

**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

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**INTERSTATE GAS SUPPLY, INC. AND RETAIL ENERGY SUPPLY ASSOCIATION'S  
MEMORANDUM CONTRA APPLICATION FOR REHEARING OF  
THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Commission's September 26, 2018 Order in this case gave the Office of the Ohio Consumers' Counsel (OCC) what it asked for; the Order approved the Stipulation. Where the Stipulation is silent on any recommendation in the Staff Report, the Stipulation adopts the recommendation. OCC did not object to the Staff Report's recommendation to decouple the OCC assessment from distribution rates. The Stipulation does not address this recommendation. Therefore, in approving the Stipulation, the Commission also approved the mechanism to decouple the OCC assessment. Again, this is what OCC and the other signatory parties asked for.

OCC's change of heart does not render the Staff Report or Stipulation "ambiguous." Both documents are clear. The Commission cannot now alter the deal OCC struck by considering parol evidence that the Stipulation means something other than what it says. The application for

rehearing should be denied. The Commission must follow through with the Order by ensuring that the SSO portion of the OCC assessment is collected through a bypassable rider.

## II. ARGUMENT

OCC acknowledges the operative language of the Staff Report: “Staff recommends that the SSO generation revenue of the PUCO/OCC assessment expense be recovered through an appropriate bypassable rider.”<sup>1</sup> OCC claims that this recommendation “cannot be read in isolation.” But it also cannot be read with blinders, as OCC would have the Commission do.

There is no ambiguity in Staff’s recommendation. Whether the Staff Report is “ambiguous” can be determined under rules of contract interpretation. “As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. Staff’s recommendation “can be given a definite legal meaning.” Indeed, OCC is not challenging the Order because Staff’s recommendation cannot be given a definite meaning; OCC is challenging the Order because the meaning of the recommendation is clear, and OCC does not want the Commission to adopt it.

The Stipulation is equally clear, and the Stipulation bars OCC from asserting the very position it is now taking. See *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164, 114 Ohio St. 3d 305, 318, n.5 (by signing the stipulation, OCC “agreed to be bound by the terms.”) OCC and the other signatory parties represented to the Commission that the Stipulation is “the entire agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objections in this proceeding.”<sup>2</sup> If OCC had an issue with any “ambiguous” provision in the Staff Report, it should have addressed the issue in the Stipulation. OCC did not.

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<sup>1</sup> OCC App. For Rehearing at 4.

<sup>2</sup> Stipulation at 15.

Whether OCC or Staff's views "evolved" since they signed the Stipulation is irrelevant.<sup>3</sup>

In interpreting a stipulation, the Commission "must focus on the meanings of the Stipulation's provisions." *Monongahela Power Co. v. Pub. Util. Comm.*, 2004-Ohio-6896, ¶ 6, 104 Ohio St. 3d 571, 573. "If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity." *Shifrin v. Forest City Enterprises, Inc.*, 1992-Ohio-28, 64 Ohio St. 3d 635, 638, 597 N.E.2d 499, 501. "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37, 129 Ohio St. 3d 397, 404, ("[W]e find that it was unlawful for the commission to rely on matters outside the written agreement of the parties.")

Stipulations inherently involve give and take. Nobody usually gets everything they want. Such is the nature of compromise. But once a compromise is reached and memorialized in a stipulation, all parties to a proceeding—signatories or not—should be able to rely on the stipulation as defining the issues in the case. Supporting parties can present evidence supporting the stipulation and opposing parties can oppose. Parties who sign on to support a stipulation should not be heard to complain if the Commission adopts the stipulation. That is not good-faith negotiation, and the Commission ought not put its stamp of approval on this tactic.

Finally, to support its effort to rewrite the Stipulation, OCC argues that because the SSO benefits all customers, "all customers should pay the distribution costs associated with it."<sup>4</sup> This statement plainly goes against not only state policy but the principles of cost causation the

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<sup>3</sup> Indeed, Staff in its initial Post-Hearing Brief recognized that its attempt at withdrawal of this recommendation was insufficient and recommended approval of the Stipulation anyway: "This evolution of the Staff's view should have been reflected in both testimony and the Stipulation but it was not. As a consequence of this, the approval of the Stipulation will include the recommended bypassable rider. . . . Despite this, the Staff still recommends the approval of the Stipulation." Staff Br. at 5.

<sup>4</sup> OCC App. for Rehearing at 7.

Commission references in its Order. If the Commission were to adopt this argument, then DP&L could recover all of the costs of the SSO through base rates, which would lead to a result clearly not intended by the General Assembly when it restructured the market. Moreover, it would be fundamentally unfair to socialize the assessments caused by the SSO, given that shopping customers must bear the same assessments embedded in the rates and charges of their competitive service providers. OCC's argument is procedurally and substantively without merit.

**III. CONCLUSION**

The Commission need not (and cannot) grant rehearing solely to accommodate OCC's change of position. The Commission should deny OCC's Application for Rehearing.

Dated: November 5, 2018

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing Memorandum Contra was served by electronic mail this 5th day of November, 2018 to the following:

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Summary: Memorandum Contra Application for Rehearing of Ohio Consumers' Counsel electronically filed by Ms. Rebekah J. Glover on behalf of Retail Energy Supply Association and Interstate Gas Supply, Inc.