BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for an Increase in Electric Distribution Rates.	: :	Case No. 15-1830-EL-AIR
In the Matter of the Application of The Dayton Power and Light Company for Approval to Change Accounting Methods.	: :	Case No. 15-1831-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Tariff Approval.	: :	Case No. 15-1832-EL-ATA

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO THE APPLICATIONS FOR REHEARING FILED BY INTERSTATE GAS SUPPLY, INC. AND RETAIL ENERGY SUPPLY ASSOCIATION

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I. INTRODUCTION AND SUMMARY

The Commission found that the Stipulation and Recommendation in this case was the product of serious bargaining among knowledgeable parties, that it would benefit customers, and that it did not violate any important regulatory principle. There was ample evidence to support those findings, including testimony submitted by witnesses from the Commission's Staff, The Dayton Power and Light Company, and The Office of the Ohio Consumers' Counsel.

Every customer group in the case signed the Stipulation, and the only parties to oppose the Stipulation are marketers. The purpose of this case is to set distribution rates, and the Commission should not allow marketers to disrupt a Stipulation to which DP&L and representatives of all of its customers have agreed.

As to the merits, RESA and IGS mount a very narrow challenge to the Stipulation. They offered no evidence as to whether the Stipulation was the product of serious bargaining or that it benefits customers. The legal arguments that they do make are very narrow, and certainly do not show that the Stipulation violates any important regulatory principle.

As demonstrated below, the Applications for Rehearing filed by IGS and RESA seek relief that is not authorized under Ohio law. The Commission should thus reject IGS and RESA's arguments and deny their Applications for Rehearing.

II. ALLOCATION OF COSTS TO THE SSO

IGS (pp. 22-32) raises five assignments of error relating to whether the Commission erred by failing to adopt IGS' proposal to allocate costs to SSO customers. RESA

(p. 3) adopts IGS' arguments on this issue by reference. Those arguments are all substantially related, and the Commission should reject them for the following reasons.

A. THE RIDER MECHANISM PROPOSED BY IGS IS UNLAWFUL

The Commission has already ruled that the RESA/IGS proposal to create new riders to allocate costs to DP&L's standard service offer is not lawful:

> "However, we find that RESA/IGS's proposal to create two new adjustable riders, as presented by RESA/IGS witness Hess, should not be adopted. We have previously stated that, to the extent a rider mechanism more appropriately allocates and reflects expenses incurred to provide service to shopping and non-shopping customers, the public interest would be better balanced and served. *AEP Ohio ESP III Case*, Opinion and Order (Apr. 25, 2018) at ¶ 203. However, the rider mechanism proposed by RESA and IGS is not authorized by R.C. 4909.18 and cannot be adopted in a rate case proceeding. In RESA and IGS's proposal, two riders would be created. First, a bypassable rider would charge SSO customers for certain distribution expenses 'related' to the SSO. Second, a non-bypassable credit rider would credit to all customers the revenue generated by the bypassable rider. (RESA/IGS Ex. 2 at 15, 18-19). These two riders, working in concert, would effectively shift the recovery of distribution expenses 'related to' the SSO to SSO customers and away from all distribution customers. Mr. Hess also testified that the riders be recalculated every six months to ensure that the riders are not over- or under recovering costs (RESA/IGS Ex. 2 at 19).
>
> The need to periodically adjust the riders is a fatal flaw of IGS's proposal. We agree that periodic adjustment of the riders would be necessary due to variations in consumption as well as shopping rates; the proposed riders, therefore, would be rate adjustment clauses. <u>However, R.C. 4909.18 does not authorize the creation of rate adjustment clauses</u>. The Commission is a creature of statute and may exercise no jurisdiction beyond that conferred by statute. Unless authorized by statute, rate adjustment clauses cannot be created in a distribution rate case. *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d at 183.
>
> The Supreme Court of Ohio's holding in *Pike* is consistent with statutory authority subsequently enacted by the General Assembly. In Am. Sub. Senate Bill 221, the General Assembly explicitly authorized single issue ratemaking, for electric distribution service,

> in ESP proceedings 'notwithstanding any provision of Title XLIX of the Revised Code to the contrary.' R.C. 4928.143(B)(2)(h). Rate adjustment clauses are a form of single issue ratemaking. However, this proceeding is a distribution rate case under R.C. 4909.18, rather than an ESP proceeding under 4928.143. The riders proposed by RESA and IGS cannot be created in a distribution rate case."

September 26, 2018 Opinion and Order ("Order"), ¶¶ 29-31 (emphasis added).

In response to that holding, IGS (pp. 29-30) states that "[t]he Order's reasoning is equivalent to throwing the baby out with the bath water" and that the Commission "could have modified the methodology" that IGS proposed. The Commission should reject IGS' argument for the following reasons.

First, and most importantly, IGS does not challenge the Commission's legal analysis. Given that IGS failed to challenge the Commission's holding that IGS' proposal is unlawful, the Commission should reject IGS' argument that the Commission should implement the two riders that IGS seeks.

Second, IGS failed to propose another methodology that would be lawful. IGS' inability to devise a lawful mechanism to accomplish its goals does not mean that the Commission erred by failing to devise such a mechanism for IGS. It is IGS' responsibility to devise a lawful mechanism to accomplish IGS' goals, not the Commission's. Further, even if a lawful mechanism could be created, there is no evidence in the record as to how it would operate and whether it would be harmful to customers. The Commission should thus reject IGS' invitation for the Commission to devise a mechanism to accomplish IGS' goals.

B. <u>THE COSTS AT ISSUE ARE DISTRIBUTION COMPANY COSTS AND SHOULD BE INCLUDED IN DISTRIBUTION RATES</u>

IGS (p. 25) first argues that the Order approving the Stipulation was unreasonable and unlawful because the evidence did not support permitting DP&L "to collect cost[s] related to competitive retail electric service through distribution rates." But Ed Hess, the witness that RESA and IGS offered on the issue, conceded at the hearing that SSO service is "a distribution company function." Trans., p. 153. <u>Accord</u>: <u>id</u>. at 75, 78-79 (Schroder); <u>id</u>. at 211 (Parke). Mr. Hess also conceded that shopping customers have the right to switch to SSO service, and that "[t]he availability of the SSO service does benefit the customers who have shopped." <u>Id</u>. at 154. <u>Accord</u>: <u>id</u>. at 241 (shopping customers benefit from SSO) (Parke).

The fact that SSO service is a distribution company service that benefits all customers (including shopping customers) demonstrates that all customers should pay those costs. Indeed, Mr. Hess opined that costs that DP&L incurs to support shopping should be allocated to all customers because SSO customers "could benefit from [those costs] at some point in time." Trans., p. 165. The same logic applies to costs that DP&L incurs to support the SSO -- those costs should be allocated to all customers because shopping customers "could benefit from [those costs] at some point in time."

It is thus reasonable and lawful that those costs be recovered through distribution rates. The Commission should thus reject IGS' arguments (pp. 22-27) that the Commission violated R.C. 4928.05(A)(1) and R.C. 4928.02 by allowing the recovery of competitive generation costs through distribution rates.

IGS (pp. 26-27) also cites to the <u>Elyria Foundry Co. v. Public Utilities Commisson</u> case to support its legal argument as some sort of support for trying to reallocate core distribution company costs to the SSO under the guise of "unbundling." However, its reliance on that case is misplaced as that case involved a finite issue related to the allocation of fuel cost, which the Court expressly found to be "an incremental cost component of generation service." 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 50. Certainly, fuel costs to provide generation service is not a distribution function like general support services required to support the distribution company such as maintaining a call-center, printing and postage, office space, and professional services.

C. IF AN ALLOCATION WERE TO BE MADE, COSTS OF PROVIDING SERVICE TO SHOPPING CUSTOMERS SHOULD BE ALLOCATED TO THEM

The Commission concluded that if costs that DP&L incurs to support the SSO should be allocated to SSO customers, then costs that DP&L incurs to support shopping should be allocated to shopping customers. Order, ¶ 28. The record amply supports that finding. Smith Test., pp. 5-8, 13-14.

For example, DP&L incurs the following costs to support shopping: interacting with competitive suppliers, calculating and collecting collateral, administering the TCRR-N opt-out pilot program, obtaining information technology, and answering calls at DP&L's call center regarding shopping issues. Smith Test., pp. 5-6; Trans., pp. 79-80 (Schroder); id. at 220 (Parke). Similarly, the right of shopping customers to return to SSO service creates "come-and-go risks" for the winning bidders at SSO auctions; the price that those winning bidders charge to SSO customers includes a premium to compensate those winning bidders for the risk that shopping customers might return to the SSO. Trans., pp. 154-55 (Hess).

IGS (p. 31) tells the Commission that "shopping customers are already paying fees to DP&L for services rendered," but that is false. (Emphasis omitted.) Neither shopping customers nor CRES providers pay fees to cover the costs of the items listed in the prior paragraph.

Mr. Hess made no effort to calculate the costs that DP&L incurs to provide service to SSO customers. Hess Test., pp. 1-19 (never mentions issue). Staff witness Smith concluded that "the costs to administer the competitive retail market and the SSO are similar." Smith Test., p. 8. Accord: id. at 13 ("Although it is likely that the provision of SSO service utilizes shared administrative and operating expenses, it is also likely that the provision of non-SSO Choice services utilize similar if not greater amounts of administrative and operating expenses."); Trans., p. 297 (Smith).

The marketers request that costs be allocated to SSO customers should thus be rejected because they conducted a biased evaluation by failing to analyze the costs that DP&L incurs to support shopping customers. To hold otherwise would result in rates that are neither just nor reasonable. R.C. 4909.19.

D. IGS ARGUES THAT THE COMMISSION FAILED TO ADDRESS THREE ARGUMENTS IN VIOLATION OF R.C. 4903.09

IGS (pp. 28-29) argues that the Commission violated R.C. 4903.09 by not expressly addressing three specific arguments. To the contrary, the Commission addressed all three arguments, but simply because the Commission did not rule in the marketers' favor does not mean that the Commission violated R.C. 4903.09.

First, IGS argues that the Commission did not address its convoluted argument that the Stipulation violates R.C. 4928.05(A)(1). The Commission directly acknowledged this argument (Order, ¶ 21), and rejected that argument because R.C. 4909.18 does not authorize the creation of the riders that IGS seeks. Order, ¶¶ 29-31.

Second, IGS argues that the Commission failed to address its arguments related to state policy. But the Commission directly addressed those arguments, citing those arguments in paragraph 71 of the Order. Ruling against the marketers, the Commission cited to the overwhelming evidence to the contrary presented by DP&L witness Schroder, OCC Witness Willis, and Staff Witness Lippthratt. Order, ¶ 72.

Finally, IGS also argues that the Commission failed to state findings of fact and reasons for rejecting quantification of SSO-related costs. To the contrary, the Commission lays out the respective arguments of the parties and its explanation of why it did not adopt the marketers' suggestion. (Order, ¶¶ 17-27). The Commission rejected IGS' arguments because IGS failed to quantify costs that DP&L incurs to support customer choice (Order, ¶ 28) and IGS' proposal is unlawful (Order, ¶¶ 29-31).

E. <u>MR. HESS' METHODOLOGY IS DEEPLY FLAWED</u>

IGS (pp. 32-33) argues that the Commission's decision is against the manifest weight of the evidence because it did not adopt the analysis by Witness Hess. The Commission should reject Mr. Hess' calculations and recommendations because his testimony and supporting calculations are deeply flawed. The evidence at the hearing showed that those flaws include:

1. Mr. Hess "did not conduct a process review, time studies, or any other data-driven analysis to assign costs to SSO customers." Smith Test., p. 11.

2. Mr. Hess "arbitrarily identified accounts that might have an imbedded SSO operational or administrative cost. There was no investigation of the imbedded costs." Id. (emphasis added).

3. Mr. Hess also erred by "basing the allocation methodology on revenue." Id.

4. Mr. Hess based his calculations on figures in the Staff Report, and did not update his calculations to address significant changes that were made as a result of the Stipulation. Trans., pp. 140-45.

Mr. Hess also admitted a glaring lack of knowledge about the subject, rendering his testimony not credible. For example:

1. Mr. Hess was not aware of any instance in which SSO costs have been allocated in the manner in which he is proposing in this case. Trans., p. 152.

2. Mr. Hess did not know whether IGS had a right to refuse to do business with a customer. Id. at 123.

3. Mr. Hess did not know whether DP&L had a call center for SSO issues only. Id. at 131.

4. Mr. Hess did not know the amount of postage that DP&L incurred to communicate with SSO customers as compared to CRES customers. Id. at 133.

5. Mr. Hess did not know whether DP&L has accounting employees who work exclusively on SSO issues. Id.

6. Mr. Hess did not know whether there are DP&L employees whose job is limited to compliance with regulatory rule requirements for the SSO. Id. at 133-34.

7. Mr. Hess did not know who pays costs associated with auction managers for the SSO. Id. at 153.

8. Mr. Hess did not know whether customers call DP&L's call center regarding their right to switch to a CRES provider. Id. at 155.

9. Mr. Hess did not know whether customers call DP&L's call center to complain about CRES charges on their DP&L bill. Id.

In short, Mr. Hess' testimony is so badly flawed and unsupported that it lacks sufficient credibility and is unreliable. Thus, it cannot be said the Commission's findings were contrary to the manifest weight of the evidence.

F. NO CUSTOMERS HAVE RAISED THE ISSUE

IGS (p. 8) tells the Commission that: "The Order is equivalent to heads SSO customers wins; tails choice customers lose." However IGS ignores the fact that all of DP&L's customer representatives in the case signed the Stipulation. Jt. Ex. 1, pp. 17-18. Further, in post-hearing briefs, customer representatives opposed the marketers' proposal. OCC Post-Hearing Brief, p. 6 ("The reallocation approach would have harmed customers by increasing the price of the standard offer for customers."); OPAE/Edgemont Post-Hearing Brief, p. 5 ("Edgemont-OPAE strongly oppose the RESA-IGS proposal and assert that the Stipulation's omission of such a proposal is an important factor in Edgemont-OPAE's support of the Stipulation . . . .").

The marketers' request that costs be allocated to the SSO is thus simply a self-serving attempt to inflate the costs of the SSO so that more customers will switch to their services and/or allow the marketers to charge higher prices and retain higher profits. Their proposal does not benefit customers and should be rejected.

III. THE COMMISSION SHOULD NOT ALTER MARKETERS' FEES

IGS (pp. 33-36) and RESA (pp. 4-10) argue that the Commission erred by rejecting their arguments regarding interval data fees and switching fees. The Commission should reject their arguments for the following reasons.

First, the Commission already has rejected RESA and IGS' arguments related to both interval data fees and switching fees for the following reasons:

> "As an initial matter, the Commission finds that, contrary to claims by RESA and IGS, Staff's decision to forgo review of the Supplier Tariff was not unreasonable. The Supplier Tariff was not proposed to be amended in DP&L's distribution rate increase application. As a general rule, tariffs which are not proposed to be modified in a rate increase application are not subject to Commission review and modification during the rate case. However, in its SSO proceeding, DP&L did agree RESA and IGS were not prohibited from advocating for changes to supplier tariffs in this proceeding or any other distribution rate case, stating: '* * * resolution of DP&L's current distribution rate case in Case No. 15-1830-EL-AIR may result in allocation of costs to the SSO rate and therefore, IGS and RESA are not prohibited from advocating for unbundling or changes to [the] SSO rate or supplier tariffs in that proceeding or any other distribution rate case' (IGS Ex. 2 at 38, fn. 10). Although the language in the first clause implies that the intent of the footnote was to ensure that RESA or IGS may raise the allocation of costs to the SSO in this proceeding, the language in the second clause states that RESA and IGS are not prohibited from advocating for changes to 'supplier tariffs.' Thus, although the meaning of this reference to 'supplier tariffs' is vague, DP&L appears to have opened the door for proposed changes to the Supplier Tariff in this proceeding even though DP&L had not proposed any such amendments in its application filed in this case.
>
> Nonetheless, we find that Staff's decision to forgo review of the Supplier Tariff was not unreasonable. The vague reference to 'supplier tariffs' in the footnote to the *ESP III Stipulation* did not provide Staff with any guidance on the specific issues RESA and IGS may have raised in this proceeding. The Supplier Tariff contains numerous specific provisions. RESA and IGS did not specify which provisions they sought to change until their objections were filed thirty days after the filing of the Staff Report. Therefore, we conclude that it was not unreasonable for Staff to forgo review of the Supplier Tariff in its investigation of DP&L's application, as reflected in Staff's testimony."

Order, ¶¶ 36-37 (alteration in original).

The Commission is plainly correct that Staff had no reason to review the Supplier Tariff based on the footnote in the ESP III Stipulation. If RESA/IGS wanted particular provisions reviewed, then they should have filed a motion or notice in this case asking that those provisions be reviewed. (As demonstrated below, that request would have been unlawful, but

RESA/IGS should not be permitted to challenge the failure to take an action that they did not request.)

Second, DP&L asks the Commission to reconsider its holding that footnote 10 in the ESP III Stipulation is sufficiently vague as to allow IGS to raise changes to supplier tariffs in this case. DP&L submits that the phrase "and therefore" in between the first and second clauses establishes that IGS' right to advocate for changes to supplier tariffs is limited to any changes to those tariffs that would result from their right to advocate for the allocation of costs to the SSO rate. DP&L thus submits that the Commission should bar IGS from challenging supplier fees in this case.

Third, IGS (pp. 34-35) and RESA (pp. 5-7) claim that the fees are unlawful because DP&L bears the burden of proof and there is no evidence in the record supporting them. That argument reflects a fundamental misconception of what this case is about. This is a base distribution rate case, and there is no provision in Title 4909 or the Commission's Standard Filing Requirements that requires DP&L to submit evidence as to the amount of its rates and fees, other than its base distribution rates as set forth in those respective provisions. To the extent footnote 10 in the ESP III Stipulation allows the marketers to advocate on these issues in this case, they were required to submit evidence to support their case. Their failure to do so dooms their arguments.[1]

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[1] RESA contends (p. 7) that DP&L could have provided information relating to supplier fees in discovery, but "refused to do so." What RESA does not mention, however, is that DP&L objected to providing such information (Trans., p. 109 (Ringenbach)), and that the marketers never moved to compel discovery. Ohio Admin. Code § 4901-1-23. RESA cannot fault DP&L for objecting to such discovery when it never moved to compel the information.

Indeed, the Supreme Court of Ohio has held that the Commission is barred from raising issues that were not raised by the utility. Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 42 Ohio St.2d 403, 330 N.E.2d 1 (1975), paragraph six of the syllabus ("When considering an application for a rate increase filed by a public utility, the Public Utilities Commission may not extend its inquiry into matters not put in issue by the applicant and not related to the rates which are the subject of the application.").

RESA's (p. 6) reliance on the Court's holding in AT&T Communications of Ohio v. Public Utilities Commission, 51 Ohio St.3d 150, 555 N.E.2d 288 (1990) (per curiam), is plainly misplaced. In that case, the Court held that the Commission could increase a collateral charge that was not addressed in the utility's application since the charge would help to satisfy the utility's total revenue requirements. Id. at 152. However, that case does not hold that a utility is required to file cost support for all of its charges. Id. The Court simply held that the Commission could consider fees not included in the utility's application. Id. That does not mean that the utility was required to support the fees in its application.

Fourth, the Commission rejected the marketers' arguments related to interval data for the following reasons:

> "The interval data fees were approved by the Commission when it adopted the stipulations recommending approval of the merger between DP&L's parent, DPL Inc., and AES Corporation. *In re AES Corporation*, Case No. 11-3002-EL-MER, Finding and Order at 10 (Nov. 22, 2011) (*Merger Case*). The Supreme Court of Ohio has held that when the Commission has made a lawful order, the Commission is bound by certain institutional constraints to provide an explanation before such order may be changed or modified. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984). The Court has explained that this does not mean that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. *In re Application of Ohio Power Co.*, 144 Ohio St.3d

1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (citations omitted). At the hearing in this case, RESA witness Ringenbach testified in support of RESA's objection on this issue. Ms. Ringenbach testified that access to customer interval data is a 'monopoly service' and, as such, the Commission should eliminate all fees associated with competitive retail electric service provider's access to the customer's data (RESA/IGS Ex. 1 at 2, 3). However, Ms. Ringenbach did not explain how any circumstances have changed since the Commission approved the current fee for interval data in the *Merger Case*. The witness did not refer to any decline in competition in the CRES market in DP&L's service territory nor to a failure to achieve any goals set by the Commission when we approved the current interval data fees in the *Merger Case*. In short, Ms. Ringenbach provided no persuasive basis for the Commission to depart from our decision in the *Merger Case*. Further, we are not persuaded by the argument that there should be no charge for access to interval data because it is a 'monopoly service.' All components of distribution service are currently non-competitive, and principles of cost causation still apply to the provision of non-competitive services. The amount of the fee was established as part of a settlement approved by the Commission in the *Merger Case*. We will not revisit that decision here. We may, however, revisit this issue through the working groups or proceedings implementing the PowerForward Initiative."

Order, ¶ 42.

RESA/IGS had the opportunity to litigate the amounts of the interval data costs in the merger case, and their failure to introduce evidence as to DP&L's costs in either that case or this case dooms their arguments.

Fifth, the Commission rejected arguments related to switching fees for the following reasons:

"With respect to the switching fees, the Commission finds that the Supplier Tariff should not be modified as proposed by RESA. DP&L correctly notes that the Commission affirmed the switching fees in DP&L's SSO proceeding. As stated above, the Commission has the authority to modify prior orders but such authority is not unlimited. The Supreme Court of Ohio has held

> that when the Commission has made a lawful order, the Commission is bound by certain institutional constraints to provide an explanation before such order may be changed or modified. *Ohio Consumers' Counsel*, 10 Ohio St.3d at 50-51,461 N.E.2d 303 (1984). However, RESA presented no evidence that the switching fees are unreasonable or that, since the approval of the switching fees in *ESP III*, circumstances in the retail market have sufficiently changed to justify a modification of the switching fees. Instead, RESA focuses its attack on the lack of attention paid to the switching fees, arguing that Staff failed to address them in its review of the application and that neither DP&L nor Staff has adequately responded to its objection. As noted above, however, the Commission concludes that Staff's decision to forgo review of the Supplier Tariff was not unreasonable. Despite RESA's protestations to the contrary, although DP&L has the burden of proof in this case, RESA has the burden of production of evidence to support its objections; and RESA has failed to provide or cite to evidence sufficient to support changing our prior order in *ESP III*."

Order, ¶ 43.

Again, RESA/IGS had the opportunity to litigate as to switching fees in DP&L's ESP III case, and their failure to introduce evidence as to DP&L's costs in either that case or this case dooms their arguments.

IV. <u>CONCLUSION</u>

The Commission should deny the Applications for Rehearing by IGS and RESA.

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I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Applications for Rehearing Filed by Interstate Gas Supply, Inc. and Retail Energy Supply Association, has been served via electronic mail upon the following counsel of record, this 5th day of November, 2018:

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