, risk absorption, better value, lower prices and improved service that competitive sector suppliers of goods and services, like One Energy, are ready, willing and able to provide without the AES/DP&L strings or conditions attached. [30]

The pattern of DP&L's and AES' behavior before and after AES' acquisition of DP&L indicates that Ohio customers and the pro-competitive state policy will not be well served as long as DP&L's current parent, management and governance system are at the controls. Accordingly, DP&L's parent, management and governance must be ring-fenced to ensure that DP&L's

[30] To the extent that DP&L's distribution system functionality might be made more reliable and resilient through investment, Ohio's state policy favor's DP&L identification of the nature, quantity and specific locations of the needed improvement, and the use of a competitive bidding process to obtain and evaluate comparable and non-discriminatory proposals from customers and competitive retail electric services ("CRES") providers. AES' threat requires that DP&L's planning reliability and operating reliability practices, procedures and protocols be reformed to timely allow demand and supply side solutions to be focused on physical and operational improvements through a non-discriminatory and comparable evaluation process. For example, actionable information provided by DP&L may enable customers and CRES providers to install capacitor banks that can cost-effectively expand the real power capacity (reliability and resilience) of existing distribution lines and associated equipment. Appropriate rate design price signals incenting customers to improve their power factor or reduce load coincident with potentially service affecting peak loads can do the same. Instead, ESP IV proposes to insert DP&L (and AES) as ubiquitous "black box" toll booths through which customers may pass if DP&L's (AES') unreasonable demands are met.

obligations and rights are focused on and directed by the public interest and the advancement of Ohio's pro-competitive state policy.

LEGAL ANALYSIS

For the reasons above, and those more fully expressed below, the ESP IV Application must and should be dismissed, and One Energy requests that the Commission do so promptly to avoid any further wasting of the Commission's and stakeholders' finite resources. One Energy also urges the Commission to, again, direct DP&L to file and implement a meaningful plan of protection ("POP II"). Enough is enough.

A. Nonbypassable riders designed to improve an electric distribution utility's financial condition are not authorized by R.C. 4928.143.

DP&L's ESP IV Application claims that the Commission has discretionary ESP authority to, among other things, approve a distribution investment rider ("DIR" at page 6, Witness Adams), a proactive reliability optimization rider ("PRO", at page 6, Witness Adams), a regulatory compliance rider ("RCR", at page 7, Witness Donlan), a consumer programs rider ("CPR", at page 8, Witness Inman), a green energy alternative tariff ("GEA tariff" at page 9, Witness Donlon), an economic development incentive tariff (page 7, Witness Inman), a distribution decoupling rider ('DCR", at page 9, Witness Teuscher), a storm cost recovery rider ("SCRR", at page 9, Witness Donlan), an infrastructure investment rider ("IIR" at page 9, no witness identified), an energy efficiency rider ("EER", at page 10, Witness Houdek), a tax savings credit rider ("TSCR" at page 10, no witness identified) and a transmission cost recovery rider ("TCRR", at page10, Witness Adams) with continuation of the current TCRR Opt-Out Pilot Program.

The testimony that DP&L was required to file in support of the ESP IV Application makes it clear that the gaggle of riders was advanced by DP&L to improve its financial condition. This EDU-financial-improvement-objective cannot be advanced through the authority the Commission possesses pursuant to R.C. 4928.143. And, as discussed below, the Commission has already recently done what it can do through the exercise of its ratemaking authority to reasonably compensate DP&L for the provision of distribution service and to safeguard DP&L's financial integrity.[31]

In response to Ohio Supreme Court decisions reversing PUCO decisions authorizing riders designed to improve an electric distribution utility's financial condition, the Commission held in DP&L's ESP III proceeding[32] that "[t]he line of cases from *Columbus S. Power Co.*, 2011-Ohio-1788, to *Ohio Edison* demonstrates that non-bypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans."[33]

The pre-filed direct testimony of DP&L Witness Malinak, at page 22-23, explains DP&L's motivation for proposing the riders:

> ***Q. For a number of the riders, you state that legally the full benefits and cost would be available if AES Ohio were operating under an MRO, but practically they would not. Can you explain?***
>
> *A. Yes. As I discuss below, AES Ohio has long been operating under financial stress which has inhibited its ability to make needed capital investments and operation and maintenance ("O&M") expenditures. ESP 4 proposes a number*

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[31] *In Re Application of the Dayton Power & Light Company to Increase its Rates For Electric Distribution, Case No. 20-1651-EL-AIR et al.* (Opinion and Order, December 14, 2022, at pages 36-37).

[32] DP&L unilaterally terminated and withdrew its ESP III, thereby reverting to its ESP I to reinstate the Rate Stability Charge ("RSC") authorized by the Commission. When the Commission partially approved DP&L's request to revert to ESP I, AES Ohio issued a press release saying that the reinstatement of the RSC would – wait for it – allow "…DP&L to make investments in its transmission and distribution system to support basic reliability in the short-term." The December 18, 2019 AES Ohio press release is available at the following link: https://www.aes-ohio.com/puco-partially-approves-dpls-rate-request-modifications.

[33] *In Re Application of the Dayton Power & Light Company*, Case No.16-395-EL-SSO *et al*, Supplemental Opinion and Order (November 21, 2019 at page 45, ¶ 108). While the ESP statute does give the Commission some authority to approve provisions regarding an EDU's distribution service, the exercise of this authority requires the Commission to examine the reliability of the EDU's distribution system and to ensure that the EDU is placing sufficient emphasis on, and dedicating sufficient resources to, distribution system reliability. Despite DP&L's repeated distribution system reliability under achievement, the Commission has not begun or completed such an examination.

> *of beneficial programs that are intended to address such past deficiencies, as well as support grid reliability and resiliency, with associated cost recovery coming through riders. AES Ohio's ability to implement those programs in a robust and timely fashion would be enhanced under ESP 4 because the utility would be able to recover certain of its costs on an accelerated basis. AES Ohio would recover these costs through several of those riders, as compared to a more delayed recovery under standard rate cases, such as those that would be filed under an MRO. Specifically, under an MRO, I understand there would be a legal basis to recover the relevant program costs (through a distribution rate case or otherwise), but the recovery would be slower, on the order of approximately three years before costs would be included in rates, versus approximately 15 months or less under ESP 4. Due to the financial stress under which AES Ohio is currently operating, and the relative lack of rider mechanisms under an MRO, AES Ohio either could not provide the full benefits of the relevant programs to its customers or would be delayed in doing so.*
>
> *Q. What is the basis for your conclusion that AES Ohio has been operating under financial stress?*
>
> *A. I have analyzed this issue extensively in prior testimonies filed with this Commission. As part of that analysis, I cited evidence that AES Ohio's credit ratings were at the lower end of investment grade or even rated below investment at times by Standard & Poor's ("S&P"), which is low for a regulated Transmission and Distribution utility. This evidence indicates that AES Ohio historically has been operating under financial stress. Furthermore, AES Ohio is in the same position today. As of the date of this testimony, AES Ohio's long term issuer ratings and outlooks are as follows: Moody's: Baa2/Stable; Fitch: BBB-/Negative; S&P: BB+/Negative. Thus, Moody's and Fitch have AES Ohio's current ratings at the lower end of investment grade, while S&P has the utility's rating at below investment grade. Both Fitch and S&P have a negative outlook for AES Ohio's ratings. These relatively low credit ratings for a regulated utility, especially the below investment grade S&P rating, combined with the negative outlooks, clearly indicate that AES Ohio is currently financially stressed, as it has been in the past.*

DP&L's proposed ESP IV is a "trojan horse" which DP&L advances to secure Commission approval of riders designed solely to improve its financial condition. Such financial-improvement may not be considered or approved as part of an ESP; and, because it is the underlying basis for the entirety of the ESP IV Application, the entirety of the proposal should be dismissed.

Further, DP&L's ESP IV application states that the RCR, PROR, RCR, CPR, DDR, SCRR, and IIR are proposed pursuant to R.C. 4928.143(B)(2)(h). Section B(2)(h) of the ESP statute provides the Commission with discretionary authority to, where proper, authorize incentives when a utility's achievements go beyond the call of duty. Accordingly, and as part of any determination regarding the inclusion of any provision described in R.C. 4928.143(b)(2)(h) in any ESP, the Commission must:

> *…examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.*

The Ohio Supreme Court addressed the meaning of R.C. 4928.143(B)(2)(h) when it reversed the Commission's authorization of a "distribution modernization rider" ("DMR") as part of a FirstEnergy ESP proposal, explaining:

> The commission relied on a dictionary definition of 'incentive' as 'something that stimulates one to take action, work harder, etc.; stimulus; encouragement.' Pub. Util. Comm. No. 14-1297-EL-SSO, Fifth rehearing entry, at ¶ 190, quoting *Webster's New World Dictionary* 682 (3d College Ed.1988). The commission found that under its preferred definition, the DMR qualified as an incentive under R.C. 4928.143(B)(2)(h) because the rider "is intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems." Id. at ¶ 190.
>
> Although the commission defined 'incentive', it did not explain how the DMR operates as an incentive. An incentive generally serves to induce someone to take some action that otherwise would not be taken but for the incentive. Moreover, the DMR is a financial incentive and 'it is inherent in an incentive payment that the recipient must do something to be paid.' *Len Stoler, Inc. v. Volkswagen Group of America, Inc.*, 232 F.Supp.3d 813, 822 (E.D.Va.2017). That is, the payment of a monetary incentive is generally conditioned upon completion of a particular action.
>
> In the context of public-utility regulation, cost-based ratemaking already ensures that the utility will recover its prudently incurred costs of providing service plus a fair rate of return on its capital investments (such as power plants or distribution systems). R.C. 4909.15(A); *Babbit v. Pub. Util.*

> *Comm.*, 59 Ohio St.2d 81, 90, 391 N.E.2d 1376 (1979). In contrast, incentive ratemaking uses rewards and penalties that link utility revenues to various standards or goals.[34]

The ESP statute does not authorize the Commission to provide incentives – extra compensation or accelerated compensation—for doing what a utility must do as a matter of law, or to provide incentives that have no connection to the achievement of any quantitative standards or goals. And, neither DP&L's history (including decades of claims of financial distress and failure to invest in its distribution system) nor the evidence presented in this case (the omission in the ESP IV Application and DP&L's prefiled direct testimony of any standards or goals) demonstrate DP&L's achievements have gone beyond the call of duty in a manner that would entitle it to financial incentives. Quite the opposite, its performance has failed to satisfy basic reliability standards. As a result, the Commission has no authority to consider or grant DP&L's as-presented request for authorization of riders RCR, PROR, RCR, CPR, DDR, SCRR, and IIR.

B. The ESP IV Application is an unlawful collateral attack on the decision in DP&L's recent distribution rate case.

DP&L's prefiled direct testimony also makes it clear that the proposed ESP IV is populated with riders designed to bypass a holistic evaluation of the return to which DP&L might stake a just and reasonable claim in the event it does, someday, satisfy its EDU distribution service obligations.

For example, at page 3 of the prefiled direct testimony of Witness Adams, DP&L asserts that the proposed DIR is designed to "…address the regulatory lag between rate case filings." Of course, any such lag is largely in DP&L's control.

[34] *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 at ¶ 15-17, 2019-Ohio-2401 (2019).

In addition, the prefiled testimony of Witness Malinak asserts, at page 8, that DP&L's ESP IV would enhance and accelerate cost recovery "...compared to a more delayed recovery under standard rate cases."

But, as DP&L knows or should know, the traditional ratemaking formula used in Ohio to compute a utility's just and reasonable return for distribution service allows, when requested, justified and approved by the Commission, the inclusion of an allowance for working capital.[35] Tellingly, DP&L's distribution rate increase request recently decided in Case No. 20-1651-EL-AIR did not include a request for an allowance for cash working capital and, more importantly, included a request for a working capital allowance without DP&L having performed or submitted a required lead-lag study. In response to this fundamental failure, the Commission accepted the Staff's recommendation to reject DP&L's proposed working capital allowance:

> The Commission adopts Staff's recommendation as to the evaluation of AES Ohio's working capital allowance. Accordingly, we deny the Company's request for a working capital allowance adjustment to its rate base. In reaching this result, we accept the determination that **it is improper to consider working capital other than wholistically**. Further, while Ohio Adm. Code 4901-7-01, Appendix A at 37-38 describes an applicant's obligation to provide a lead lag study as to cash working capital amounts within a request for a working capital allowance, we decline to find that the rule excuses an applicant from the obligation to fully support its requested working capital allowance. This determination is especially important here, where AES Ohio's most recent rate case reflects a negative working case capital amount, which would serve to reduce the non-cash allowance that it requests in this case (Staff Ex. 9 at 4).[36]

(Emphasis added).

[35] "Working capital has been generally defined as the average amount of capital provided by investors in the Company, over and above the investments in plant and other specifically identified rate base items, to bridge the gap between the time that expenditures are required to provide service and the time collections are received for the service." Staff Report of Investigation at page 12, Case No. 20-1651-EL-AIR et al.

[36] *In Re Application of the Dayton Power & Light Company to Increase its Rates For Electric Distribution, Case No. 20-1651-EL-AIR et al.* (Opinion and Order, December 14, 2022, at page 40) ("DP&L Rate Case Order").

The Commission's recent decision in DP&L's distribution rate case proceeding holistically evaluated the justness and reasonableness of the compensation which DP&L should have a reasonable opportunity to collect. As a result, the Commission made upward adjustments to address any financial stress that might be legitimately and lawfully claimed by DP&L.[37] In other words, the Commission has already done what it could through the exercise of its ratemaking authority to safeguard DP&L's financial integrity. Any effort by DP&L to leverage claims of financial stress to its advantage in the ESP IV proceeding (including through the inclusion of countless riders) is, in effect, a prohibited collateral attack on the Commission's recent rate case decision.

C. R.C. 4928.143 Does Not Allow for Granting Relief that May Be Available Pursuant to R.C. 4928.47 and R.C. 4905.31.

DP&L's ESP IV Application states (at pages 8-9) that its Green Energy Alternative tariff proposal was and is made pursuant to R.C. 4928.47.[38] R.C. 4928.47 provides an opportunity for

[37] DP&L Rate Case Order at pages 36-37 (emphasis added):

> *Absent special circumstances calling for downward or upward adjustments, the Commission further finds it reasonable to begin at the range midpoints: a 7.32 percent ROR and 9.78 percent ROE.* ***In this case, however, special circumstances do exist, and they point to upward adjustments. The Commission specifically highlights two of those circumstances: (1) the heightened financial risk that the Company currently faces, and will likely continue to face, which increases the cost of equity and (2) the Company's concurrent need to be able to continue to attract and invest the capital needed to make customer-beneficial network renovations and improvements to support maintaining and improving reliability and service quality for customers. In this, we acknowledge that while rate payers cannot be held responsible for the business decisions made by a company in acquiring a utility the Commission must do what we can to safeguard the financial integrity of the regulated utility providing essential electric service to Ohioans.*** *Further, we agree with the concerns cited by Staff in its recommended risk-free rate of return calculation, which include extraordinary forecasting variables such as the COVID-19 pandemic and recent interest rate increases. Thus, in determining the amount of the upward adjustment, we must find a reasonable balance of interests. In doing so, the Commission concludes that an ROR and ROE above the midline but below the upper quartile is appropriate. We further find it appropriate to cap the ROE at its current level of 9.999 percent, which is consistent with the ROE in AES Ohio's last rate case.*

[38] R.C. 4928.47 states that the Commission shall not authorize an EDU to collect any costs associated (assigned or allocated) with an approved mercantile customer agreement from customers other than the participating mercantile customer(s).

an EDU to, on a non-discriminatory basis, "enter into ***an agreement*** having a term of three years or more with ***a mercantile customer*** or ***group of mercantile customers*** for the purpose of constructing a customer sited renewable energy resource." (Emphasis added). That agreement is "subject to approval" by the Commission.[39] The statutory vehicle for securing Commission approval of such an agreement requires a filing pursuant to R.C. 4905.31 and applicable Commission rules by an EDU, a mercantile customer or a group of mercantile customers. There is no language in R.C. 4928.143 that allows the Commission to review or approve agreements filed with the Commission pursuant to R.C. 4928.47, or that indicates that R.C. 4928.143 may be used to grant the utility blanket authority for agreements contemplated by R.C. 4928.47 as DP&L's proposed tariff implies.

In addition, DP&L's ESP IV Application lacks any explanation of the required accounting or process that will be employed to ensure the cost/recovery segregation required by R.C. 4928.47 is properly implemented, capable of being audited and devoid of code of conduct loopholes. Therefore, the Green Energy Alternative tariff proposal as proposed is improper and the ESP IV Application should be dismissed.

D. R.C. 4928.143 does not permit the Commission to authorize an EDU to engage in non-utility lines of business, to bundle non-utility and regulated lines of business w, to secure accounting authority that facilitates EDU engagement in non-utility lines of business or to make captive distribution customers responsible for any cost incurred by an EDU pursuing non-utility lines of business.

DP&L's ESP IV proposal invites the Commission to use the ESP statute to make DP&L a necessary party in a stream of commercial activity that is already occurring in the goods and services market (the competitive sector), thereby requiring regulatory oversight in areas for which the Commission has no jurisdiction. This invitation includes DP&L's entry into (or expansion of)

[39] R.C. 4928.47.

activities associated with electric vehicle (EV) charging (including the sale of chargers https://aesohiomarketplace.com/) despite the fact that the PUCO has held, in Case No. 20-434-EL-COI, that electric vehicle charging is not within the scope of public utility activities that are regulated by the Commission.[40]

As the Commission knows, Ohio's Department of Transportation (ODOT) is the lead Ohio agency responsible for statewide administration of Ohio's EV charging program and the distribution of Ohio's share ($140 million) of the federal infrastructure formula funding.[41] Ohio's Drive Ohio https://drive.ohio.gov/home is also involved. It is telling that there is nothing in DP&L's ESP IV application or prefiled testimony indicating that it has developed its EV charging lines of business ambitions in coordination with ODOT or will, if approved, administer such proposals to best leverage federal funds.[42]

To the extent that DP&L is seriously interested in absorbing the business and financial risks associated with entering into or expanding non-utility lines of business, the Commission should ensure that: (i) the risk and cost falls on DP&L's parent company or shareholders; and, (ii) DP&L's captive electric distribution service customers are proactively insulated against such risks

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[40] *See* Finding and Order (July 1, 2020).

[41] https://www.transportation.ohio.gov/about-us/news/statewide/ohio-announces-statewide-approach-to-ev-charging%206-30-20b.

[42] Ohio Senate Bill 307 addresses EV charging and centralizes Ohio's EV charging efforts through Drive Ohio and the creation of a task force within Drive Ohio. SB 307 was introduced on March 2, 2022 and referred to the Energy and Public Utilities Committee on March 16, 2022. SB 307, if enacted, would expand the policy in R.C. 4928.02 to add the following: *Encourage electric distribution utilities to deploy electric grid infrastructure, including additions and improvements to utility property that operate as part of the electric distribution grid, through competitively neutral programs that support the development of electric vehicle charging infrastructure, minimize customer costs for the construction of the infrastructure, and allow for utility recovery of prudently incurred program costs.* SB 307 would also add new section R.C. 4928.1414 which says: *An electric distribution utility may develop programs to promote, prepare for, and support transportation electrification within the utility's certified territory. The programs shall be developed as part of the utility's electric security plan established under section 4928.143 of the Revised Code.* SB 307's addition of R.C. 4928.1414 suggests that EDU efforts to "…promote, prepare for and support transportation electrification" are not contemplated by the existing ESP statute. *See* November 29, 2022 Testimony of Marc Ritter on behalf of AEP-Ohio: https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA134-SB-307 file:///Users/sam/Downloads/SB307-AEP-Testimony.pdf.

through the imposition of appropriate audit-ready accounting protocols and structural corporate separation requirements that preclude DP&L from seeking or securing an advantage through its regulated utility role.[43]

CONCLUSION

For the reasons set forth in the above supporting memorandum, One Energy hereby requests that the Commission dismiss DP&L's September 26, 2022 application without prejudice.

Respectfully submitted on behalf of
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[43] Proper accounting associated with EDU engagement in non-utility lines of business should result in direct assignment or allocation of all costs resulting from such activities either away from the regulated utility or "below the line". Conceptually speaking, this conclusion extends to DP&L's Green Energy Alternative ("GEA") proposal which signals DP&L's interest in working with mercantile customers *via* a non-described reasonable arrangement process that will necessitate future PUCO approvals, to install renewable energy resources. Mercantile customers already have statutory authority to seek a reasonable arrangement for any purpose that might be served by DP&L's GEA proposal.

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 Motion to Intervene was served upon the parties of record listed below this 9th day of January 2023 *via* electronic mail.

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