BEFORE
THE PUBLIC UTILITY COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution	)))	Case No. 15-1830-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Accounting Authority	)))	Case No. 15-1831-EL-AAM
In the Matter of the Application of Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case No. 15-1832-EL-ATA

APPLICATION FOR REHEARING OF THE
RETAIL ENERGY SUPPLY ASSOCIATION

In accordance with R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the Retail Energy Supply Association (RESA)[1] respectfully submits this Application for Rehearing of the Order issued by the Commission on September 26, 2018. The Order is unreasonable and unlawful because:

1. **The Order authorizes distribution rates that recover costs incurred by DP&L to provide SSO service, in violation of R.C. Chapter 4928.**

2. **DP&L has not shown that certain supplier charges are based on costs it incurs to provide the associated services. The Order approving these charges therefore violates R.C. Chapter 4909.**

3. **The Order authorizes DP&L to charge switching fees only to customers who leave the SSO for CRES service, in violation of R.C. 4905.33 and R.C. 4905.35.**

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

For these reasons, discussed more fully below, the Commission should grant rehearing.

Respectfully submitted,

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ATTORNEYS FOR THE RETAIL ENERGY SUPPLY ASSOCIATION

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

RESA objected to the Stipulation for two reasons; first, because the Stipulation perpetuates a rate structure where SSO-related costs are subsidized by distribution rates; second, because DP&L failed to present evidence that certain supplier charges are necessary to recover costs associated with historical usage requests and customer switching from SSO to CRES service. The Order overrules these objections and adopts the Stipulation in its entirety.

This Application focuses on the second issue: supplier fees. RESA agrees with IGS on the first issue, so rather than repeat the arguments raised in IGS's application for rehearing, RESA incorporates those arguments here by reference.

The supplier fees at issue encompass two distinct charges. One is a charge levied on CRES suppliers for historical usage data (also referred to as "interval data" in the Order). The other is a $5 switching fee. When DP&L filed its application, it did not propose to change the

amount of these fees. The Order reasons that because DP&L did not propose to change the fees, there was no reason for Staff to determine whether the fees were cost-justified. "As a general rule, tariffs which are not proposed to be modified in a rate increase application are not subject to Commission review and modification during the rate case."[2] The Order allows DP&L to continue recovering these fees not because they are cost-justified, but for the simple fact that the fees were approved in prior proceedings. The Order claims that RESA bore the burden of proving that "circumstances have changed" since the fees were first approved, and that RESA failed to meet this burden.[3]

The Order disregards basic ratemaking principles and the statutory framework for setting rates. RESA does not have the burden of showing that DP&L's supplier charges are unreasonable. DP&L has the burden of proving that its charges are reasonable. R.C. 4909.19(C). Even if the fees were cost-justified when first approved, not a shred of evidence was introduced to show that the fees are necessary to recover costs incurred during the test year. The initial approval of these fees is no reason to allow DP&L to continue collecting them. Eliminating these fees would not conflict with any prior Commission order.

There is no evidence showing whether DP&L's supplier fees are based on any underlying costs. Therefore, DP&L has not met its burden of proof, and the Commission committed reversible error by approving the fees. issuing an Order than permits these fees to continue.

II. ARGUMENT

This is a rate case. The basic objective of a rate case is to determine test year revenue requirements. To figure out a utility's revenue requirement, the Commission must have a full accounting of costs and revenues incurred or collected during the test year. R.C. 4909.15(C)(1).

[2] Order ¶ 36.
[3] *Id*. at ¶ 42.

"Costs" and "revenues" mean actual expenses and receipts. *Office of Consumers' Counsel v. Public Util. Comm'n*, 10 Ohio St. 3d 49, 50 (1984) (reversing Commission order permitting greater recovery of costs than actually expended in the test year); *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.,* 86 Ohio St. 3d 53, 53 (1999) (reversing Commission order imputing test year revenue the utility would not actually receive). The revenue requirement determination cannot be based on assumptions or guesswork. "A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166 (1996).

The Order is not based on evidence. The Order merely assumes a conclusion to the fact in dispute—that there *must* be a fact-based, cost-justified basis for the supplier fees because the Commission previously authorized them. The Order is unlawful and must be corrected on rehearing.

A. Staff's decision to forgo review of the supplier charges merely confirms the absence of evidence necessary to support a finding that the fees are just and reasonable.

The Order first addresses the lack of supporting evidence for the supplier fees by attempting to explain *why* there is a lack of evidence. This entire discussion misses the point. Whether Staff's *investigation* of DP&L's supplier fees was reasonable is a different question from whether the *fees* are reasonable, and whether the fees are reasonable is ultimately a decision for the Commission, not Staff. The supplier fees cannot be approved by default simply because Staff chose not to investigate.

The Order sanctions Staff's failure to investigate by claiming that no investigation was necessary; DP&L did not propose to change the fees, and "tariffs which are not proposed to be modified in a rate increase application are not subject to Commission review and modification

during the rate case."[4] The Commission is factually mistaken, and its conclusion legally erroneous.

Regarding the $5 switching fee, the version of Schedule D34 in effect at the time DP&L filed its application imposed the fee for customers switching *to or from* SSO service.[5] The tariffs approved in this proceeding eliminate the fee for customers returning to the SSO. The fee remains in effect for customers who leave the SSO to take service from a CRES provider.[6] Although the fee remains at $5, the applicable tariff not only was "proposed to be modified," but *was* modified and approved by the Order.

DP&L did not file a revised Supplier Tariff with its application, but that does not mean the historical usage fees contained in this tariff are off the table. When a utility files an application under R.C. 4905.15, all charges "related to" the rates at issue in the application are subject to review. *AT&T Communications of Ohio, Inc. v. Public Util. Comm'n*, 51 Ohio St.3d 150. The Commission must "cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, *and of the matters connected therewith.*" R.C. 4909.19(C) (emphasis added). A full accounting of costs and revenues is necessary. The prohibition against single-issue ratemaking does not allow utilities to cherry-pick which rates and charges the Commission may review. All rates and charges are on the table in a base rate case.

Nothing in Chapter 4909 prohibits a utility from seeking changes to certain rates but not others. But the Commission is not bound by the utility's application, and the Commission may change rates the utility proposed to leave unchanged. For example, in *AT&T*, GTE filed an application to increase rates to local exchange users while keeping its carrier common line

[4] Order ¶ 36.
[5] P.U.C.O. No. 17, The Dayton Power and Light Company Electric Distribution Service Schedule of Rates, Classifications, Rules and Regulations, First Revised Sheet No. D34, "Switching Fee Rider."
[6] Application, Book II, Vol. IV, at 103.

charge at a previously approved level. The Commission ordered an increase to the carrier common line charge, and long-distance providers subject to the charge appealed. The appellants argued that because GTE did not apply to increase the line charge, the Commission could not raise it. *Id*. at 151. The Court disagreed. Under R.C. 4909.15, "the Commission had authority to alter GTE's rate structure and to increase the [line charge]. The revenue derived from the [line charge] helps satisfy GTE's total revenue requirements, and these revenues pay GTE for supplying telephone service. Thus, the [line charge] is related to the rates which are the subject of the instant application, and the commission could increase it." *Id*. at 152. *See also City of Cleveland v. Public Util. Comm'n*, 63 Ohio St.2 62, 66 (1980) (affirming Commission approval of fixed customer charge not proposed in rate case application).

As in *AT&T*, DP&L's supplier fees are "related to" the rates at issue in its application. The supplier fees generate funds that contribute to DP&L's overall revenue requirement. Ohio law required Staff to investigate these charges, and Staff failed to do so. DP&L could have provided the information requested in discovery so that RESA could have investigated, but DP&L refused to do so. The consequence of these failures must fall on DP&L, not RESA. There is simply no evidence to support the continued collection of supplier fees.

B. The Commission does not need to modify any prior orders to eliminate the supplier fees.

The supplier fees were approved in prior proceedings. A request to eliminate these fees prospectively is not equivalent to a request to change or modify these prior orders, as the Order here erroneously claims.

The Commission authorized the supplier fees based on then-existing facts and circumstances during the 2011 merger proceeding and 2017 ESP III proceeding. RESA is not asking the Commission to undo anything it previously did. The rates and charges at issue *in this*

proceeding must be based on evidence of revenue and expenses in the test year. Whether the supplier fees *were* just and reasonable when initially approved is a totally different issue, and an irrelevant one at that. *See Cincinnati Gas & Elec. Co. v. Pub. Util. Comm*., 86 Ohio St. 3d 53, 53 (1999) ("If the revenues received by the utility *during the test year* are less than the gross annual revenues to which the utility is entitled, the commission is required to fix new rates that will raise the necessary revenue.") (Emphasis added.) A finding in this proceeding that the supplier fees are not just and reasonable would not contradict any issue heard and decided in the previous proceedings.

DP&L's rate case is not a continuation of the merger proceeding or ESP III. Each of these proceedings nominally involve supplier charges, but in completely different contexts spanning a period of 8 years. Even if the Commission had previously spoken on any issue relevant here (and it did not), the Commission's authority to modify previously-approved rates is clear. "[T]he commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission." R.C. 4909.15(F).

RESA has no burden to show that "circumstances have changed" since the Commission first approved the supplier fees. DP&L has this burden, and the only relevant measure of whether "circumstances have changed" is that whatever is borne out in the test year. DP&L's rates should recover the company's test year revenue requirement. If DP&L incurs costs to store or provide interval data to CRES providers, DP&L should recover these costs. To the extent DP&L recovers these costs through base rates, there is no need for additional supplier charges. If base rates do not recover these costs, then additional supplier charges may be appropriate. The problem, again, is that neither DP&L nor Staff have produced evidence showing which is the case.

Not only *may* the Commission alter or rescind previously-approved charges, it *must* do so when the evidence shows that a charge is no longer just and reasonable. That is the very reason DP&L filed this case: because rates found just and reasonable in 1991 are not just and reasonable in the test year. The ratemaking formula does not permit DP&L to raise one category of charges that are too low but freeze a separate category of charges that are too high—or may no longer be justified at all.

The Order tempers its claim that the supplier charges are beyond review in this proceeding by stating the Commission may revisit these charges in the future "through the working groups or proceedings implementing the PowerForward Initiative."[7] If the Commission attempts to eliminate these fees outside a base rate case, then as surely as night follows day, DP&L will protest that the prohibition against single-issue ratemaking precludes eliminating these fees (a prohibition that never seems to apply when requests are made to increase a specific rate or charge). And DP&L would probably be right. The time to eliminate these fees is now.

C. The Order purports to authorize an unreasonable preference or advantage, in violation of R.C. 4905.33 and 4905.35.

R.C. 4905.33 and 4905.35 prohibit undue or unreasonable preferences or advantages, including charging different fees for doing "a like and contemporaneous service under the same circumstances and conditions." At the time DP&L filed its application, the $5.00 switching fee was applied to customers switching to or from SSO service. The Order authorizes DP&L to file a revised tariff that eliminates the switching fee for customers who return to the SSO. Thus, going forward, suppliers will be charged $5.00 every time a customer leaves the SSO for a CRES supplier, but they will not be charged when customers leave a CRES supplier to return to the SSO.

[7] Order ¶ 42.

The revised tariff plainly treats like customers differently. Even if DP&L incurred costs to switch customers (there is no evidence it does), there is no reason to suspect, and no evidence offered, to suggest that these costs are different for customers who leave the SSO versus customers who return to the SSO. A switch is a switch, and DP&L's systems must keep track of customers regardless of where they are switching to or from. The switching fee is a stealth tax on shopping customers, and it is unlawful.

Moreover, this new stealth tax shifts costs to distribution ratepayers. DP&L recovers its revenue requirement through a combination of fixed charges (like the switching tax) and base volumetric rates. The less DP&L recovers through the switching tax, the more it must recover through base rates. It stands to reason that by exempting returning customers from the stealth tax, DP&L will collect less revenue from this charge than it would if the charge was applied to both departing and returning customers. Less revenue from the switching tax means more revenue must be wrought from base rates. This result is completely at odds with the notion of "cost-causation" described in the Order. Eliminating the switching fee for *all* customers would remedy this disparity.

III. CONCLUSION

The Commission's authority and obligation to establish just and reasonable rates is not limited by a utility's application or Staff's review of the application. When a party calls attention to an issue that Staff should have addressed but did not, the Commission has an obligation to address the issue. RESA and IGS raised an issue about the supplier fees at the earliest opportunity—in their respective objections to the Staff Report. The issue is whether these fees are cost-justified during the test year. No evidence—none—has been produced to show that they are. The Commission cannot resolve this issue by defending Staff's failure to review these

charges in the first instance. The Commission must do what the law demands when a utility fails to meet its burden of proving that a charge is just and reasonable: the Commission must remove these charges from the utility's tariffs.

Dated: October 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing Application for Rehearing was served by electronic mail this 26th day of October, 2018 to the following:

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Summary: Application for Rehearing and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of Retail Energy Supply Association