BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

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November 20, 2017

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APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Interstate Gas Supply, Inc. ("IGS Energy" or "IGS") respectfully submits this Application for Rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission") on October 20, 2017 for the following reasons:

1. **The Order is unlawful, unjust and unreasonable inasmuch as it materially modified the Amended Stipulation and authorized an electric security plan that required DP&L to collect the Reconciliation Rider ("RR") through a non-bypassable rider applicable to all distribution customers:**
   a. **The Order's authorization of the non-bypassable RR unjustly and unreasonably undermined the benefit of the mutually agreed Amended Stipulation.**
   b. **The Order's authorization of the non-bypassable RR is not supported by the manifest weight of the evidence; the Order could have addressed any rate concerns in a manner less disruptive to the**

competitive market. The Order further violated R.C. 4903.09 by failing to submit findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact contained in the record*. General Telephone Co. v. Public Utilities Commission of Ohio*, 30 Ohio St. 2d 271, 277 (1972).

c. **The Order's authorization of the non-bypassable RR violated Ohio law, policy, and precedent which prohibits the recovery of transition revenue. *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 443-450 (2016).**

d. **The Order violated R.C. 4928.143(B)(2)(d) and 4928.02(H) by authorizing DP&L to recover generation-related costs through distribution rates*. Elyria Foundry Pub. Util. Comm*., 114 Ohio St 3d 305, 315-317 (2007)**

For the reasons stated herein, IGS urges the Commission to grant this application for rehearing and to correct the errors identified herein.

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MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

I. INTRODUCTION

On March 14, 2017, a diverse group of parties submitted an Amended Stipulation for approval to the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Amended Stipulation attempted to comprehensively resolve several contentious issues. The agreement struck a delicate balance to avoid litigation and extensive appeals. No party would have agreed to the Stipulation absent the package being submitted and approved as a whole without modification.

Despite the parties' agreement to a package, on October 20, 2017, the Commission issued an Opinion and Order ("Order") materially modifying and approving the Amended Stipulation. Specifically, the Order modified the Reconciliation Rider ("RR"), making it non-bypassable to customers served by competitive retail electric service

("CRES") providers. This modification is as unreasonable as it is unlawful: the Order disrupted the balance that parties worked so hard to achieve, and, in its place, the Order substituted an outcome that directly contravenes Ohio law, policy, and Supreme Court of Ohio precedent. Therefore, IGS urges the Commission to grant rehearing and correct the errors identified herein.

Under the Amended Stipulation, if the Commission does not grant this Application for Rehearing, IGS is permitted to withdraw its status as a signatory party. If that occurs, "the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs."[1] To the extent that the Commission does not correct the errors identified in this Application for Rehearing, IGS reserves the right to withdraw from the stipulation and assert any legal right available to it, including contesting any element of proposed electric security plan ("ESP") and the Amended Stipulation.

II. BACKGROUND

A. The Stipulation and the Amended Stipulation

On February 22, 2016, DP&L filed an application for an ESP. On October 11, 2016, in the wake of negative rulings by the Federal Energy Regulatory Commission related to purchase power agreements with affiliates, DP&L amended its ESP application.

The amended ESP application proposed a non-bypassable distribution modernization rider, as well as a non-bypassable Reconciliation Rider ("RR") to recover

[1] Joint Ex. 1 at XI(5).

costs related to DP&L's investment in the Ohio Valley Electric Corporation ("OVEC"), which operates two competitive generation facilities.

On January 30, 2017, a diverse group of parties submitted a Stipulation and Recommendation[2] to resolve the contested issues in this proceeding.[3] As part of that settlement, DP&L agreed to establish a component of the SSO rate to recognize costs related to but avoided by default service.

On March 14, 2017, following additional negotiations and bargaining, the parties to the initial Stipulation, the Commission Staff, and other parties executed an Amended Stipulation to resolve all of the outstanding issues in this proceeding.[4] Among other things, the Amended Stipulation acknowledged the existence of SSO-related costs embedded in distribution rates, but the parties agreed to evaluate that matter in DP&L's distribution rate case rather than resolve it here.[5] The Amended Settlement, however, made the RR bypassable to customers served by a CRES provider.[6] RESA/IGS witness White testified that "[m]aking any cost recovery related to DP&L's OVEC entitlement bypassable avoids an anticompetitive subsidy that would result from collecting generation related costs through nonbypassable charges imposed on shopping customers."[7]

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[2] DP&L Ex. 3 at 4.

[3] To the extent that IGS withdraws from the Amended Stipulation and Recommendation, IGS reserves the right to require parties to support the Stipulation and Recommendation executed on January 30, 2017 before the Commission or a court of competent jurisdiction.

[4] Joint Ex. 1. While document is dated March 13, 2017, it was not documented and posted onto the Commission's docketing infomration system until March 14, 2017.

[5] Joint Ex. 1 at III(d).

[6] Joint Ex. 1 at VI(1)(a)(ii).

[7] RESA Ex. 1 at 11-12.

While the Amended Stipulation was not perfect, it was a comprehensive bargain between parties to resolve several contested issues:

> This Stipulation is a consensus among the Signatory Parties of an overall approach to rates in this proceeding. It is submitted for the purposes of this case alone and should not be understood to reflect the positions that an individual Signatory Party may take as to any individual provision of the Stipulation standing alone, nor the position a Signatory Party may have taken if all of the issues in this proceeding had been litigated.[8]

"The willingness of Signatory Parties to sponsor this document currently is predicated on the reasonableness of the Stipulation taken as a whole."[9]

Recognizing the importance of the Commission adopting the Stipulation without modification, the Stipulation provided a process to ensure a party negatively impacted by the modification may contest the ESP:

> **This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification**. **If the Commission rejects or modifies all or any part of this Stipulation, any Signatory Party shall have the right to apply for rehearing. If the Commission does not adopt the Stipulation without material modification upon rehearing**…then within thirty (30) days of the Commission's Entry on Rehearing or Order on Remand: (a) any Signatory Party may withdraw from the Stipulation by filing a notice with the Commission ("Notice of Withdrawal") . . . . No Signatory Party shall file a Notice of Withdrawal or Utility Notice without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation. If a new agreement achieves such an outcome, the Signatory Parties will file the new agreement for Commission review and approval. ***If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are unsuccessful, and a Signatory Party files a Notice of Withdrawal, then the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses,***

[8] Joint Ex. 1 at XI(3).

[9] Joint Ex. 1 at XI(3).

> ***to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs***.[10]

As a result of the Order's material modification of the Amended Stipulation, it is necessary to follow this process to determine if the benefit of the bargain may be preserved.

B. The Opinion and Order Materially Modified the Stipulation

On October 20, 2017, the Commission issued an Order modifying and approving the Amended Stipulation. Specifically, the Order modified the RR by making it non-bypasable.[11] The modification was material—mandating that shopping customers pay for generation-related costs that they do not desire or need in violation of Ohio law, policy, and Supreme Court of Ohio precedent.

The Order's modification is based upon one reason: "because the signatory parties have proposed that the Reconciliation Rider be bypassable, we agree that there is the potential for escalating bill impacts as shopping increases. Therefore, we will modify the Amended Stipulation to provide that the Reconciliation Rider be nonbypassable."[12]

Pursuant to Pursuant to Section 4903.10, Revised Code, Rule 4901-1-35, and Section XI(5) of the Amended Stipulation, IGS hereby files for rehearing. IGS urges the Commission to uphold the totality of the bargain contained in the Amended Stipulation. The Order's finding with respect to the RR is unjust, unlawful, unreasonable, and against the manifest weight of the evidence. To the extent that the Commission does not correct the errors identified herein, IGS reserves the right to withdraw from the Amended Stipulation and to contest any element of the proposed ESP, the Stipulation, or any matter

[10] Joint Ex. 1 at XI(5) (emphasis added).

[11] Order at 35.

[12] Order at 35.

raised in the Entry on Rehearing. To the extent that IGS files a notice of withdrawal from the Amended Stipulation, IGS further reserves the right to require that signatory parties support the Stipulation and Recommendation entered on January 30, 2017 either before the Commission or a court of competent jurisdiction.

III. ARGUMENT

A. The Order is unlawful, unjust and unreasonable inasmuch as it materially modified the Amended Stipulation and authorized an electric security plan that required DP&L to collect the Reconciliation Rider ("RR") through a non-bypassable rider applicable to all distribution customers:

1. The Order's authorization of the non-bypassable RR unjustly and unreasonably undermined the benefit of the mutually agreed Amended Stipulation.

Through settlements, parties may comprehensively resolve contested legal issues, thereby avoiding significant expenses and lengthy appeals. But each settlement is deliberately crafted such that no party would have agreed to any single term or provision absent the package as a whole. In many respects, the provisions in a settlement are like the legs of a table. Eliminate one leg without concurrently replacing it with another of equal strength, and the table comes crashing down.

The bypassable RR represented a significant improvement from DP&L's amended ESP application. It preserved the statutory right of shopping customers to select the generation-related services and products that they so desire rather than being made captive to the generation-related decisions and market-based fortunes (or lack thereof) of a public utility. Indeed, RESA/IGS witness White testified that "[m]aking any cost recovery related to DP&L's OVEC entitlement bypassable avoids an anticompetitive subsidy that would result from collecting generation related costs through nonbypassable

charges imposed on shopping customers."[13] The Order's finding that shopping customers must pay for OVEC-related costs unjustly and unreasonably modifies the package submitted to the Commission.

Moreover, it undermines confidence in the settlement process and has a chilling effect on parties' willingness to amicably work to resolve contested issues in future cases. Therefore, to mitigate the damage caused by the Order, the Commission should grant this Application for Rehearing and authorize shopping customers to avoid the RR.

2. The Order's authorization of the non-bypassable RR is not supported by the manifest weight of the evidence; the Order could have addressed any rate concerns in a manner less disruptive to the competitive market. The Order further violated R.C. 4903.09 by failing to submit findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact contained in the record. *General Telephone Co. v. Public Utilities Commission of Ohio*, 30 Ohio St. 2d 271, 277 (1972).

The Order's modification of the RR is based upon one reason: "because the signatory parties have proposed that the Reconciliation Rider be bypassable, we agree that there is the potential for escalating bill impacts as shopping increases. Therefore, we will modify the Amended Stipulation to provide that the Reconciliation Rider be nonbypassable."[14] This reasoning, however, is not justified by record evidence, and, even if it were to any extent, the Order could have otherwise narrowly addressed this concern without materially modifying the settlement.

[13] RESA Ex. 1 at 11-12.

[14] Order at 35.

It is axiomatic that the Commission must support its decisions with record evidence. *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87 (1999). The Order, however, contains no citation or discussion of what rate impact the RR may have either currently or in the future. It merely claims that there may be "escalating bill impacts as shopping increases."[15] But there is no discussion of the impact of a bypassable RR vs. a non-bypassable under existing or any shopping levels. Therefore, the Order's concern is based upon an incomplete and undeveloped hypothetical concern. It is not based upon evidence in the record—it is mere speculation. Such speculation does not provide a sufficient evidentiary basis to materially modify the Amended Stipulation.

Likewise, the Order violated R.C. 4903.09 for failure to submit a written opinion based upon findings of fact in the record. As the Court has noted, "[t]he purpose of R.C. 4903.09 is to provide the court with sufficient details to enable it to determine how the commission reached its decision." *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St. 3d 202, 209 (1994). *See also General Telephone Co. v. Public Utilities Commission of Ohio*, 30 Ohio St. 2d 271, 277. Neither a party to this proceeding, nor an appellant court has any basis to understand how the Commission reached its determination. For example, the Order contains no discussion of what level of RR would cause an escalating rate impact, and it fails to identify what level of customer switching and combination of wholesale market prices would have to occur for such an impact to occur.

In addition to the Order failing to justify its decision, an examination of the potential bill impacts that are in the record further demonstrates that the Order's modification is not

[15] Order at 35.

supported by the manifest weight of the evidence and the Order could have addressed any of the Commission's concerns without materially modifying the Amended Stipulation. According to the DP&L witness Schroder, the impact of a bypassable RR for a typical residential customer that uses 1000 kWh per month would have been $1.85 in each month of the ESP.[16] That translates to $.00185 per kWh per month for a residential customer. Even with the bypassable RR, DP&L projected that monthly rates would decrease for DP&L's residential SSO customers in each of the next three years ($0.25 in 2017, $1.23 in 2018, and $1.84 in 2019).[17]

In contrast, making the RR nonbypassable results in a residential monthly bill of $0.54 for that same customer, or $0.0005427 per kWh.[18] The monthly difference is $1.31 from the initially proposed rate. That difference alone cannot provide the basis for the Commission's concern of potential rate shock, especially given that another Ohio utility is currently charging similarly situated customers $1.66 per month for its OVEC-related charge. Given these factors, the Commission could have easily addressed any rate shock concerns through more reasonable means.

Since the Order's reasoning is based upon a hypothetical concern that may or may not happen in the future, it would be more reasonable to include conditions to guard against that condition when and if it occurs. Given the projected annual SSO rate decrease of $1 per month relative to current rates—which include the projected bypassable RR—the Order could have established an upper bound rate for the

[16] DP&L Ex., Ex. A p. 1 Column F.

[17] *Id.* p. 1 Line 7 Column L, p. 13 Line 7 Column L, p. 25 Line 7 Column L.

[18] *See* P.U.C.O. No. 17 ELECTRIC DISTRIBUTION SERVICE RECONCILIATION RIDER, Original Sheet No. D40 (Oct. 31, 2017).

bypassable RR that would have safeguarded against the Commission's concern in the event that shopping levels drastically increase. The Order could have placed a per kWh cap on the size of any bypassable charge (or credit) that a default service customer would incur. In the next RR reconciliation, if the necessary rate to recover ongoing costs and previously unrecovered costs is greater than 10% of the initially forecasted RR rate,[19] DP&L could recover that surplus amount through a non-bypassable portion of the RR. While IGS does not believe that it is appropriate to make any shopping customer pay for generation-related costs of a distribution utility, within the context of this specific settlement, placing a cap on DP&L's bypassable cost recovery would specifically address the Commission's stated concern and provide a more reasonable outcome than the material modification to the settlement.

Accordingly, IGS urges the Commission to make the RR bypassable as proposed by the Amended Stipulation and, to the extent that Commission has potential future bill impact concerns, authorize safeguards such as a cap on bypassable cost recovery as described above. Depending on the terms authorized by the Entry on Rehearing, the benefit of the bargain may be preserved.

3. The Order's authorization of the non-bypassable RR violated Ohio law, policy, and precedent which prohibits the recovery of transition revenue. *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 443-450 (2016).

The Order's modification is as unlawful as it is unreasonable. The Order concluded that the Reconciliation Rider is lawful for two reasons: (1) it alleges that a technicality distinguishes the rider from a transition charge; (2) it alleges the RR is a rate stability

[19] The initially projected bypassable RR rate was projected to be $0.00185 per kWh; therefore, unrecovered RR costs would become non-bypassable to the extent that they would cause the rider to exceed $0.00203 per kWh.

charge authorizable under R.C. 4928.143(B)(2)(d) as a hedge against increases in wholesale prices. Although the Order attempted to justify the legality of its determination, that reasoning is unavailing based upon Supreme Court of Ohio precedent.

The Order's holding that the RR does not authorize DP&L to collect transition revenue is premised on the notion that transition charges must relate to generation facilities previously authorized to collect transition revenue in an electric transition plan. Specifically, the Order states:

> As we have discussed in other proceedings with similar proposed riders, the purpose of transition revenue was to allow electric distribution utilities to recover the costs of generation assets used to provide generation service to customers prior to the unbundling of rates in S.B. 3, if such costs could not be recovered through the market. R.C 4928.39. However, OVEC's generation output was used to provide generation service to the U.S. Department of Energy and its predecessors prior to January l, 2001. Therefore, the OVEC contractual entitlement, which was a wholesale transaction between OVEC and DP&L, was not" directly assignable or allocable to retail electric generation service provided to electric consumers in this state." R.C. 4928.39(B). Moreover, at the time of the enactment of S.B. 3 and the transition to a competitive market on January 1, 2001, OVEC's generation assets were used to serve OVEC's customer, the U.S. Department of Energy. Therefore, DP&L was not "entitled an opportunity to recover the costs," within the meaning of the statute. R.C. 4928.39(D). *In re Ohio Power Co.,* Case Nos. 14-1693-EL-RDR et al. *(Ohio Power),* Second Entry on Rehearing (Nov. 3, 2016) at 100; Fifth Entry on Rehearing (Apr. 5, 2017) at 37-38. There is no evidence in the record of this proceeding to distinguish our determination in *Ohio Power* from the facts of this case. Accordingly, consistent with our decision in *Ohio Power,* we find that costs related to OVEC's generation assets do not meet the criteria for transition costs under R.C 4928.39(B) or (D). Since OVEC's generation assets were used to provide generation service. to the U.S. Department of Energy and its predecessors prior to the transition to a competitive market on January 1, 2001, costs related to OVEC' s generation assets cannot be the basis for transition charges or their equivalent.[20]

[20] Order at 55-56.

As discussed below, it is simply irrelevant that OVEC did not serve DP&L customers prior to restructuring—that is a distinction without a difference. As discussed below, the restructuring legislation that occurred in 1999, and further refined in 2008, clearly tied the Commission's hands from authorizing charges such as the non-bypassable RR after the end of the market development period (2005).

During the process of restructuring Ohio's energy markets, the General Assembly provided utilities with a one-time opportunity to file an application to recover prudently incurred generation investment that would not be recoverable in a competitive market. R.C. 4928.31-4928.40 et sec. This investment is commonly referred to as stranded costs or transition costs, which utilities may collect through transition revenue riders. Transition revenue was quantified by comparing the difference of the unbundled generation revenue that a utility could collect prior to restructuring and expected market revenue generation resources it would receive in a competitive market. Most Ohio utilities performed a comparison to determine whether the revenue produced by the generating assets in a competitive market would allow the utility to recover the net book value of those assets in existence on December 31, 2000.

The deadline for recovery of generation-related transition revenue ended on December 31, 2005 with the end of the market development period.[21] After that point, the utility shall be on its own in the competitive market and shall not recover any additional transition revenue ***or equivalent revenue***:

> **The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue**

[21] Utilities were allowed to recover regulatory assets until December 31, 2010.

> **source, *the utility shall be fully on its own in the competitive market.* The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.**[22]

See also In re Application of Columbus S. Power Co., 147 Ohio St. 3d 439, 444-449 (2016) (hereinafter "*AEP ESP II Decision*"); *see also In re Application of Dayton Power & Light Co.,* 147 Ohio St.3d 166 (2016) (hereinafter "*DP&L ESP II Decision*"). Interpreting this statutory language, the Court has determined that the Commission lacks authority to authorize utilities to recover out-of-market costs from all customers: "the commission lacked authority to approve the RSR, since it allowed the company to recover costs that are otherwise unrecoverable in the competitive generation market. We find this argument well taken." *AEP ESP II Decision* at 443. Thus, following the market development period (2005), the utility may not receive handouts from all distribution customers to make up for a shortfall in market-based compensation.

Here, the Order modified the Stipulation to require DP&L to collect the net cost of DP&L's OVEC entitlement through a non-bypassable rider applicable to all distribution customers. By providing DP&L with out-of-market compensation for its competitive services, the Order authorized DP&L to collect transition revenue in violation of R.C. 4928.38 and the Supreme Court of Ohio's precedent in the *AEP ESP II Decision* and *DP&L ESP II Decision.*

The Order's claim that the RR is a hedge against rising wholesale prices does not save it from being a transition charge. This reasoning is contradicted by the Order's own

[22] R.C. 4928.38 (emphasis added).

determination that the RR will be a charge.[23] Indeed, the basis for making the charge non-bypassable is that it may have an escalating impact on SSO customers as shopping levels increase.[24] Given that finding, it is undeniable that Order contemplates the RR providing out-of-market compensation to DP&L from all distribution customers.

Moreover, labeling the RR as a stability charge does not change the character of the charge at issue. The Supreme Court has noted, labels are irrelevant—the Court will look to the underlying nature of the charge. And if the charge allows the utility to collect out-of-market revenue from all customers, it is a transition charge:

> [t]the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue under the guise of the RSR. The commission's overly narrow definition of transition revenue overlooks that R.C. 4928.38 bars "the receipt of transition revenues *or any equivalent revenues* by an electric utility" after 2010. (Emphasis added.) By inserting the phrase "any equivalent revenues," the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name. Therefore, we find that the commission erred in focusing solely on whether AEP had sought to receive transition revenues that are now barred.
>
> ****
>
> In sum, we find that the commission erred in focusing solely on whether AEP had expressly sought to receive transition revenues *rather than looking at the nature of the costs recovered through the RSR*. R.C. 4928.38 bars the "the receipt of transition revenues *or any equivalent revenues* by an electric utility." Based on the record before us, *we find that the RSR in this case recovers the equivalent of transition revenue and the commission erred when it found otherwise.*

[23] Order at 28, 35, 55-56.

[24] Order at 35.

AEP ESP II Decision at 445 (emphasis added); *see also DP&L ESP II Decision*. Notably, in these cases, the Court reversed "stability charges" authorized under R.C. 4928.143(B)(2)(d) as providing untimely and unlawful transition revenue.

Here, the Order itself acknowledges that the RR will be a charge to collect out-of-market revenues from all customers to support DP&L's financial integrity.[25] The RR guarantees that DP&L may recover the prudently incurred investment cost of generation assets from all distribution customers regardless of the market price. The structure of the RR is nearly identical to the formula for determining transition revenue. The RR charge is based on whether the OVEC units' market-based revenues recover their net book value plus a rate of return on that investment. Accordingly, the Order unlawfully authorized DP&L to collect transition revenue that is otherwise not recoverable in a competitive market. By the Order's own admission, there are instances in which the RR will allow AEP to collect costs that would not otherwise be recoverable in the competitive market. Indeed, the Order acknowledges that the RR will be a charge to recover uneconomic costs associated with DP&L-owned generation facilities. This is an admission that the RR will permit DP&L to recover from all distribution customers stranded generation investment beyond the statutory deadline for such collection.

Finally, the one party that advocated for the RR to be non-bypassable also acknowledged that doing so would result in the authorization of untimely transition revenue. As OCC witness Kahal testified regarding the initially proposed non-bypassable

[25] Order at 28, 35, 55-56.

RR, "such charges to customers to recover above market costs would be a transition charge."[26]

Therefore, to avoid providing DP&L an untimely and unlawful round of transition revenue, the Commission should grant rehearing and require DP&L to make the RR bypassable.

4. The Order violated R.C. 4928.143(B)(2)(d) and 4928.02(H) by authorizing DP&L to recover generation-related costs through distribution rates. *Elyria Foundry Pub. Util. Comm*., 114 Ohio St 3d 305, 315-317 (2007)

The Order determined that R.C. 4928.143(B)(2)(d) authorizes the Commission to approve the RR. That provision, however, does not authorize the Commission to establish a generation-related non-bypassable charge.

The Supreme Court of Ohio has indicated that the Commission may approve only ESP provisions authorized by R.C. 4928.143. *In re Application of Columbus Southern Power*, 128 Ohio St. 3d 512, (2011). R.C. 4928.143 provides only two instances in which the Commission may authorize nonbypassable generation-related riders: divisions (B)(2)(b) and (c). Under those two divisions, a nonbypassable charge is available to recover costs associated with generating facilities *under construction or constructed after 2009* that meet additional statutory requirements. The General Assembly's specific directive that a non-bypassable generation-related charge may be authorized under these two sections indicates a lack of authority to authorize such a charge in any other circumstances. The Supreme Court of Ohio has stated:

[26] OCC Ex. 12a at 49; *id* at 49-51.

> As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where, as in the cases *sub judice*, the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions.

Montgomery County Bd. of Comn'rs v. Pub. Util. Comm'n of Ohio, 28 Ohio St.3d 171, 175 (1986) (citations omitted). Because the RR does not pertain to the construction of new generation or otherwise satisfy the criteria of divisions (b) and (c), it cannot be lawfully authorized in an ESP. Therefore, the Commission should reject it.

Further, the Commission must reject the RR because it violates bedrock principles of Ohio law and policy, which prohibit subsidies to the generation portion of the business. "Pursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)." *Industrial Energy Users-Ohio v. Pub Util. Comm'n*, 2008-Ohio-990 at ¶6. Thus, generation is no longer subject to the Commission's economic regulation.

Unbundling regulated and unregulated services "ensured that distribution service would not subsidize the generation portion of the business. In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St.3d 451. 453 (2004). These regulatory principles are codified in R.C. 4928.02(H). That section prohibits "the recovery of any generation-related costs through distribution or transmission rates." To that end, the Commission has held that R.C. 4928.02(H) prohibits nonbypassable charges that are designed to collect generation-

related costs.[27] Furthermore, in *Elyria Foundary*, the Court reversed and remanded a Commission decision to permit FirstEnergy to recover fuel costs through distribution rates.

As discussed above, the RR would require all distribution customers to guarantee DP&L's investment in these generation resources. In short, it is unlawful for the Commission to ensure that distribution customers provide out-of-market compensation to support DP&L's investment in generation resources.

IV. CONCLUSION

For the reasons contained herein, IGS urges the Commission should grant this Application for Rehearing and authorize shopping customers to avoid the RR.

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[27] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider,* Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012).

CERTIFICATE OF SERVICE

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Summary: Application for Rehearing and Memorandum in Support electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy