

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-396-EL-ATA
Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13)	

**IEU-OHIO'S APPLICATION FOR REHEARING AND
MEMORANDUM IN SUPPORT**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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In the Matter of the Application of) The Dayton Power and Light Company for) Approval of Certain Accounting Authority) Pursuant to Ohio Rev. Code § 4905.13)	Case No. 16-397-EL-AAM

IEU-OHIO’S APPLICATION FOR REHEARING

The Dayton Power and Light Company (“DP&L”) filed an application for its third electric security plan (“ESP”) on February 22, 2016. On October 11, 2016, DP&L filed an amended application (“Application”). On March 14, 2017, DP&L filed an Amended Stipulation and Recommendation (“Stipulation”).¹ To resolve issues raised by the Application, the Stipulation proposed modifications to several provisions of the Application that were acceptable to or not opposed by DP&L, the Staff of the Public Utilities Commission of Ohio (“Commission”), and over a dozen intervenors. Because the Application and Stipulation were contested, the Commission conducted a hearing on the Application and Stipulation in April 2017. Following the submission of briefs, the Commission approved the Application as modified by the Stipulation with one significant exception. In the Opinion and Order (“Order”), the Commission altered the proposed

¹ On January 30, 2017, DP&L filed a stipulation that was opposed by many of the parties and lacked Commission Staff support. Negotiations continued, and the result was the Stipulation that was reviewed in the April 2017 hearing.

Reconciliation Rider (“RR”), which recovers the above-market costs DP&L incurs as a result of its interest in generation facilities of the Ohio Valley Electric Corporation. As proposed in the Stipulation, the rider was to be bypassable.² The Commission, however, authorized DP&L to bill and collect the RR on a nonbypassable basis.³

The Commission’s modification to the Stipulation is unlawful and unreasonable for the following reasons.

- The Order is unlawful and unreasonable because the Commission failed to base its authorization of the RR as a nonbypassable rider on findings of fact supported by the record as required by R.C. 4903.09.
- The Order is unlawful and unreasonable because it orders a change in the proposed RR when the Commission retains the ongoing authority to adjust the RR if standard service offer rates become unreasonable.
- The Order is unlawful and unreasonable because the Commission failed to base its authorization of the cost allocation and rate design for a nonbypassable RR on findings of fact supported by the record as required by R.C. 4903.09.

As more fully explained in the attached Memorandum in Support, the Commission should grant IEU-Ohio’s Application for Rehearing and reverse its decision to authorize the RR as a nonbypassable rider. If the Commission does not reverse its decision to authorize the RR as a nonbypassable rider, it should grant rehearing for the purpose of allowing parties to present additional evidence on the appropriate cost allocation and rate design for a nonbypassable RR.

Respectfully submitted,

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² Stipulation at 13.

³ Order at 35.

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IEU-OHIO’S MEMORANDUM IN SUPPORT

I. INTRODUCTION

After lengthy negotiations, DP&L filed the Stipulation to resolve DP&L’s third ESP on March 14, 2017. The Stipulation represented a watershed moment regarding DP&L’s ESPs; after five years of intensive litigation and multiple appeals to the Ohio Supreme Court, nearly all of the interested parties were able to come together and reach a settlement package that enabled parties to either join the settlement or agree to not oppose it. The Commission’s October 20, 2017 Opinion and Order (“Order”) has upset the delicate balance reached by the parties. For practical and legal reasons, the Commission should restore the delicate balance reached by nearly all of the parties to this proceeding and limit the unnecessary litigation that may follow as a result of the Commission’s modification.

To that end, the Commission should grant rehearing and modify the Order to provide that DP&L’s RR will be collected on a bypassable basis. From a legal standpoint,

the Commission's modification to the RR was based on speculation. The record evidence does not support a finding that the impacts on SSO customers from a bypassable RR are going to materially increase over the term of the ESP. Practically speaking, the rate impact concerns expressed by the Commission as grounds for its modification to the proposed RR can still be addressed by the Commission at a future point if they materialize. Because the record does not contain any projection of material increases in the RR rates over the term of the ESP and the Commission retains the ability to address impacts from a bypassable RR in the future, the Commission should restore the bypassable RR recommended in the Stipulation.

Additionally, because the Stipulation provided for a bypassable RR, no evidence was put into the record regarding the proper allocation or rate design of a nonbypassable RR. If the Commission does not grant rehearing to restore the bypassability of the RR, it should grant rehearing to take additional evidence regarding the appropriate cost allocation and rate design for the nonbypassable RR.

II. ARGUMENT

A. The Order is unlawful and unreasonable because the Commission failed to base its authorization of the RR as a nonbypassable rider on findings of fact supported by the record as required by R.C. 4903.09.

Ohio law requires that the Commission base its decisions on the record before it.⁴ The Commission's decision to authorize the RR as a nonbypassable rider, however, is not supported by the record before the Commission in this case.⁵ Because the record does not support the Commission's decision to recover wholesale generation-related

⁴ R.C. 4903.09; *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 30 (ruling on an issue without record support is an abuse of discretion and reversible error).

⁵ Order at 34-35.

costs on a nonbypassable basis, the Commission should grant rehearing and authorize the RR as recommended in the Stipulation.

In a contested case, R.C. 4903.09 requires the Commission to issue “findings of fact and [a] written opinion[] setting forth the reasons prompting the decision[] arrived at, based on said findings of fact.” Under this section, the Commission in assessing the record must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.⁶ “The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom.”⁷

In the Order, the Commission offers the following finding for authorizing a nonbypassable RR to collect the above-market costs DP&L incurs because it retains an interest in OVEC: “there is the potential for escalating bill impacts as shopping increases.”⁸ The paragraph ordering the rider to be nonbypassable does not state what evidence it is relying on to conclude that there is a risk of price spikes due to increased shopping.⁹ Earlier in the Order, however, the Commission noted that OCC claimed that the RR would unfairly burden nonshopping customers, citing OCC Ex. 12 at 38.¹⁰

If the Commission is relying on OCC Ex. 12 for support for the claim that the RR price would spike, that reliance is unwarranted. That exhibit, the prefiled testimony of Mr. Kahal, argues only that a bypassable RR will increase the standard service offer price

⁶ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519 (2011).

⁷ *Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 61 Ohio St.3d 396, 406 (1991), (*quoting Columbus Pub. Utils. Comm’n of Ohio*, 58 Ohio St.2d 103, 104 (Brown, J., dissenting)).

⁸ Order at 35. Although the Commission does not cite the potential for material increases in the RR revenue requirement as a basis for its modification to the bypassability of the RR, the record evidence indicates that the RR revenue requirement is not projected to materially increase over the term of the ESP. DP&L Ex. 2B at Exhibit RJM-1.

⁹ Order at 35.

¹⁰ *Id.* at 32.

in a way that may allow competitive suppliers to compete unfairly.¹¹ It offers no basis for a finding that the price of the RR will spike due to increased shopping.

Moreover, OCC also did not identify any record evidence that demonstrates that shopping will increase over the term of the ESP in support of its claim that the RR price might increase to an unreasonable level. In support of its claim that the impact of the RR on SSO customers will get worse over time as shopping increases, OCC cited to the cross-examination of DP&L witness Jackson. Mr. Jackson, however, testified that shopping had increased since his testimony in the prior DP&L ESP case.¹² He did not offer any testimony regarding any expected future increases in shopping, and he was not asked to provide any prediction of the direction of shopping in the DP&L service territory. As a result, this cross-examination does not provide any basis to conclude that shopping will increase or to what degree.¹³

The decision to reject the recommendation that the RR be collected on a bypassable basis is based on the unsupported assumption that shopping will increase in the DP&L service territory. The decision to reject the recommendation therefore is based on only speculation. As a result, the Commission violated the requirements of R.C. 4903.09. To correct the violation, the Commission should grant rehearing and reverse its decision to authorize the RR as a nonbypassable rider.

¹¹ OCC Ex. 12 at 38.

¹² OCC Initial Brief at 43 (*citing* Tr. Vol. I at 40).

¹³ Elsewhere in its brief, OCC also cites the testimony of IGS/RESA witness White as indicating that certain aspects of the Stipulation were intended to promote the development of competitive retail markets in Ohio. *Id.* at 15 (*citing* RESA Ex. 1). This testimony similarly fails to establish a basis to conclude that shopping will increase and to what degree.

B. The Order is unlawful and unreasonable because it orders a change in the proposed RR when the Commission retains the ongoing authority to adjust the RR if standard service offer rates become unreasonable.

The Commission has the authority to prospectively modify rates, including ESP rates, during the term of an ESP if the change is substantively lawful and reasonable.¹⁴ To this end, if bypassable RR rates materially increase over the ESP term, the Commission could initiate a proceeding (or undertake a review in the context of the annual RR rate updates), and order any lawful and reasonable changes to the RR rates. Because the Commission can address the speculative concern that formed the basis of its modification of the bypassability of the RR (increased shopping, and by implication, increased rates), there is no reason to order the modification before the actual issue materializes.

C. The Order is unlawful and unreasonable because the Commission failed to base its authorization of the cost allocation and rate design for a nonbypassable RR on findings of fact supported by the record as required by R.C. 4903.09.

In the Order, the Commission found that the RR “should be allocated to tariff classes based on an allocation method of 50 percent demand and 50 percent energy with the demand being allocated on a total load on a 5 Coincidental Peak basis and charged on a KWh basis.”¹⁵ The decision authorizing the allocation and rate design is unlawful and unreasonable because there is no record evidence to support the cost allocation or rate design of a nonbypassable RR.

Because the Stipulation recommended a bypassable RR, the evidence supporting the Stipulation took into account only the impact of the RR on SSO customers.¹⁶ Altering

¹⁴ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 16-18.

¹⁵ Order at 35.

¹⁶ See, e.g., DP&L Ex. 3 at 20-21, Exhibit A.

the proposed RR to a nonbypassable charge, however, subjects shopping customer loads to a new charge. The impacts of the RR on these new customer loads, driven by the cost allocation and rate design for a nonbypassable RR, were not addressed by any party in this proceeding. As a result, there is no record to support any cost allocation or rate design methodology for a nonbypassable RR.

As noted above, R.C. 4903.09 requires the Commission to base its decisions on findings of fact supported by the record. If the Commission does not reverse its decision to authorize the RR as a nonbypassable rider, then it must comply with R.C. 4903.09 and support the allocation and rate design with proper findings of fact based on the record. Accordingly, the Commission would be required to grant rehearing to address the rate design and allocation of the RR.

III. CONCLUSION

The Commission modified the proposed RR based on a rationale that is not supported by the record and prematurely addressed an issue that has not, and may never, materialize. The Commission should therefore grant rehearing and restore the bypassability of the RR.

If the Commission does not grant rehearing and reverse its decision to authorize the RR on a nonbypassable basis, the Commission should grant rehearing and allow parties the opportunity to present evidence concerning the proper allocation and rate design for the rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *IEU-Ohio's Application for Rehearing and Memorandum In Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 20th day of November, 2017, via electronic transmission.

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Summary: Application IEU-Ohio's Application for Rehearing and Memorandum in Support electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio