

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton Power    )  
and Light Company for Approval of its Electric        ) Case No. 16-0395-EL-SSO  
Security Plan.    )

In the Matter of the Application of the Dayton Power    ) Case No. 16-0396-EL-ATA  
and Light Company for Approval of Revised Tariffs.        )

In the Matter of the Application of the Dayton Power    )  
and Light Company for Approval of Certain                ) Case No. 16-0397-EL-AAM  
Accounting Authority Pursuant to Ohio Rev. Code §        )  
4905.13.    )

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**MEMORANDUM CONTRA APPLICATIONS FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra to protect Dayton Power & Light Company ("DP&L") consumers from paying their utility tens of millions of dollars in unjust and unreasonable charges to subsidize old, uneconomic coal plants. In its Opinion and Order issued on October 20, 2017 ("Order"), the Public Utilities Commission of Ohio ("PUCO") approved the Reconciliation Rider. It allows DP&L to charge all consumers to subsidize the Ohio Valley Electric Corporation ("OVEC"). Certain other parties (marketers, industrial interests) don't like that. They want only standard service offer ("SSO") customers – residential and small businesses, by and large – to pay (100%) for the Rider. So they have filed applications for rehearing to enlist the PUCO's help in making a massive shift

in costs from all customers to only residential customers and small business.<sup>1</sup> The PUCO should not do so.

OCC files this memorandum contra the intervenors' applications for rehearing to protect consumers. As explained below, the PUCO should reject the various intervenors' applications for rehearing.

## **II. RECOMMENDATIONS**

The Order in this electric security plan ("ESP") proceeding has only confirmed what consumers learned long ago – that ESPs and settlements are bad for consumers and the State of Ohio. Rather than facilitating the competitive marketplace and the low prices it brings, ESPs result in more government regulation, subsidies (for utilities and settlement signatories), single-issue ratemaking, and higher prices for consumers. Under ESPs, customers are required to fund excessive profits, just not significantly excessive profits.

And while the typical ESP is bad, this one is even worse given that it has authorized DP&L to charge customers above-market prices to subsidize two old, uneconomic coal plants, which can no longer compete in the competitive market. This is contrary to competition and the intent of the 1999 law, S.B. 3.<sup>2</sup>

Just as bad, the Order approved a settlement where the utility bought signatures by handing out cash and cash equivalents to parties who signed or did not oppose the

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<sup>1</sup> See Applications for Rehearing of IGS, Inc. ("IGS"), Ohio Manufacturers Association Energy Group ("OMAEG"), Industrial Energy Users of Ohio ("IEU-Ohio"), Kroger Co. ("Kroger"), Retail Energy Supply Association ("RESA") (Nov. 20, 2017).

<sup>2</sup> See Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999.

settlement. And the settlement process itself is tainted by the fact that the utility possesses unequal bargaining power by virtue of its veto power over any PUCO modifications.<sup>3</sup>

In order to protect consumers, the PUCO should eliminate ESPs and overhaul the settlement process in order to create a more just and reasonable process.

In response to the Order, applications for rehearing were filed by numerous parties. Yet the arguments in the applications for rehearing are essentially three: (1) there is no record support making the Reconciliation Rider nonbypassable; (2) the PUCO failed to accord the terms of the Settlement substantial weight; and (3) a nonbypassable OVEC rider is not lawful or reasonable. While OCC is not conceding that the Reconciliation Rider is lawful or reasonable (OCC believes that it is neither), none of the intervenor arguments merit rehearing.

**A. Making the Reconciliation Rider nonbypassable is supported by record evidence and lessens the harm to standard service offer consumers.**

The PUCO modified the Amended Stipulation and Recommendation (“Settlement”) to make the Reconciliation Rider nonbypassable instead of bypassable because “there is potential for escalating bill impacts as shopping increases.”<sup>4</sup> Several

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<sup>3</sup> See *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (“In the case of an ESP, the balance of power created by an electric distribution utility’s authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility’s ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.”).

<sup>4</sup> Order at 63.

intervenors argue that making the Reconciliation Rider nonbypassable is unlawful under R.C. 4903.09 because doing so lacks record support.<sup>5</sup> They are wrong.

OCC witness Kahal and DP&L witness Schroeder both provide direct record evidence in support of the PUCO's conclusion. In his supplemental direct testimony, OCC witness Kahal explained that the Reconciliation Rider was unreasonable because it would result in higher charges to SSO customers as shopping increases.<sup>6</sup> For example, Mr. Kahal explained:

There are additional practical or common-sense concerns regarding [the Reconciliation Rider's] anomalous cost allocation. It essentially assigns all costs to one narrow set of customers (as indicated, unrelated to cost causation or cost responsibility), in this case those who take SSO. For example, assume that all OVEC charges could be fully collected by a charge to all distribution customers of 0.1 cents per kWh, and further assume that SSO is 25 percent of total DP&L kWh sales. Hence, this direct assignment would require a charge to SSO customers of 0.4 cents per kWh— a 400 percent increase over a more conventional allocation. All other customers pay zero. This is clearly unreasonable and unfair. It effectively targets residential and small commercial customers because these are the customers more likely to be taking SSO service. Further, no one has any idea what the SSO load will be over the next six years (due to migration to competition or municipal aggregation). In my example, the already onerous 0.4 cents charge for SSO customers now goes to 0.8 cents as compared to a more reasonable 0.1 cent if assigned to all distribution customers. Such an outcome is unfair and unacceptable.<sup>7</sup>

Similarly, under cross-examination by OCC, Ms. Schroeder admitted that increased shopping would lead to an increase in charges to SSO customers under a bypassable Reconciliation Rider.<sup>8</sup> Specifically, Ms. Schroeder admitted:

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<sup>5</sup> IGS Application for Rehearing at 11-14; Kroger Application for Rehearing at 7-9; OMAEG Application for Rehearing at 10-12; RESA Application for Rehearing at 4-8; IEU-Ohio Application for Rehearing at 2-4.

<sup>6</sup> See Kahal Supplemental Testimony at 36-38 (March 3, 2017).

<sup>7</sup> Kahal Supplemental Testimony at 36-37 (emphasis added).

<sup>8</sup> See Transcript Vol. II at 350:21-351:9 (Shroeder).

Q. Okay. But you are going to collect a certain amount under the reconciliation rider and that's the difference between the cost and the revenues, correct?

A. That will be how it's proposed, yes.

Q. Okay. And only SSO customers are going to pay that amount, whatever it is, correct?

A. Or receive that benefit.

Q. Okay. **So as more customers shop**, given -- given a cost for the reconciliation rider, **the amount of that cost is going to be borne by SSO customers is going to necessarily increase, correct?**

A. I would say -- **I would agree with that in the aggregate.**<sup>9</sup>

Thus, there is direct record evidence to support making the Reconciliation Rider nonbypassable for all customers.<sup>10</sup> These assignments of error should be denied.

**B. The PUCO did not err by making the Reconciliation Rider nonbypassable, thereby protecting consumers.**

Several intervenors argue that making the Reconciliation Rider nonbypassable is unlawful because the PUCO failed to give the terms of the Settlement substantial weight.<sup>11</sup> This argument has no merit.

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<sup>9</sup> Id (emphasis added).

<sup>10</sup> Any failure by the PUCO to cite to this, or any other, specific piece of evidence to support its conclusion is an omission of a technical nature, which does not render the Order void. *East Ohio Gas Co. v. Public Utils. Comm'n.*, 45 Ohio St.2d 86, 92 (1976).

<sup>11</sup> Kroger Application for Rehearing at 5-7; OMAEG Application for Rehearing at 8-10.

While the terms of a settlement may be given substantial weight, the PUCO is not bound by a settlement. As the PUCO has relevantly and aptly stated: “[p]arties to any stipulation are well aware that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission.”<sup>12</sup> Indeed, R.C. 4928.143(C)(1) gives the PUCO the express authority to modify a settlement, and the PUCO routinely does so.<sup>13</sup> Here, the PUCO reviewed the record evidence, including the Settlement, and decided to use its discretion to modify it. The PUCO is well within its rights to do so and no intervenor cites compelling legal authority stating otherwise. Thus, these assignments of error should be denied.

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<sup>12</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing at P 51 (August 16, 2017).

<sup>13</sup> See e.g. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 96-99 (March 31, 2016) (“However, before the Commission can find that the Stipulations benefit ratepayers and advance the public interest, a number of additional modifications and clarifications are necessary based upon the record of this proceeding.”); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 99 (July 18, 2012) (“...the Commission believes a number of modifications and clarifications are necessary where the Stipulation differs from the Combined Stipulation in the *ESP 2 Case*.”); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 158 (December 14, 2011) (“Further, to ensure these provisions are not speculative, we find it necessary to modify the Stipulation and remove the contingency on the Companies achieving a ten percent return on equity. We find this modification furthers the public interest.”).

**C. The Reconciliation Rider is unlawful regardless of whether it is bypassable or nonbypassable.**

Several intervenors also assert that while a bypassable Reconciliation Rider is lawful and reasonable, a nonbypassable Reconciliation Rider is not.<sup>14</sup> These arguments have no merit. As has been described on numerous occasions, an OVEC subsidy rider, like the Reconciliation Rider, is unlawful and unreasonable regardless of the rider's rate design (i.e., whether it is bypassable or nonbypassable).<sup>15</sup> Indeed, in its Order, the PUCO made no mention of rate design in its determination of whether the Reconciliation Rider was a transition charge.<sup>16</sup>

Further, the intervenors ignore the fact that this precise issue has already been decided by the PUCO in another proceeding. In the AEP PPA Rider proceeding, the PUCO held that a nonbypassable OVEC subsidy rider is lawful and reasonable for AEP Ohio's customers.<sup>17</sup> And even if the PUCO finds on rehearing that DP&L's nonbypassable Reconciliation Rider is unlawful or unreasonable, that does not in any way demonstrate that a bypassable Reconciliation Rider *is* lawful and reasonable. The Rider would still be illegal. A Reconciliation Rider is unlawful and unreasonable whether it is bypassable or nonbypassable.

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<sup>14</sup> See IGS at 14-20; Kroger Application for Rehearing at 10-12; OMAEG Application for Rehearing at 12-15. Arguing that the nonbypassable Reconciliation Rider is an unlawful transition charge; See IGS Application for Rehearing at 20-22. Arguing that the nonbypassable Reconciliation Rider cannot be approved under R.C. 4928.143; See RESA Application for Rehearing at 8-9. Arguing that the nonbypassable Reconciliation Rider does not comply with Ohio policies enumerated under R.C. 4929.02.

<sup>15</sup> See, e.g., OCC Initial Brief at 20-21; Kahal Supplemental at 23, 34-38.

<sup>16</sup> See Order at 55-56.

<sup>17</sup> See AEP PPA Rider, Case No. 14-1693-EL-SSO, Second Entry on Rehearing PP 51-58 (Nov. 3, 2016).

**D. RESA’s proposed “trigger-point” approach should be rejected.**

RESA proposes, for the first time in its application for rehearing, an alternative to the nonbypassable Reconciliation Rider that it terms the “trigger-point” approach.<sup>18</sup> RESA’s proposal would allow for the Reconciliation Rider to be bypassable. But if the rate reaches a certain “trigger-point,” the amounts above the trigger point would be collected on a nonbypassable basis.

This proposal should not be adopted for a couple of reasons. First, as RESA admits, the only testimony regarding a “trigger-point” was about a typical residential customer’s bypassable rate.<sup>19</sup> The evidence was not offered or contemplated by other parties as supporting the “trigger-point” proposal. No such proposal was even made. There is no record evidence to support the proposal, so the PUCO cannot adopt it.<sup>20</sup>

Second, the “trigger-point” approach should not be approved because it is unlawful for the same reasons as the Reconciliation Rider (whether bypassable or nonbypassable). RESA does not even attempt to explain how its “trigger-point” proposal passes legal muster.

RESA’s assignment of error based on the “trigger-point” proposal should be denied.

**III. CONCLUSION**

For the reasons set forth above, the PUCO should reject the various intervenors’ applications for rehearing. Denying the applications for rehearing will allow consumers to be protected from paying even more than already ordered by the PUCO.

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<sup>18</sup> See RESA Application for Rehearing at 9-12.

<sup>19</sup> See RESA Application for Rehearing at 11.

<sup>20</sup> See R.C. 4903.09; *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999). It is rather ironic that RESA spends the vast majority of its application for rehearing arguing that making the Reconciliation Rider nonbypassable lacks record support, then turns right around and makes the “trigger-point” proposal without record support.



Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 4<sup>th</sup> day of December 2017.

/s/ William J. Michael

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Summary: Memorandum Memorandum Contra Applications for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.