

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power & Light Company for)	Case No. 16-0395-EL-SSO
Approval of Its Electric Security Plan.)	
In the Matter of the Application of The)	
Dayton Power & Light Company for)	Case No. 16-0396-EL-ATA
Approval of Revised Tariffs.)	
In the Matter of the Application of The)	
Dayton Power & Light Company for)	
Approval of Certain Accounting Authority)	Case No. 16-0397-EL-AAM
Pursuant to Ohio Rev. Code § 4905.13.)	

**APPLICATION FOR REHEARING OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4901-1-35, the Retail Energy Supply Association¹ submits this Application for Rehearing of the October 20, 2017 Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this matter. The Commission’s decision to modify the stipulated terms related to the Reconciliation Rider was unjust and unreasonable in the following respects:

- (1) The Commission acted unlawfully and unreasonably by modifying the recovery of OVEC costs under the Reconciliation Rider without sufficient record support.

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 more than 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.

- (2) The Commission acted unlawfully and unreasonably by inappropriately weighing the evidence in the record when modifying the recovery of OVEC costs under the Reconciliation Rider.
- (3) The Commission acted unlawfully and unreasonably by modifying the recovery of OVEC costs under the Reconciliation Rider in a manner that violates Ohio law and policy and harms the competitive marketplace.
- (4) The Commission acted unlawfully and unreasonably by failing to consider alternatives to a nonbypassable Reconciliation Rider such as a trigger point above which recovered amounts under the Reconciliation Rider would be recovered on a nonbypassable basis.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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

I. INTRODUCTION

After the January 30, 2017 Stipulation and Recommendation was filed in this docket, an Amended Stipulation and Recommendation was negotiated and filed that included Staff as a signatory party.² That renegotiated package contained an important component for RESA and others – the three-pronged agreement regarding the recovery by The Dayton Power and Light Company (“DP&L”) of its costs of purchasing electricity generated by the Ohio Valley Electric Corporation (“OVEC”).³ In pertinent part, the Stipulating Parties agreed:⁴

- DP&L would withdraw its pending request to recover previously deferred OVEC costs;
- DP&L would, going forward, defer and recover the net proceeds of the OVEC electricity sold into the wholesale marketplace via DP&L’s Reconciliation Rider on a bypassable basis during the term of this electric security plan (“ESP”); and
- DP&L would continue to pursue options to discharge its OVEC obligations and report on those efforts.

The Commission upset this three-pronged agreement by concluding that a bypassable Reconciliation Rider creates “a *potential* for escalating bill impacts as shopping increases.”⁵ The Commission then modified the Reconciliation Rider to require it to be nonbypassable.⁶ This

² Joint Ex. 1, Amended Stipulation and Recommendation dated March 13, 2017 at 39-41.

³ DP&L witness Schroder explained that the OVEC generation has been used for years to provide service to customers. DP&L Ex. 3 (Schroder Amended Stipulation Direct Testimony) at 14.

⁴ Amended Stipulation at Section VI.1.a.

⁵ Opinion and Order at ¶63. (Emphasis added.)

⁶ *Id.*

material modification to the bargain struck by RESA, Staff, DP&L and other parties significantly reduces the value of the Amended Stipulation to RESA and others.

Faced with a material modification of the Amended Stipulation, RESA submits this application for rehearing.⁷ The Commission's conversion of the Reconciliation Rider to a nonbypassable rider was not based on sufficient record evidence, was not justified from the evidence in the record, violates Ohio law and policy, and it negatively and unreasonably affects the competitive marketplace for years. Most importantly, the Commission did not consider alternatives to making the rider nonbypassable, such as establishing a trigger point above which amounts collected under the Reconciliation Rider would be collected on a nonbypassable basis.

RESA urges the Commission to reconsider its decision, grant rehearing and although shopping customers should not be responsible for the costs of utility-owned generation, at minimum, put in place an alternative approach that would balance the Commission's concerns about potential impacts while maintaining the negotiated benefits of the Amended Stipulation.

II. ASSIGNMENT OF ERROR NO. 1: The Commission acted unlawfully and unreasonably by modifying the recovery of OVEC costs under the Reconciliation Rider without sufficient record support.

The Commission is required by law to base its decisions on the factual records before it. R.C. 4903.09 and see *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 90, 1999 Ohio 206. The Commission abuses its discretion when it renders an opinion on an issue without record support. For example, in *Indus. Energy Users-Ohio v. PUCO*, 117 Ohio St.3d 486, 493, 2008-Ohio-990, the Supreme Court of Ohio found that, although Ohio law would allow recovery of costs of a proposed generation facility, the evidence in the record before the Commission did not support such recovery because the record was incomplete in multiple respects. Also, in *Tongren*,

⁷ Section XI.5 of the Amended Stipulation recognizes the right of any Signatory Party to seek rehearing if the Commission rejects or modifies the Amended Stipulation. It also reflects that if a material modification remains, any Signatory Party may withdraw from the Amended Stipulation.

supra, the Court reversed the Commission decision because the Commission relied upon multiple “findings” of the Commission staff that were not in the record or related to the facts in the record.⁸

As it did in *Tongren*, the Commission has committed a reversible error in this proceeding. The Commission’s basis for rejecting Staff’s and other parties’ agreement to make the Reconciliation Rider bypassable was the “*potential* for escalating bill impacts as shopping increases.”⁹ But there is no evidence in the record that the Reconciliation Rider rates (theoretically charges and credits) will escalate during the term of the ESP. DP&L presented estimated customer rates for the Reconciliation Rider for the first year of the ESP.¹⁰ DP&L witness Schroder testified that DP&L does not know the overall cost or benefit of the Reconciliation Rider over the ESP term.¹¹ She also testified that many DP&L customer bills will decrease under the stipulated ESP, and that DP&L’s residential rates will become the lowest in Ohio under the stipulated ESP.¹²

The only testimony against a bypassable Reconciliation Rider was presented by OCC witness Kahal. He theorized that if shopping increased in the DP&L territory, that the Reconciliation Rider charges for non-shopping customers (standard service offer or “SSO” customers) would increase.¹³ Yet, Mr. Kahal admitted that “no one has any idea what the SSO load will be over the six-year term of the ESP.”¹⁴ And on cross-examination, DP&L witness Sharon Schroder testified that the Reconciliation Rider could be a charge or credit which would

⁸ *Tongren, supra*, at 90-91.

⁹ Opinion and Order at ¶63. (Emphasis added.)

¹⁰ DP&L Ex. 3 (Schroder Amended Stipulation Direct Testimony) at Exhibit A; Tr. Vol. II at 345.

¹¹ Tr. Vol. II at 346.

¹² DP&L Ex. 3 (Schroder Amended Stipulation Direct Testimony) at 20-21 and Exhibit B.

¹³ OCC Ex. 12 (Kahal Direct Amended Stipulation Testimony) at 36-37.

¹⁴ *Id.*

affect whether non-shopping customers would be adversely affected if shopping increased.¹⁵ She only agreed that SSO customers would see increased costs under the hypothetical of increased shopping coupled with reconciliation charges (no credits).¹⁶ This mechanical explanation of how the rider rates would be calculated under a hypothetical situation is not based on facts.

Simply put, the record is silent on the potential for a bypassable Reconciliation Rider to rise to a level that will impact non-shopping customers. The record contains testimony that approximately 53% of DP&L's residential customers are on the SSO, but contains no projections of how shopping levels will change over the term of the ESP. The record also contains no projections of the amount of credits or charges under the Reconciliation Rider over the term of the ESP based on different shopping levels. The only evidence is OCC's theoretical claim that the Reconciliation Rider's impact will increase if the SSO customer base shrinks due to increased customer shopping. That is not sufficient to support the Commission's conclusion that there is a potential for escalating bill impacts as shopping increases. Accordingly, there is insufficient record support for the Commission's modification of the rider, and it was unlawful and unreasonable to modify the Amended Stipulation to make the Reconciliation Rider nonbypassable for the entire six-year ESP term.

III. ASSIGNMENT OF ERROR NO. 2: The Commission acted unlawfully and unreasonably by inappropriately weighing the evidence in the record when deciding to make the Reconciliation Rider nonbypassable.

In deciding to make the Reconciliation Rider nonbypassable, the Commission also failed to consider evidence in the record that supports a bypassable Reconciliation Rider. Specifically, DP&L witness Schroder testified that the Reconciliation Rider will fluctuate throughout the ESP

¹⁵ Tr. Vol. II at 350.

¹⁶ Tr. Vol. II at 351.

between charges and credits based on the difference between the OVEC generation costs and revenues.¹⁷ She also indicated in her testimony that factors such as market conditions and costs could impact whether the rider was a charge or credit.¹⁸ The Commission relied on Ms. Schroder's direct testimony when determining that the rider "*will* act as a hedge which *will* mitigate spikes in market prices."¹⁹ The Commission, however, then ignored Ms. Schroder's testimony when stating that there is a "*potential* for escalating bill impacts as shopping increases."²⁰

If the Reconciliation Rider works as the Commission believes it will, then credits will increase for non-shopping customers as shopping increases. In other words, as shopping increases, the alleged benefit of rate stability under the Reconciliation Rider also will increase for non-shopping customers. The Commission cannot rely on the record to support its conclusion that the rider will be a hedge (both charges and credits) but then ignore the same evidence to conclude a potential exists for increased impacts on SSO customers based on continuous charges under a bypassable Reconciliation Rider.

It is also worth noting that the Commission failed to consider the evidence in the record that the Reconciliation Rider will be adjusted annually,²¹ and the rate modifications will be reviewed and approved by the Commission.²² These facts establish that Commission reviews throughout the ESP term are already built into the rider's framework, allowing the Commission to take any necessary actions to modify the rider based on the results of its reviews. Given the

¹⁷ DP&L Ex. 3 (Schroder Amended Stipulation Direct Testimony) at 14.

¹⁸ Tr. Vol. II at 349.

¹⁹ Opinion and Order at ¶63 citing Co. Ex. 3 at 14; Tr. Vol. IV at 755-756.

²⁰ Opinion and Order at ¶63. (Emphasis added)

²¹ Joint Ex. 1 at Section VI.1.a.ii.

²² Tr. Vol. II at 347-348.

Commission's ongoing oversight and annual reviews, the Commission's concern for future escalations does not justify a rejection of the Staff's and other Signatory Parties' agreement to make the Reconciliation Rider bypassable.

The record evidence supports a bypassable Reconciliation Rider and, given that record evidence, it was unlawful and unreasonable for the Commission to ignore that evidence and modify the rider.

IV. ASSIGNMENT OF ERROR NO. 3: The Commission acted unlawfully and unreasonably by modifying the Reconciliation Rider in a manner that violates Ohio law and policy and harms the competitive marketplace.

Retail electric generation is a competitive service in Ohio and the generation costs have been separated from the utility's distribution service costs.²³ The policy of the state of Ohio is to:²⁴

(A) **Ensure** the availability to consumers of adequate, reliable, safe, efficient, **nondiscriminatory**, and reasonably priced **retail electric service**;

* * *

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by **prohibiting the recovery of any generation-related costs through distribution or transmission rates**; * * * (Emphasis added.)

If the Reconciliation Rider is nonbypassable, shopping customers will pay DP&L for generation that they did not receive from another provider or DP&L. OCC witness Kahal acknowledged that the Reconciliation Rider would result in the collection/crediting of generation

²³ R.C. 4928.03, 4928.07, and 4928.141.

²⁴ R.C. 4928.02.

expenses/revenues.²⁵ As a result, a nonbypassable Reconciliation Rider does not comply with Ohio's statutory policy for the recovery of generation related costs.

By contrast, a bypassable Reconciliation Rider will comply with Ohio policy and establish a pro-competitive-market structure by preserving customer choice and avoiding "an anticompetitive subsidy that would result from collecting generation related costs through nonbypassable charges imposed on shopping customers."²⁶ The Commission should promote choice, which is in the public interest. The Reconciliation Rider, if allowed by the Commission, should be a bypassable rider and not a nonbypassable rider as modified by the Commission in its Opinion and Order.

V. ASSIGNMENT OF ERROR NO. 4: The Commission acted unlawfully and unreasonably by failing to consider alternatives to a nonbypassable Reconciliation Rider such as a trigger point above which recovered amounts under the Reconciliation Rider would be recovered on a nonbypassable basis.

The Commission determined that because of potential escalating bill impacts, collection under the Reconciliation Rider on a nonbypassable basis would be in the public interest.²⁷ The Commission, however, did not consider other alternatives that would provide an equal level of protection for non-shopping customers. For example, the Commission could have imposed a trigger point at which charges above a certain amount would be recovered on a non-bypassable basis. Doing so would provide the protection the Commission believes is necessary to protect non-shopping customers while minimizing amounts shopping customers pay for utility-held generation. As noted earlier, RESA does not believe that shopping customers should be responsible for the costs of utility-owned generation; however, a trigger point could

²⁵ Tr. Vol. IV at 755.

²⁶ RESA Ex. 1 (White Amended Stipulation Direct Testimony) at 11-12. *See, also*, OCC Ex. 12 (Kahal Amended Stipulation Direct Testimony) at 37.

²⁷ Opinion and Order at ¶63.

appropriately recognize the Commission's concerns about potential escalating impacts of the Reconciliation Rider if and when they arise, and also retain the negotiated benefits of the Amended Stipulation.

The trigger-point approach would be structured based on creating bypassable and nonbypassable components of the Reconciliation Rider. The bypassable component would be the primary rider used to collect revenue requirements and provide credits to non-shopping customers. The nonbypassable component would be used to collect the revenue requirements in excess of a set trigger point. Under this structure, non-shopping customers will be assured of being protected from excessive increases in the Reconciliation Rider if shopping in the DP&L territory increases.

The process for the trigger-point approach would be as follows:

- DP&L estimates the Reconciliation Rider requirements for the following year (as required under the Amended Stipulation).
- DP&L sets the bypassable component for non-shopping customers using the Commission directed class allocation (50% demand using a 5 CP basis and 50% volumetric basis).
- DP&L compares the bypassable rate for non-shopping customers to a trigger-point rate.
- If the bypassable rate for non-shopping customers is less than the trigger-point rate, DP&L sets the nonbypassable component at zero.
- If the bypassable rate for non-shopping customers is more than the trigger-point rate, DP&L populates the nonbypassable component in the amount necessary to set the bypassable component to be less than the trigger-point rate.

As to the specific trigger point, RESA recommends it be ten percent above the baseline. In DP&L's prior ESP proceeding, the Commission established a similar protective structure for recovery of certain deferred costs associated with four different bypassable riders when the

deferred amount reached a certain level.²⁸ DP&L proposed to recover those deferred balances on a nonbypassable basis to prevent a potentially small number of non-shopping customers from having to cover large deferred amounts. The Commission agreed that when the deferred costs of those bypassable riders exceeded ten percent of a baseline amount, DP&L could recover those amounts on a nonbypassable basis through the Reconciliation Rider – Nonbypassable (RR-N), which has since been terminated.²⁹ The Stipulating Parties in this proceeding agreed that a bypassable Reconciliation Rider was appropriate and DP&L witness Schroder testified as to the typical residential customer’s bypassable rate, which could be used as the baseline.³⁰ Based on the prior ESP case precedent and the evidence in this record, a ten-percent-above-baseline trigger could be readily incorporated.³¹

As noted above, when the annual adjustment is under review, DP&L and the Commission will have the opportunity to review the rate changes and determine if the trigger point has been met. This continual-review approach is consistent with two other Commission mandates in its October 20, 2017 Opinion and Order in this matter. First, due to concerns over the impact of the Distribution Modernization Rider (“DMR”), the Commission required a review DP&L’s use of

²⁸ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, Opinion and Order at 35 (September 4, 2013), Entry Nunc Pro Tunc (September 6, 2013), and Entry on Rehearing at ¶33 (March 19, 2014)

²⁹ *Dayton, supra*, Opinion and Order at 35. Also, a similar proposal was presented to and approved by the Commission before the prior DP&L ESP case. In that proceeding involving other utilities, the Commission approved an ESP stipulation in which the parties agreed to recovery of generation costs through a bypassable rider, unless its balance exceeded a five-percent trigger for two consecutive quarters when recovery became nonbypassable. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 10-388-EL-SSO, Opinion and Order at 10, 35, 47 (August 25, 2010).

³⁰ DP&L Ex. 3 (Schroder Amended Stipulation Direct Testimony) at Exhibit A page 1 column F.

³¹ The baseline would be the bypassable Reconciliation Rider Rate for a residential customer with monthly usage of 1,000 kWh – \$0.00185 per kWh. The trigger point would be \$0.00185 per kWh + (10% of \$0.00185) = \$0.00203 per kWh.

DMR funds.³² Second, due to concerns over the transmission pilot program, the Commission required DP&L and the Staff to continuously review the results of the pilot.³³ These changes were made to handle potential issues with those other riders and they provide further justification for the Commission to revise its decision as to the Reconciliation Rider and establish a trigger point.

The trigger-point approach should be given serious consideration for it could solve and address the issues raised by the Commission's material modification of the Amended Stipulation and avoid parties withdrawing from the Amended Stipulation. The Commission's failure to consider alternatives to a nonbypassable Reconciliation Rider was unlawful and unreasonable, but that error can be corrected by adopting a trigger-point approach.

VI. CONCLUSION

The Commission's decision to reverse the bargain struck and make the Reconciliation Rider nonbypassable is a material modification of the Amended Stipulation. It was made without record support and by ignoring evidence supportive of a bypassable Reconciliation Rider. The Commission's modification is unlawful, contrary to policy, and harmful to the competitive market. The Commission can avoid these errors by granting rehearing and, although RESA does not believe that shopping customers should be responsible for the costs of utility-owned generation, the Commission should put into place an alternative approach by establishing

³² Opinion and Order at ¶43.

³³ Opinion and Order at ¶62.

a trigger point at which recovery of escalated amounts above the trigger point would be on a nonbypassable basis during the ESP term, as described above by RESA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that this document is also being served electronically on the following parties on this 20th day of November 2017.

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Summary: Application for Rehearing electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association