

**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)	Case No. 16-0397-EL-AAM
Authority Pursuant to Ohio Rev. Code)	
§ 4905.13.)	

**MEMORANDUM CONTRA OF INTERSTATE GAS SUPPLY, INC. TO THE DAYTON
POWER AND LIGHT COMPANY'S MOTION TO STRIKE AND MEMORANDUM IN
SUPPORT**

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I. INTRODUCTION

Following the denial of Interstate Gas Supply, Inc’s (“IGS”) application for rehearing, IGS timely and appropriately filed a Notice of Withdrawal from the Amended Stipulation (“Notice”). The Dayton Power and Light Company (“DP&L”) moved to strike IGS’ Notice, asserting three arguments: (1) the Notice is premature, given that another entity sought rehearing (2) IGS is not a signatory party to the Stipulation; therefore, IGS has no right to withdraw, and (3) the modification was not material; therefore, IGS has no right to withdraw. DP&L’s arguments lack merit.

IGS' Notice was timely. The existing application for rehearing before the Commission does not provide the Commission with an opportunity to rectify IGS' concern; therefore, it is appropriate to permit IGS' to withdraw and contest the Stipulation.

Moreover, IGS is a signatory party to the Stipulation under its clear and unambiguous terms. IGS submitted testimony in support of the Reconciliation Rider ("RR"), noting that any cost recovery related to the RR must be bypassable to comport with Ohio law. Given this fact, IGS clearly supported the RR provision and demonstrated that any modification would be material. Therefore, the Commission should reject the motion and establish a procedural schedule to afford IGS due process rights.

II. BACKGROUND

In this challenging proceeding, IGS has made every effort to settle contested legal matters without protracted litigation. Indeed, IGS has been a party to not one but two different stipulations in this case. The first stipulation was submitted on January 30, 2017. As part of that settlement, DP&L agreed to establish a component of the standard service offer ("SSO") rate to recognize costs related to but avoided by default service.

Following additional discussions, IGS joined the Amended Stipulation and Recommendation ("Amended Stipulation") on March 14, 2017. Among other things, the Amended Stipulation required the Reconciliation Rider ("RR") to be bypassable to customers served by a competitive retail electric service ("CRES") provider.

IGS was not obligated to file testimony or briefs supporting the Amended Stipulation.¹ Despite this fact, IGS filed testimony stating that, *if* the Commission allows

¹ Amended Stipulation at fn 9.

any cost recovery related to OVEC (“Ohio Valley Electric Corporation”) through the RR, such recovery should be *bypassable*:

To the extent the Commission allows DP&L to recover costs related to its entitlement from the OVEC coal units at the Kyger Creek and Clifty Creek facilities, that recovery should be on a bypassable basis. By setting OVEC cost recovery as a bypassable charge, it preserves the right of shopping customers to select their choice of competitive generation supply. Making 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.²

On October 20, 2017, the Commission issued an Opinion and Order modifying the RR provision to make it non-bypassable. The modification undermined an integral component of the bargain; therefore, it was material.

Under the Amended Stipulation, any Signatory Party³ may withdraw following a material modification:

This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification. 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").¹¹ Upon the filing of such Utility Notice by DP&L, the Stipulation shall immediately become null and void. 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

² RESA/IGS Ex. 1 (containing the Direct Testimony of Matthew White on behalf of Interstate Gas Supply, Inc. and the Retail Energy Supply Association).

³ “Signatory Parties” is a defined term under the Stipulation as “the parties that have signed below.” IGS signed the Amended Stipulation as a Signatory Party. Moreover, the Stipulation defines “Non-opposing Parties” as “those parties that sign this Stipulation as ‘Non-opposing Parties.’”

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. If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are successful, then some or all of the Signatory Parties shall submit the amended Stipulation to the Commission for approval after a hearing if necessary.

The requirements to withdraw are rather straightforward. The modification must be material. Additionally, the aggrieved party must first file an application for rehearing requesting that the Commission adopt the Stipulation without modification. Following the denial of the application for rehearing, the aggrieved party must undertake good faith negotiations to attempt to salvage the benefit of the bargain through a subsequent agreement. If those negotiations are not successful, the Signatory Party must file a Notice of Withdrawal within 30 days of the Entry on Rehearing.

On November 20, 2017, IGS and several parties sought rehearing of the Commission's material modification to the Amended Stipulation. The Commission issued an Entry on Rehearing denying IGS' application for rehearing on September 19, 2018.⁴

Following the Commission's September 19, 2018 Entry on Rehearing, IGS negotiated with other parties in good faith to attempt to salvage the benefit of the bargain. Those discussions were not successful.

On October 19, 2018, within 30 days for the Commission's Entry on Rehearing, IGS submitted its Notice and requested that the Commission establish a procedural schedule to permit IGS to contest the Amended Stipulation. On that same day, the Office

⁴ Entry on Rehearing at 18-31 (Sep. 19, 2018).

of the Ohio Consumers' Counsel ("OCC") filed an Application for Rehearing narrowly tailored to address two issues, neither relate to the RR. First, OCC challenged the Entry on Rehearing's reliance upon R.C. 4905.31 (the reasonable arrangement statute) to support the deployment of advanced metering. Second, OCC challenged the Entry on Rehearing's reliance upon R.C. 4905.31 for purposes of applying the ESP vs. MRO test.

On October 26, DP&L moved to strike IGS' Notice, arguing that: (1) IGS' Notice was not timely, (2) IGS is not a Signatory Party, (3) the modification was not material. As discussed below, DP&L's motion lacks merit and should be denied.

III. ARGUMENT

A. IGS' Notice is Timely

DP&L claims that IGS' Notice is not timely, relying upon *Senior Citizens Coalition v. Pub. Util. Comm'n*, 40 Ohio St. 3d 329, 332-33 (1988).⁵ DP&L's argument is premised on the fact that OCC filed an application for rehearing, which prevents the Commission's September 19, 2018 Entry on Rehearing from becoming a final appealable order. DP&L's argument misses the mark.

Senior Citizens has no bearing on the issue presented by IGS' Notice. Under Ohio law, only final orders may be appealed. *Senior Citizens* simply determined that a party cannot take an appeal to the Supreme Court of Ohio until the last application for rehearing has been ruled upon. In favor of judicial economy, the Court has "routinely pronounced its disfavor of piecemeal appeals." *Id.* at 332 (quoting *Toledo Edison Co. v. Pub. Util. Comm'n*, 5 Ohio St. 3d 95 (1983)). Therefore, a "commission order is not final and

⁵ DP&L Motion at 2.

appealable where the matter is still pending before the commission on rehearing.” *Toledo Edison Co. v. Pub. Util. Comm’n*, 5 Ohio St. 3d 95 (1983).

IGS’ right to withdraw, however, is not tied to the Commission issuing a final appealable order. While the Amended Stipulation could have tied IGS’ right to withdraw to a final appealable order, it did not. Rather, IGS’ right is contingent on an Entry on Rehearing failing to adopt the Amended Stipulation without material modification. Because the September 19, 2018 Entry on Rehearing denied IGS’ application for rehearing, IGS’ right to withdraw is ripe.

Moreover, IGS is not seeking to take an appeal at this juncture; rather, IGS is seeking an opportunity to go to trial and oppose the Amended Stipulation. It defies common sense and reason and would waste resources to wait until a final appealable order just to go back to the trial stage.

In a similar vein, the outstanding nature of OCC’s application for rehearing is a red herring. An Entry on Rehearing must either grant or deny specific challenges raised in the relevant application for rehearing under consideration. Because OCC’s application for rehearing did not challenge the non-bypassable RR in any fashion, the entry that ultimately addresses OCC’s challenge cannot provide IGS with its desired relief regarding the RR.⁶⁶ It is a legal impossibility and would lead to nonsensical results. It is equivalent to asking a person to patiently wait for a bus that will take them to the wrong place.

Accordingly, IGS’ Notice was timely filed.

⁶⁶ *Discount Cellular, Inc. v. Pub. Util. Comm’n*, 112 Ohio St. 3d 360 ¶65 (2006).

B. IGS is Signatory Party

DP&L argues that IGS' cannot withdraw because IGS is a not a Signatory Party to Section VI.1.a.ii of the Amended Stipulation.⁷ DP&L alleges that IGS is a "Non-Opposing Party" and therefore cannot withdraw.⁸ DP&L's argument mischaracterizes IGS' status and misreads the language of the Amended Stipulation.

Contrary to DP&L's claim, IGS is a Signatory Party under the clear and unambiguous terms of the Amended Stipulation. Section XI(5) expressly provides a Signatory Party with a right to withdraw if the Amended Stipulation is modified in a material fashion. "Signatory Parties" and "Non-Opposing Parties" are specifically referenced as defined terms in the Amended Stipulation. Signatory Parties are "the parties that have signed below"⁹ whereas Non-Opposing Parties "shall be those parties that sign this Stipulation as Non-Opposing Parties."¹⁰ IGS signed the Amended Stipulation in the section designated for Signatory Parties.¹¹ Therefore, IGS qualifies as a Signatory Party and may exercise its right to withdraw.

DP&L's argument regarding the footnote in Section VI.1.a.ii is misplaced. Although Stipulations often state that they are not precedential, this principle is not always

⁷ DP&L Motion at 3.

⁸ *Id.*

⁹ Amended Stipulation at 1.

¹⁰ *Id.* at fn 2.

¹¹ *Id.* at 39-40.

respected. A footnote insulates against the risk that another party cites to an isolated stipulation provision in another case. Footnotes, however, do not change the fact that parties submit the stipulation as a package—the package, of course, includes all provisions.

Regarding the RR, IGS included a footnote stating “RESA and IGS do not support but agree not to oppose Section VI.1.a.i. and ii. of the Stipulation.”¹² Each party must speak for their self. But, to IGS, the presence of a footnote reflects a heightened sensitivity around a provision. The subject of utility-owned or controlled generation is a sensitive issue—especially given that DP&L’s legacy investments in old and inefficient generating assets has led to consecutive requests to shore up its balance sheet on the backs of all distribution customers. Thus, it should be no surprise that IGS included a footnote in the RR provision, which permitted an electric distribution utility to rely upon its own generating assets in an electric security plan. Despite the footnote, IGS signed the Amended Stipulation as a Signatory Party and supported it as a package deal.

To the extent that IGS’ position regarding the RR was unclear, IGS’ testimony **in support of the Stipulation** should clear up any confusion. IGS was not obligated to file testimony or briefs supporting the Amended Stipulation.¹³ Despite this fact, IGS filed testimony and submitted briefs stating that, *if* the Commission allows *any* cost recovery related to OVEC through the RR, such recover should be *bypassable*:

To the extent the Commission allows DP&L to recover costs related to its entitlement from the OVEC coal units at the Kyger Creek and Clifty Creek facilities, that recovery should be on a bypassable basis. By setting OVEC cost recovery as a bypassable charge, it preserves the right of shopping customers to select their

¹² *Id.* at fn 6.

¹³ Amended Stipulation at fn 9.

choice of competitive generation supply. Making 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.¹⁴

Indeed, the Testimony of IGS employee Matthew White is the *only testimony in the record* that specifically recommends that the Commission authorize the RR as a bypassable rider.¹⁵ Therefore, under the clear and unambiguous language of the Amended Stipulation and the weight of the evidence, IGS was a Signatory Party and appropriately exercised its right to withdraw after the Order undermined the benefit of the bargain.

C. The Modification was Material

DP&L's argument that the modification was not material is largely predicated on its meritless footnote argument.¹⁶ DP&L also argues that: (1) the modification was not material because RESA did not withdraw, and (2) IGS is not a customer that pays the RR and thus the modification of the RR does not have a material impact on IGS.¹⁷ Each of these arguments lack merit.

Initially, Black's Law Dictionary provides the following definition, which is broader than the definition that DP&L purportedly obtained from the same source:

Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. An allegation is said to be material when it forms a substantive part of the case presented by the pleading. Evidence offered in a cause, or a question propounded, is

¹⁴ RESA/IGS Ex. 1 at 11-12 (containing the Direct Testimony of Matthew White on behalf of Interstate Gas Supply, Inc. and the Retail Energy Supply Association).

¹⁵ Although DP&L witness Schroeder testified in support of the RR, she does not discuss any preference between a bypassable or non-bypassable charge.

¹⁶ DP&L Motion at 3.

¹⁷ *Id.*

material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.¹⁸

The bypassable RR is not only a “substantive part of the case” it was one of the most important provisions in the Amended Stipulation. Indeed, five different Signatory and Non-Opposing Parties filed applications for rehearing in response to the Order’s modification of the RR.¹⁹ Clearly, the bypassable RR was a “substantive part of the case” and critical to the “merits.” It was not a matter of form over substance—IGS would not withdraw and commit significant resources to litigate a proceeding over an immaterial modification.

RESA’s decision to not withdraw is irrelevant. Whether a party ultimately does or not withdraw has no bearing on the materiality of the modification. Just because a party did not withdraw, does not mean they could not have. They simply made a business decision that the Amended Stipulation, as modified, had value. While IGS could give its perspective on whether RESA believed the modification was in fact material, there is no need. RESA’s application for rehearing speaks for itself: “The Commission then modified the Reconciliation Rider to require it to be non-bypassable. ***This 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.”²⁰ Likewise, OMA’s²¹ application

¹⁸ <https://thelawdictionary.org/material/> (last viewed on Nov. 2, 2018).

¹⁹ Applications for Rehearing were submitted by RESA, IGS, Industrial Energy Users-Ohio, Ohio Manufacturers’ Association Energy Group, and Kroger.

²⁰ Application for Rehearing and Memorandum in Support of the Retail Energy Supply Association at 3-4 (emphasis added); see *id.* at 12.

²¹ Application for Rehearing and Memorandum in Support of Ohio Manufacturers’ Association Energy Group at 5 (“The Amended Stipulation also materially modified the Reconciliation Rider”)

for rehearing and Kroger's application for rehearing²² indicated that the Order's modification of the RR was material. Therefore, if anything, the positions of other parties provides further evidence that the modification was material.

Finally, DP&L is incorrect that only customers have standing to complain about the modification of the RR. The modification will impact the price to compare for default service; therefore, it may impact the competitive landscape in the retail electric market in DP&L's service territory. Moreover, as IGS 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."²³ Requiring shopping customers to pay for generation-related costs of the Electric Distribution Utility undermines IGS ability to provide valuable competitive products and services. It injects an unhedgeable risk to shopping customers. In the absence of the non-bypassable RR, IGS can appropriately tailor competitive products and services to meet the entirety of a customer's generation-related needs.

Accordingly, the modification was material and undermined the benefit of the bargain.

IV. CONCLUSION

IGS undertook great effort to resolve its concerns in this case without protracted litigation. For one reason or another, the Order did not adopt the Amended Stipulation without modification.

²² Application for Rehearing and Memorandum in Support of the Kroger Co. at 4 ("The Commission's material modification of the terms and provisions of the negotiated Amended Stipulation, which provided that the Reconciliation Rider would be *bypassable* . . .").

²³ RESA/IGS Ex. 1 at 11 (containing the Direct Testimony of Matthew White on behalf of Interstate Gas Supply, Inc. and the Retail Energy Supply Association).

Following the material modification of the Amended Stipulation, IGS timely and appropriately exercised its right to withdraw. Therefore, IGS respectfully requests that the Commission honor IGS' desire to withdraw from the Amended Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Memorandum Contra of Interstate Gas Supply, Inc. to The Dayton Power and Light Company's Motion to Strike and Memorandum in Support of* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 2nd day of November 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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/s/ Joseph Olikier

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Summary: Memorandum MEMORANDUM CONTRA OF INTERSTATE GAS SUPPLY, INC. TO THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO STRIKE AND MEMORANDUM IN SUPPORT electronically filed by Regan Donoughe on behalf of Interstate Gas Supply, Inc.