

**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. )	

---

**APPLICATION FOR REHEARING OF THE  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

---

/s/ Kimberly W. Bojko  
Kimberly W. Bojko (0069402) (Counsel of Record)  
James D. Perko, Jr. (0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
Bojko@carpenterlipps.com  
Perko@carpenterlipps.com  
(willing to accept service by email)

*Counsel for the OMAEG*

## TABLE OF CONTENTS

I.	<u>INTRODUCTION AND PROCEDURAL HISTORY</u> .....	3
II.	<u>STANDARD AND REVIEW</u> .....	6
III.	<u>ASSIGNMENTS OF ERROR</u> .....	6
	<b>ASSIGNMENT OF ERROR NO. 1: The Commission’s Order Modifying The Amended Stipulation To Provide That The Reconciliation Rider Be Nonbypassable Is Unjust, Unreasonable, And Unlawful</b> .....	6
	A. The Commission Failed To Accord The Terms Of The Negotiated Amended Stipulation Substantial Weight .....	7
	B. The Commission’s Modification Of The Reconciliation Rider Is Without Record Support In Violation Of R.C. 4903.09.....	10
	C. The Commission’s Modification Of The Reconciliation Rider Making It Nonbypassable Transforms The Rider Into An Unlawful Transition Charge In Violation Of R.C. 4928.38 And State Policy .....	12
IV.	<u>CONCLUSION</u> .....	16

**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. )	

---

**APPLICATION FOR REHEARING OF THE  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

---

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code (O.A.C.), the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) October 20, 2017 Opinion and Order<sup>1</sup> issued in the above-captioned proceeding, wherein the Commission approved with modifications an amended stipulation (Amended Stipulation) to implement The Dayton Power and Light Company's (DP&L) third electric security plan. OMAEG contends that the Order is unlawful, unjust, and unreasonable in the following respects:

- A. The Commission's Order Modifying The Amended Stipulation To Provide That The Reconciliation Rider Be Nonbypassable Is Unjust, Unreasonable, and Unlawful.

---

<sup>1</sup> *In the Matter of the Application of The Dayton Power and Light Company For Approval of Its Electric Security Plan, et al.*, Case Nos. 16-395-EL-SSO, et al., Opinion and Order (October 20, 2017) (Order).

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant its application for rehearing and adopt the Amended Stipulation as filed that was either supported or not opposed by almost all parties.<sup>2</sup>

Respectfully submitted,

/s/ Kimberly W. Bojko  
Kimberly W. Bojko (0069402) (Counsel of Record)  
James D. Perko, Jr. (0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
Bojko@carpenterlipps.com  
Perko@carpenterlipps.com  
(willing to accept service by email)

*Counsel for the OMAEG*

---

<sup>2</sup> Amended Stipulation at 39-41 (March 13, 2017); DPL Reply Brief at 1, n.1.

**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.	)	

---

**MEMORANDUM IN SUPPORT**

---

**I. INTRODUCTION AND PROCEDURAL HISTORY**

On February 22, 2016, DP&L filed an application for a standard service offer (SSO) in the form of an electric security plan (ESP) to be in effect initially from January 1, 2017 through December 31, 2026 (ESP III).<sup>3</sup> The Application included, inter alia, a request for a Distribution Investment Rider (DIR) and a Reconciliation Rider that would flow through to customers the net cost (or benefit) from DP&L's sale of its Ohio Valley Electric Corporation (OVEC) contractual entitlement into the PJM market less all associated costs.

On October 11, 2016, DP&L filed an amended application (Amended Application) wherein DP&L introduced a new credit support rider, Distribution Modernization Rider (DMR), seeking \$145M/year for 7 years, totally approximately \$1.015 billion. After numerous settlement conferences, on January 30, 2017, DP&L, DPL Inc., and seven other signatory

---

<sup>3</sup> *In the Matter of the Application of The Dayton Power and Light Company For Approval of Its Electric Security Plan, et al.*, Case Nos. 16-395-EL-SSO, et al. (ESP III Case).

parties<sup>4</sup> filed a stipulation (Stipulation) wherein, inter alia, the parties agreed to \$125M/year for five years, split between the nonbypassable DMR and the DIR-B, totaling \$625M.<sup>5</sup> The first Stipulation also proposed that the OVEC Reconciliation Rider be implemented on a *nonbypassable* basis.<sup>6</sup> Due to the excessive DMR amount and the nonbypassable nature of the Reconciliation Rider, among other items, the majority of the intervening parties to this proceeding opposed the Stipulation and DP&L's Amended Application.<sup>7</sup> The Staff of the Commission (Staff) was among the opposing parties. Notably, there was only one consumer group that agreed to sign the Stipulation. Due to the general lack of support for the Stipulation, the parties to this proceeding resumed negotiations.<sup>8</sup>

As a result of those continued negotiations, the parties were able to compromise on some issues that resulted in the filing of another stipulation. Accordingly, on March 14, 2017, DP&L, DPL Inc., Staff, nine signatory parties,<sup>9</sup> and five non-opposing parties (including OMAEG as a

---

<sup>4</sup> The signatory parties to the Stipulation were the DP&L, DPL Inc., City of Dayton (Dayton), Interstate Gas Supply, Inc. (IGS), Retail Energy Supply Association (RESA), Edgemont Neighborhood Coalition (Edgemont), People Working Cooperatively (PWC), Mid-Atlantic Renewal Energy Coalition (MAREC), and Ohio Hospital Association (OHA). Two intervening parties agreed not to oppose the Stipulation.

<sup>5</sup> ESP III Case, Stipulation and Recommendation (January 30, 2017) (Stipulation).

<sup>6</sup> See Stipulation at 16.

<sup>7</sup> The parties opposed to the Amended Application and the Stipulation included: Staff, OMAEG, Office of the Ohio Consumers' Counsel, Ohio Energy Group (OEG), Industrial Energy Users-Ohio, The Kroger Co. (Kroger), Wal-Mart Stores East, LP and Sam's East, Inc., Ohio Partners for Affordable Energy (OPAE), Calpine Energy Solutions, LLC, PJM Interconnection, L.L.C., Independent Market Monitor for PJM, Utility Workers Union of America Local 175, Environmental Law and Policy Center, Environmental Defense Fund and Environmental Council, Adams County, Monroe Township, Sprigg Township, Adams County Ohio Valley School District, and Manchester Local School District. See Stipulation at 40-42.

<sup>8</sup> As explained by DP&L witness Sharon Schroder, even though the January 30, 2017 Stipulation was filed, DP&L continued to negotiate with Staff and other parties. See DP&L Ex. 3 at 4 (Direct Testimony of Sharon R. Schroder).

<sup>9</sup> The Signatory parties to Amended Stipulation include: DP&L, DPL Inc., Staff, Dayton, IGS, RESA, Edgemont, PWC, OHA, Kroger, OPAE, and OEG. See Amended Stipulation at 39-40.

non-opposing party),<sup>10</sup> filed an amended stipulation, which modified several material terms of the original Stipulation (Amended Stipulation).<sup>11</sup> Specifically, the Amended Stipulation eliminated the DIR-B and included a reduced DMR of \$105M/year for three years with a possible extension of up to two years subject to Commission approval.<sup>12</sup> Although OMAEG did not support the DMR, it agreed not to oppose this provision of the Amended Stipulation taking into consideration the Amended Stipulation as a total package.<sup>13</sup> The Amended Stipulation also materially modified the Reconciliation Rider set forth in the prior Stipulation, authorizing it to be “charged on a *bypassable* basis, allocated to tariff classes based on an allocation method of 50% demand and 50% energy with demand being allocated on a non-shopping customers 5 coincidental peak (5 CP) basis and charged on kWh basis.”<sup>14</sup>

The customer groups which negotiated and signed, or agreed not to oppose, the Amended Stipulation represent a wide range of customer interests consisting of Ohio manufacturers, hospitals, suppliers, commercial and industrial consumers, and low-income residential consumers.

On October 20, 2017, the Commission issued its Order adopting and modifying the Amended Stipulation.<sup>15</sup> On its own initiative, the Commission modified an expressly negotiated term of the Amended Stipulation providing that the Reconciliation Rider be nonbypassable

---

<sup>10</sup> See Amended Stipulation at 41. DP&L and MAREC filed a notice on March 24, 2017 indicating that MAREC will not oppose the Amended Stipulation.

<sup>11</sup> Amended Stipulation and Recommendation (March 14, 2017).

<sup>12</sup> Amended Stipulation at 5.

<sup>13</sup> Id. at 4, n. 1.

<sup>14</sup> Id. at 13 (Emphasis added).

<sup>15</sup> Order at ¶ 1.

instead of bypassable.<sup>16</sup> Such a modification jeopardizes an explicitly negotiated benefit for shopping customers as part of a negotiated settlement package.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a Commission order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”<sup>17</sup> OMAEG was granted intervention in this proceeding.<sup>18</sup>

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the Commission’s Order is unjust and unwarranted. It, therefore, should be abrogated or modified.

## **III. ASSIGNMENTS OF ERROR**

### **ASSIGNMENT OF ERROR NO. 1: The Commission’s Order Modifying The Amended Stipulation To Provide That The Reconciliation Rider Be Nonbypassable Is Unjust, Unreasonable, And Unlawful.**

Under the Amended Stipulation, the Signatory and Non-Opposing parties agreed that the Reconciliation Rider would be bypassable.<sup>19</sup> This provision and term was supported or unopposed by parties representing a diverse set of interests. The Commission’s material

---

<sup>16</sup> Id. at ¶ 63.

<sup>17</sup> R.C. 4903.10.

<sup>18</sup> See Entry granting OMAEG’s Motion to Intervene (August 16, 2017); Tr. Vol. I at 3.

<sup>19</sup> Amended Stipulation at 13.



modification of the terms and provisions of the negotiated Amended Stipulation, which provided that the Reconciliation Rider would be *bypassable*, is unreasonable and unlawful. Importantly, the Commission's material modification opens the door for parties to withdraw from the Amended Stipulation, which could result in additional litigation.<sup>20</sup>

The Commission's modification is unreasonable and unlawful because: 1) it failed to accord the terms of the Amended Stipulation substantial weight; 2) modification of the Reconciliation Rider is without record support in violation of R.C. 4903.09; and 3) the Commission's modification transformed the Reconciliation Rider into an unlawful transition charge in violation of R.C. 4928.38 and state policy. Because the Commission's modification of the Amended Stipulation regarding the Reconciliation Rider was unjust and unwarranted, the Commission should grant OMAEG's application for rehearing and abrogate or modify its Order to make the Reconciliation Rider *bypassable*. Alternatively, the Commission may provide that the Reconciliation Rider be conditionally bypassable.

**A. The Commission Failed To Accord The Terms Of The Negotiated Amended Stipulation Substantial Weight.**

Although not binding on the Commission, the terms of a stipulation are to be accorded substantial weight.<sup>21</sup> The Commission erred in modifying an expressly negotiated, material term of the Amended Stipulation to provide that the Reconciliation Rider be nonbypassable.<sup>22</sup> By

---

<sup>20</sup> See Amended Stipulation at 38 ("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, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, 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"); or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice ("Utility Notice").

<sup>21</sup> *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82, 2002-Ohio-1735, 765 N.E.2d 862.

<sup>22</sup> Order at ¶ 63.

proposing that the Reconciliation Rider be bypassable, Signatory and Non-Opposing parties to the Amended Stipulation intended to ensure that shopping customers will only pay for the generation that they use. By making the Reconciliation Rider nonbypassable, shopping customers will now be forced to bear the cost associated with a fleet of uneconomic generating units. What is worse, because shopping customers take generation from competitive retail electric service (CRES) providers, upon the Commission's modification, they will be paying for generation that they do not use and will be forced to unlawfully subsidize DP&L's generation costs. Effectively, shopping customers will pay twice. As RESA witness Matthew White testified, "[b]y setting OVEC cost recovery as a bypassable charge, it preserves the right of shopping customers to select their choice of competitive generation supply."<sup>23</sup> He further explained 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."<sup>24</sup>

After numerous negotiations and the filing of one settlement, the parties were able to compromise on some issues that resulted in the filing of the Amended Stipulation. The second stipulation modified several material terms of the original Stipulation and was supported by DP&L, DPL Inc., Staff, nine signatory parties, and five non-opposing parties.<sup>25</sup> The customer groups which negotiated and signed, or agreed not to oppose, the Amended Stipulation represent a wide range of customer interests consisting of Ohio manufacturers, hospitals, suppliers, commercial and industrial consumers, and low-income residential consumers.

---

<sup>23</sup> RESA Ex. 1 at 12 (Direct Testimony of Matthew White).

<sup>24</sup> Id.

<sup>25</sup> See Amended Stipulation at 39-41. DP&L and MAREC filed a notice on March 24, 2017 indicating that MAREC will not oppose the Amended Stipulation.

While not all Signatory Parties or Non-Opposing Parties agree with every provision of the Amended Stipulation, the numerous parties agreed to either support or not oppose the settlement as a total package. Importantly, the Amended Stipulation eliminated the DIR-B and included a reduced DMR of \$105M/year for three years with a possible extension of up to two years subject to Commission approval.<sup>26</sup> The Amended Stipulation also materially modified the Reconciliation Rider set forth in the prior Stipulation, authorizing it to be “charged on a *bypassable* basis, allocated to tariff classes based on an allocation method of 50% demand and 50% energy with demand being allocated on a non-shopping customers 5 coincidental peak (5 CP) basis and charged on kWh basis.”<sup>27</sup>

The terms of the Amended Stipulation (especially the modifications noted above) were expressly considered and negotiated. The Commission’s modification of an expressly negotiated, material term of the Amended Stipulation, which provided that the Reconciliation Rider would be nonbypassable instead of bypassable, jeopardizes an explicitly negotiated benefit for shopping customers as part of a negotiated settlement package.

As a result of the material modification, Signatory and Non-opposing Parties have the right to withdraw from the Amended Stipulation, which could result in additional litigation.<sup>28</sup> If parties withdraw from the Amended Stipulation, an evidentiary hearing will commence to afford

---

<sup>26</sup> Amended Stipulation at 5.

<sup>27</sup> Id. at 13 (Emphasis added).

<sup>28</sup> See Amended Stipulation at 38 (“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, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, 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”); or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice (“Utility Notice”).

the withdrawing party or parties an opportunity to contest the Amended Stipulation.<sup>29</sup> Even if the parties are able to arrive at a new settlement to address the Commission's modification, another amended stipulation would need to be filed and a hearing on that new stipulation will likely occur.

To honor the balance achieved by the total settlement package that was carefully negotiated and to prevent further litigation of the issues, the Commission should modify its Order and adopt the Amended Stipulation in its entirety as a total settlement package.

**B. The Commission's Modification Of The Reconciliation Rider Is Without Record Support In Violation Of R.C. 4903.09.**

The Commission's finding that "there is potential for escalating bill impacts as shopping increases" is unsupported by the record in violation of R.C. 4903.09.<sup>30</sup> R.C. 4903.09 requires the Commission to include, with its written opinions, "reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has stated that the Commission is required to "explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its orders are based."<sup>31</sup> The Order did not provide record citations to support its conclusion that there is the potential for escalating bill impacts and the Order failed to explain and identify, in sufficient detail to enable review, how there may be such a potential.

As DP&L explained in its reply brief, the argument that the Reconciliation Rider will inflate SSO costs should be rejected because: "(1) it is reasonable that SSO customers pay the Reconciliation Rider, since it relates to generation; (2) DP&L's rates for typical residential

---

<sup>29</sup> Id. at 38-39.

<sup>30</sup> Order at ¶ 63.

<sup>31</sup> *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016- Ohio-1607 at ¶53 (April 21, 2016); see *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987).

customers will remain the lowest in the state and customers will receive a rate decrease (Shroder Test. (DP&L Ex. 3), pp. 20-21, Exs. A&B); and (3) *customers can avoid the rider by switching.*”<sup>32</sup> Indeed, even with a bypassable Reconciliation Rider, the ESP III is forecasted to reduce residential customer bills by \$39.84 over three years.<sup>33</sup> Even if residential customers would not see a reduction in their bills, which they will, every customer can avoid the Reconciliation Rider by switching to a CRES provider for electric generation service. Therefore, any risk of “escalating bill impacts” can be avoided by customers shopping.

Further, the Commission’s finding that the Reconciliation Rider will “benefit customers” and its finding that “there is potential for escalating bill impacts as shopping increases,” is contradictory and inconsistent.<sup>34</sup> In its Order, the Commission found that the Reconciliation Rider “will benefit customers because it will act as a hedge which will mitigate spikes in market prices.”<sup>35</sup> If the Reconciliation Rider is to “benefit customers” and operate as a “hedge” as the Commission found, under this premise, “the potential for escalating bill impacts as shopping increases” should be minimal.<sup>36</sup> If the Reconciliation Rider would benefit customers, fewer customers to share this “benefit” should therefore increase the “benefit” among the non-shopping SSO customers. The potential for any “escalating bill impacts” should be limited because every DP&L SSO customer has the option to switch to a CRES provider and avoid the Reconciliation Rider. And as Staff explained, “[s]hopping customers will be helped by the availability of the

---

<sup>32</sup> DP&L Reply Brief at 12 (May 15, 2017) (Emphasis added) (DP&L Reply Brief).

<sup>33</sup> Residential customers using 1000 kWh can expect to see a reduction of \$3.00 in 2017 (DP&L Ex. 3 at Ex. A, p. 1), \$14.76 in 2018 (DP&L Ex. 3 at Ex. A, p. 13), and \$22.08 in 2019 (DP&L Ex. 3 at Ex. A, p. 25).

<sup>34</sup> Order at ¶ 63.

<sup>35</sup> Id.

<sup>36</sup> See Id.

direct hedge provided by the *bypassable* Reconciliation Rider.”<sup>37</sup>

Because any potential for escalating bill impacts can be avoided, the Commission should abrogate or modify its Order to provide that the Reconciliation Rider be bypassable. Additionally, because the Commission materially modified the Amended Stipulation, the Signatory and Non-opposing Parties to the Amended Stipulation may withdraw from the agreement leading to additional litigation.<sup>38</sup>

Notwithstanding the above, the Commission’s concern for the potential of escalating bill impacts as shopping increases could be alleviated or mitigated with the implementation of a “circuit breaker” provision. On rehearing, the Commission could establish an alternative to the settlement by providing for the Reconciliation Rider to be conditionally bypassable when a threshold is met. A threshold could be established so that when customers’ bill impacts reach a certain percentage or level, the Reconciliation Rider would become nonbypassable. Setting a “circuit breaker” or threshold would prevent a situation where the amounts to be recovered from customers under the Reconciliation Rider would become so large that it drives up the SSO cost. The Commission approved a similar “circuit breaker” rider provision in a previous ESP case.<sup>39</sup>

**C. The Commission’s Modification Of The Reconciliation Rider Making It Nonbypassable Transforms The Rider Into An Unlawful Transition Charge In Violation Of R.C. 4928.38 And State Policy.**

Under R.C. 4928.38, the Commission is barred from authorizing “the receipt of transition

---

<sup>37</sup> Staff Initial Post Hearing Brief at 6 (May 5, 2017) (Emphasis added).

<sup>38</sup> See Amended Stipulation at 38.

<sup>39</sup> See *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 (August 25, 2010) (“The Generation Cost Reconciliation Rider (Rider GCR) will be avoidable by customers during the period that the customer purchases retail electric generation service from a CRES provider unless the allowed balance of Rider GCR reaches five percent of the generation expense in two consecutive quarters.”)

revenues or any equivalent revenues by an electric utility” after December 31, 2010.<sup>40</sup> The Supreme Court of Ohio recently reversed the Commission’s approval of DP&L’s former *nonbypassable* service stability charge as an unlawful transition charge.<sup>41</sup> In the original Stipulation, the Reconciliation Rider subsidizing DP&L’s OVEC liability had the initial makings of an unlawful transition charge. However, in the Amended Stipulation, the parties agreed that the Reconciliation Rider would be bypassable. As DP&L noted in its reply brief, “transition costs are by definition ‘nonbypassable.’”<sup>42</sup> Indeed, the Supreme Court of Ohio explained that transition costs “are generation costs that the utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have switched to another generation provider.”<sup>43</sup> In other words, a transition charge is by definition nonbypassable.

Under the terms of the Amended Stipulation, the Reconciliation Rider was *bypassable* and therefore, DP&L’s generation costs in OVEC could not be recovered from customers who switched to a CRES provider. However, a *nonbypassable* Reconciliation Rider would operate identical to AEP’s RSR and DP&L’s service stability charge that the Court found to be unlawful transition charges.<sup>44</sup> Therefore, when the Commission modified the Reconciliation Rider to make it nonbypassable, it transformed the rider into an unlawful transition charge.

Further, the Commission’s modification of the Reconciliation Rider providing that it be nonbypassable violates Ohio policy such that it authorizes the collection of generation charges

---

<sup>40</sup> R.C. 4928.38; R.C. 4928.40.

<sup>41</sup> *In re Dayton Power and Light Co.*, 147 Ohio St. 3d 166, 2016-Ohio-3490, 62 N.E.3d.

<sup>42</sup> DP&L Reply Brief at 23 (citing R.C. 4928.37(A)(1)(b)).

<sup>43</sup> *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 15 (finding AEP’s Retail Stability Rider (RSR) to be an unlawful transition charge).

<sup>44</sup> See *Id.*; see also *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179, ¶ 1.

from distribution customers who shop for generation service. Under R.C. 4928.02, it is Ohio policy to:

(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 . . . .<sup>45</sup>

It is also the duty of the Commission to ensure that the policies set forth in R.C. 4928.02 are effectuated.<sup>46</sup> By modifying the Reconciliation Rider to provide that it be nonbypassable, the Commission's Order is unjust and unreasonable as it violates Ohio's foregoing policy because shopping customers will be forced to subsidize generation-related costs that are not incurred by their generation provider.

A nonbypassable Reconciliation Rider subsidizes DP&L's generation-related costs.<sup>47</sup> It is undisputed that the Reconciliation Rider allows DP&L to recover generation costs associated with its contractual commitments in OVEC.<sup>48</sup> The Reconciliation Rider, therefore, operates to subsidize DP&L's generation costs in OVEC.

Finally, a nonbypassable Reconciliation Rider is collected through a distribution rider. Because the Commission modified the Reconciliation Rider to be nonbypassable, all distribution customers will pay this charge, including customers who purchase generation from a CRES provider. Notwithstanding, the Commission has found that an electric distribution utility's SSO

---

<sup>45</sup> R.C. 4928.02(H).

<sup>46</sup> R.C. 4928.06.

<sup>47</sup> RESA Ex. 1 at 12 (Direct Testimony of Matthew White).

<sup>48</sup> See Tr. Vol. IV at 755; see also DP&L Ex. 3 at 13:17-19 (Direct Testimony of Sharon R. Schroder).



must comply with State policies in R.C. 4928.02.<sup>49</sup> Subsidizing DP&L's interest in OVEC through a nonbypassable rider violates Ohio's policy under R.C. 4928.02(H).

Agreeing that the Reconciliation Rider would be bypassable ensured that shopping customers would only pay for generation costs incurred by their CRES supplier. Upon the Commission's modification, shopping customers must now also subsidize DP&L's generation-related costs. Accordingly, the Commission's modification of the Reconciliation Rider in its Order fails to effectuate Ohio policy under R.C. 4928.02(H) and violates R.C. 4928.06.

The Commission's Order is, therefore, unreasonable and unlawful. Accordingly, the Commission should abrogate or modify its Order making the Reconciliation Rider bypassable.

---

<sup>49</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service, et al.*, Case Nos. 08-936-EL-SSO, et al., Opinion and Order at 13-14 (Nov. 25, 2008).

#### IV. CONCLUSION

OMAEG respectfully requests that the Commission grant its application for rehearing of the issues set forth herein and abrogate or modify its Order that provides that the Reconciliation Rider be nonbypassable and adopt the terms and provisions of the Amended Stipulation in their entirety and without modification. Alternatively, the Commission should consider adopting a provision whereby the Reconciliation Rider would be conditionally bypassable.

Respectfully submitted,

/s/ Kimberly W. Bojko  
Kimberly W. Bojko (0069402) (Counsel of Record)  
James D. Perko, Jr. (0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
Bojko@carpenterlipps.com  
Perko@carpenterlipps.com  
(willing to accept service by email)

*Counsel for the OMAEG*

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on the following parties on November 20, 2017.

/s/James D. Perko, Jr.

thomas.mcnamee@ohioattorneygeneral.gov  
natalia.messenger@ohioattorneygeneral.gov  
jsharkey@ficlaw.com  
djireland@ficlaw.com  
chollon@ficlaw.com  
william.michael@occ.ohio.gov  
andrew.garver@occ.ohio.gov  
kevin.moore@occ.ohio.gov  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com  
kboehm@BKLawfirm.com  
jkylercohn@BKLawfirm.com  
joliker@igsenergy.com  
mswhitegigsenergy.com  
Ebettertongigsenergy.com  
schmidt@sppgrp.com  
jeffrey.mayes@monitoringanalytics.com  
evelyn.robinson@pjm.com  
sechler@carpenterlipps.com  
paul@carpenterlipps.com  
cmooney@ohiopartners.org  
mdortch@kravitzllc.com  
rparsons@kravitzllc.com  
rsahli@columbus.rr.com  
chris@envlaw.com  
tony.mendoza@sierraclub.org  
kristin.henry@sierraclub.org  
greg.wannier@sierraclub.org  
michelle.d.grant@dynegy.com  
mfleisher@elpc.org  
kfield@elpc.org  
lhawrot@spilmanlaw.com  
dwilliamson@spilmanlaw.com  
charris@spilmanlaw.com

Stephen.Chriss@walmart.com  
Greg.Tillman@walmart.com  
mjsettineri@vorys.com  
smhoward@vorys.com  
glpetrucci@vorys.com  
ibatikov@vorys.com  
wasieck@vorys.com  
gthomas@gtpowergroup.com  
stheodore@epsa.org  
laurac@chappelleconsulting.net  
ejacobs@ablelaw.org  
slesser@calfee.com  
jlang@calfee.com  
talexander@calfee.com  
mkeaney@calfee.com  
jdoll@djflawfirm.com  
mcrawford@djflawfirm.com  
rick.sites@ohiohospitals.org  
mwarnock@bricker.com  
dborchers@bricker.com  
amy.spiller@duke-energy.com  
jeanne.kingery@duke-energy.com  
elizabeth.watts@duke-energy.com  
crtamm@classicconnectors.com  
jstock@beneschlaw.com  
ocollier@beneschlaw.com  
mlandes@isaacwiles.com  
bzets@isaacwiles.com  
todonnell@dickinsonwright.com  
rseiler@dickinsonwright.com  
cpirik@dickinsonwright.com  
wvorys@dickinsonwright.com  
prosecutorkelley@usa.com  
dana.whalen@adamscountyoh.gov  
dparram@bricker.com  
eppla@theOEC.org

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**11/20/2017 5:24:26 PM**

**in**

**Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM**

Summary: App for Rehearing Application for Rehearing of the Ohio Manufacturers' Association Energy Group electronically filed by Mr. James D Perko on behalf of The Ohio Manufacturers' Association Energy Group