

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM
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**THE DAYTON POWER AND LIGHT COMPANY'S MOTION  
TO STRIKE NOTICE OF WITHDRAWAL FROM THE AMENDED STIPULATION**

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The Dayton Power and Light Company ("DP&L") moves to strike the October 19, 2018 Notice of Withdrawal from the Amended Stipulation and Recommendation of Interstate Gas Supply, Inc. ("Notice of Withdrawal") for three separate and independent reasons.

First, IGS's Notice of Withdrawal is premature in light of the October 19, 2018 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel, which extends the period in which the Commission may modify its Opinion and Order. Ohio Rev. Code § 4903.10; Ohio Admin. Code § 4901-1-35; Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 332, 533 N.E.2d 353 (1988). Pursuant to Section XI.5 of the Stipulation, a Signatory Party may withdraw from the Stipulation "[i]f the Commission does not adopt the Stipulation without material modification upon rehearing." (Emphasis added.) Since the rehearing process is ongoing, any notice of withdrawal at this point not only would violate the Stipulation, but also would potentially waste time, energy, and resources of the Commission and the parties.

Second, even if the Notice of Withdrawal were timely, IGS expressly did not support the only provision modified by the Commission at issue in the Notice of Withdrawal: Section VI.1.a.ii. Stipulation, p. 13, n.6. Since only Signatory Parties may withdraw from the Stipulation, the Commission should reject IGS's attempt to do so. Stipulation, § XI.5.

Third, even if IGS were a Signatory Party as to Section VI.1.a.ii, its failure to support that provision demonstrates that the Commission's modification was not "material," a prerequisite of any withdrawal. Id. Thus, IGS's Notice of Withdrawal should be struck.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF  
THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO STRIKE  
NOTICE OF WITHDRAWAL FROM THE AMENDED STIPULATION**

The Commission should strike IGS's Notice of Withdrawal and reject its attempt to commence an evidentiary proceeding to oppose the Stipulation. At issue is the modification of Section VI.1.6.ii of the Stipulation, which recommended that DP&L's Reconciliation Rider, which recovers net proceeds from selling OVEC energy and capacity into the PJM marketplace and OVEC costs, "be charged on a bypassable basis." Stipulation, p. 13. The October 20, 2017 Opinion and Order (¶ 63) modified that provision to charge the rider on a non-bypassable basis.

Section XI.5 of the Stipulation provides the sole mechanism for withdrawing from the Stipulation. It provides, in pertinent part:

"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 . . . 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 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, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs."

(Emphasis added.)

Thus, pursuant to Section XI.5, a notice of withdrawal can be filed only "upon rehearing" when the Commission fails to "adopt the Stipulation without material modification." Id. In addition, only Signatory Parties (as opposed to the separate category of Non-Opposing Parties, who did not support the Stipulation, but agreed not to challenge it)<sup>1</sup> can withdraw from the Stipulation. Id. Put differently, a notice of withdrawal can be filed only (1) "upon rehearing," (2) by a Signatory Party, and (3) after a "material modification."

The Notice of Withdrawal fails to satisfy all three prerequisites of Section XI.5. First, although the Commission denied IGS's application for rehearing regarding the modification at issue,<sup>2</sup> the rehearing process is not complete in light of the October 19, 2018 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel. As the Supreme Court of Ohio has held, "under R.C. 4903.10, any order on rehearing may modify or even abrogate the original order." Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 332, 533 N.E.2d 353 (1988) ("Thus, the statutes link all parties in the rehearing process following issuance of the commission's original order and, in effect, hold the original order hostage to the outcome of the final rehearing."). Thus, it cannot be said that a decision has been made "upon rehearing" triggering a party's right to withdraw from the Stipulation. Allowing IGS to drag the parties into an evidentiary hearing to attack the Stipulation while the Commission's Opinion and Order is still subject to change would potentially waste time, energy, and resources of the Commission and the parties. The Notice of Withdrawal is, therefore, premature. Ohio Rev. Code § 4903.10; Ohio Admin. Code § 4901-1-35; Senior Citizens, 40 Ohio St.3d at 332.

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<sup>1</sup> Stipulation, p. 41.

<sup>2</sup> Sept. 19, 2018 Third Entry on Rehearing.

Second, IGS is not a Signatory Party as to Section VI.1.a.ii of the Stipulation. A footnote to Section VI.1.a, states: "RESA and IGS do not support but agree not to oppose Section VI.1.a.i. and ii. of the Stipulation." Stipulation, p. 13, n. 6 (emphasis added). Thus, with respect to that provision, IGS is a Non-Opposing Party, rather than a Signatory Party who may withdraw from the Stipulation under Section XI.5. The Commission should not reward parties who partially join stipulations and recommendations with the full benefits of parties who join without reservation. Since IGS expressly did not support the provision recommending that the Reconciliation Rider be bypassable, it should not be permitted to withdraw from the Stipulation only because the Commission modified that aspect of it. Id.

Third, the Commission's modification was not material. Black's Law Dictionary defines "material" as that "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Here, IGS expressly withheld support from the provision recommending that the Reconciliation Rider be bypassable. Stipulation, p. 13, n. 6. Thus, IGS cannot credibly argue that the recommendation was so "significant" or "essential" as to affect its "decision-making." Tellingly, the similarly situated RESA, which joined IGS in refusing to support Section VI.1.a.ii., did not also file a notice of withdrawal under Section XI.5 and remains a party to the Stipulation.

The modification is also not material because IGS does not pay the Reconciliation Rider. Since the rider is paid by DP&L's customers – not IGS – only those customers should be able to challenge rate allocations. The Commission's allocation here, thus, does not have any material effect on IGS.

For each of these separate and independent reasons, the Commission should strike the Notice of Withdraw.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing The Dayton Power and Light Company's Motion to Strike Notice of Withdrawal from the Amended Stipulation has been served via electronic mail upon the following counsel of record, this 26th day of October, 2018.

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

**Commission of Ohio Docketing Information System on**

**10/26/2018 5:09:16 PM**

**in**

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

Summary: Motion The Dayton Power and Light Company's Motion to Strike Notice of Withdrawal from the Amended Stipulation electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company