

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton)	
Power and Light Company for an Increase in)	Case No. 15-1830-EL-AIR
Electric Distribution Rates.)	

In the Matter of the Application of the Dayton)	
Power and Light Company for Approval to Change)	Case No. 15-1831-EL-AAM
Accounting Methods.)	

In the Matter of the Application of the Dayton)	Case No. 15-1832-EL-ATA
Power and Light Company for Tariff Approval.)	

**MEMORANDUM CONTRA THE MARKETERS’
APPLICATIONS FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

IGS Energy (“IGS”) and the Retail Energy Supply Association (“RESA”) (together, the “Marketers”) want standard service offer (“SSO”) customers to pay higher rates. That is bad. Their motivation is apparent: if the SSO is more expensive, customers will have a greater incentive to shop for generation with Marketers, thus increasing the Marketers’ profits. In its Brief, DP&L chastised the Marketers:

The marketers’ goal is not to benefit customers; instead, the marketers’ goal is to increase the SSO price so more customers will shop; The fact that the marketers goal is to increase their own profits is further demonstrated by the marketers’ multiple references to their own costs, which are entirely irrelevant to the issues in this case.¹

¹ DP&L Reply Brief at 4 (Aug. 27, 2018) (“DP&L Reply Brief”).

To achieve their goal for higher profits at the expense of SSO customers, the Marketers argue that when DP&L provides distribution service to SSO customers, it is engaging in competitive services,² which the PUCO does not regulate. This is false.

It is crucial to keep the separation of distribution services (which are regulated in Ohio) and generation services (which are not). But there is no commingling of distribution and generation rates in this case. DP&L provides distribution service to SSO customers, just as it does to shopping customers. Distribution services do not transform into generation services simply because DP&L is offering them to SSO generation customers.

The PUCO's Order³ protects customers by rejecting the Marketers' proposal to artificially increase charges to SSO customers. The PUCO should reject the Marketers' applications for rehearing.

² See Application for Rehearing and Memorandum in Support of Interstate Gas Supply, Inc. (Oct. 26, 2018) (the "IGS AFR") at 22-25; Application for Rehearing of the Retail Energy Supply Association (Oct. 26, 2018) (the "RESA AFR") at 1. RESA's first assignment of error is that the Order "authorizes distribution rates that recover costs incurred by DP&L to provide SSO service, in violation of R.C. Chapter 4928." See RESA AFR at 1. RESA does not provide any argument on this issue but instead incorporates IGS's AFR by reference. *Id.* at 3. Thus, when OCC cites IGS's application for rehearing, it refers to the Marketers as opposed to solely referring to IGS.

³ Opinion & Order (Sept. 26, 2018).

II. RECOMMENDATIONS

- A. **The Marketers have failed to show that the Settlement – which was negotiated and signed by diverse parties (including OCC) “who recommend that the Commission approve and adopt this Stipulation without modification to resolve all of the issues” – violates any of the PUCO’s standards warranting a modification of the Settlement’s terms. (Stipulation at 1 (emphasis added).) Indeed, the Marketers’ proposal for a modification would threaten the Settlement. (Stipulation at 16-17.) The PUCO should adopt the Settlement “in its entirety and without material modification,” as the Settlement signatories agreed. (Stipulation at p. 16.)**

The Marketers have failed to show that the Settlement – which was negotiated and signed by diverse parties (including OCC) “who recommend that the Commission approve and adopt this Stipulation without modification to resolve all of the issues” – violates any of the PUCO’s standards warranting a modification of the Settlement’s terms.⁴ The PUCO’s settlement standards are: if this Settlement is the product of serious bargaining among capable, knowledgeable parties; if this Settlement as a package benefits customers and the public interest, and if this Settlement violates any important regulatory principle or practice.⁵ The PUCO will also consider if the signatories represent diverse interests.

As OCC addressed in its Brief, the PUCO’s standards are met for adopting this Settlement. And, for the additional reasons stated below, the Marketers have failed to show that the Settlement standards have been violated. The PUCO should deny the Marketers’ applications for rehearing and protect and preserve the Settlement from their proposed material modification.

⁴ Stipulation at 1 (emphasis added).

⁵ See OCC Brief at 2 (Aug. 17, 2018).

B. The PUCO's Order does not result in unlawful regulation of competitive services.

The Marketers' opposition to the Order relies on the false claim that the Order will result in the unlawful regulation of competitive services. In its Application for Rehearing, IGS makes the following arguments: "The Order is unlawful and unreasonable inasmuch as authorized [sic] DP&L to recover the cost of competitive retail electric service through non-competitive service rates."⁶ "The Order should have allocated all competitive retail electric service costs to the SSO,"⁷ and "The Order's reasoning circumvents the statutory limitation against regulation of competitive retail electric services under Chapter 4909."⁸ These arguments all fail because nothing in the Order constitutes regulation of competitive services.

The law identifies the following competitive services: "retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility."⁹ At no point in their applications for rehearing do the Marketers refer to this definition or otherwise identify how the Order would result in the regulation of retail electric generation, aggregation, power marketing, or power brokerage services. Instead, they rely on vague references to "costs associated with the SSO."¹⁰

⁶ See IGS AFR at 22.

⁷ *Id.* at 29.

⁸ *Id.* at 30.

⁹ R.C. 4928.03.

¹⁰ See, e.g., IGS AFR at 9.

Distribution utilities in Ohio necessarily incur distribution costs that are “associated with the SSO.” After all, 100% of SSO customers are also distribution customers, and DP&L must provide distribution service to those customers, just as it provides distribution service to 100% of shopping customers. The mere provision of distribution services to SSO customers does not transform those services into competitive services. But that is essentially what the Marketers are arguing here.

The Marketers’ own witness contradicts their theory. Edward Hess, testifying on behalf of the Marketers, identified various costs that he would reallocate exclusively to SSO customers.¹¹ He pointed to things like call center costs, printing and postage, accounting infrastructure, IT employees and software, administrative and general salaries, legal and regulatory costs, office space, regulatory assessments, and taxes.¹² But these are all typical distribution functions provided to all distribution customers including both SSO customers and shopping customers. Indeed, Mr. Hess identified these categories of costs by looking at applicable distribution-related FERC accounts.¹³ Tellingly, Mr. Hess did not testify that these expenses should be excluded from those FERC accounts or included in DP&L’s electric security plan (which generally sets the terms of DP&L’s standard service offer).

If Mr. Hess believed that the costs in question were costs for competitive services, then he would have testified that it was improper to include them in distribution-related FERC accounts in the first place. But he did not challenge DP&L’s inclusion of these

¹¹ See RESA/IGS Ex. 2 (“Hess Testimony”) at 14-15.

¹² *Id.*

¹³ *Id.* at Exhibit JEH-2.

costs in distribution accounts. This fatally undermines the Marketers' argument that the Order results in competitive costs being included in non-competitive distribution rates.

The Marketers are right that the PUCO should not charge customers for competitive services through monopoly distribution rates. But the distribution rates in the approved Settlement do not include any charges for competitive services. The Order complies with the law by charging all distribution customers (SSO customers and shopping customers) only for distribution-related services through base distribution rates.

C. The PUCO's Order does not violate R.C. 4928.02 because there is no anti-competitive subsidy to SSO customers.

The PUCO should reject the Marketers' argument that the Settlement violates state policy found in R.C. 4928.02.¹⁴ In support of this argument, the Marketers rely on *Elyria Foundry Co. v. PUCO*, 14 Ohio St. 3d 305 (2007), where the Ohio Supreme Court ruled that the PUCO violated R.C. 4928.02 by allowing FirstEnergy to charge distribution customers for generation costs.

But the costs in *Elyria* were not the same as the costs here. In *Elyria*, the PUCO authorized FirstEnergy to charge distribution customers for fuel costs—costs that are unambiguously generation costs.¹⁵ Here, DP&L is not seeking to charge distribution customers for SSO fuel costs or any other generation-related costs. As described above, the costs in question are typical costs that a distribution utility incurs to provide distribution service.¹⁶

¹⁴ See IGS AFR at 26.

¹⁵ *Elyria* at 314-15.

¹⁶ See *supra* § I.A (refuting the Marketers' claim that call center costs, printing and postage, accounting infrastructure, IT employees and software, administrative and general salaries, legal and regulatory costs, office space, regulatory assessments, and taxes are generation-related costs that must be charged exclusively to SSO customers).

DP&L's SSO customers pay their generation costs through a separate generation rider. A typical SSO customer using 1,000 kWh per month pays \$55.62 per month in generation charges alone through that rider.¹⁷ And the rider is bypassable, meaning that those generation charges are paid exclusively by SSO customers, not shopping customers.

Whereas in *Elyria*, customers would have been charged generation costs through distribution rates, here, SSO customers pay for their generation costs exclusively through a generation rider. Thus, the Supreme Court's ruling in *Elyria* does not extend to this case. There is no subsidy, and thus no violation of state policy against anticompetitive subsidies.

D. The PUCO's Order accurately identified that the Marketers' proposal has a one-sided and unfair effect on customers.

In the Order, the PUCO recognized the one-sidedness of the Marketers' approach. The Marketers argue that some distribution costs are related exclusively to the SSO and therefore should be charged exclusively to SSO customers.¹⁸ But they ignore the flip side—that using the same logic, some distribution costs would be related exclusively to shopping. If the PUCO were to adopt the Marketers' proposal (which it should not), then at a minimum, it would need to evaluate not just the distribution costs that are related exclusively to the SSO customers but those that are related exclusively to shopping customers. The Order recognizes the fairness of this approach as compared to the Marketers' biased attempt to inflate charges to SSO customers. The Order states: "If we are to evaluate whether there are actual distribution costs solely related to providing SSO

¹⁷ See Reply Brief by the Office of the Ohio Consumers' Counsel ("OCC Reply Brief") at 14 (Aug. 27, 2018).

¹⁸ See generally IGS AFR.

service, we should also evaluate whether there are actual distribution costs solely related to the customer choice program.”¹⁹

The Marketers cannot overcome the basic logic of this reasoning. Nevertheless, they attempt to do so in two ways, both of which fail.

First, the Marketers argue that any distribution costs related to customer choice are already “directly assigned to CRES providers.”²⁰ But the record does not support this conclusion. The Marketers state that the total costs “directly assigned to CRES providers” is less than \$600,000 per year.²¹ These costs pertain to switching fees and interval data fees.²² The Marketers, however, are asking the PUCO to charge SSO customers for over \$11 million in distribution costs, including call center costs, printing and postage, accounting infrastructure, IT employees and software, administrative and general salaries, legal and regulatory costs, office space, regulatory assessments, and taxes.²³ The Marketers are comparing apples and oranges, so their comparison fails.

Second, the Marketers argue that the PUCO need not look at distribution costs related to shopping because those costs are for non-competitive services.²⁴ According to the Marketers, when DP&L provides distribution services to SSO customers, DP&L is providing a *competitive* service, and only SSO customers should pay for those services. But when DP&L provides those exact same services to shopping customers, DP&L is providing a *non-competitive* service, and SSO and shopping customers should pay for

¹⁹ See Order at 10

²⁰ See IGS AFR at 31.

²¹ See *id.* at 17.

²² *Id.*

²³ See Hess Testimony at 14-15.

²⁴ See IGS AFR at 31-32.

those services. The PUCO saw through this inconsistent proposal to unreasonably increase charges to SSO customers and properly rejected it.²⁵ It should do so again by denying the Marketers' applications for rehearing.

E. The PUCO should reject the Marketers' testimony as unreliable and inadequate to support additional charges to SSO customers.

The Marketers misstate the record by suggesting that there is uncontroverted evidence that SSO customers should pay an additional \$11 million for distribution service. According to the Marketers: "IGS submitted testimony indicated [sic] that based upon the amount of revenue recommended in the Staff Report, DP&L would recover in excess of \$11 million in SSO-related costs through distribution rates. No other quantitative estimate of the SSO subsidy was provided."²⁶ This is misleading and false.

First, every party that filed a reply brief in response to the Marketers' proposal disputed the Marketers' claim that there is any subsidy at all, which is the same as quantifying the subsidy at \$0.²⁷

Second, the claim that there is "[n]o other quantitative estimate" is false. OCC witness Willis quantified the subsidy at \$0.²⁸ As did DP&L.²⁹

²⁵ See Order at 10.

²⁶ See IGS AFR at 33.

²⁷ See OCC Reply Brief at 3-15; Reply Brief of the Greater Edgemont Community Coalition and Ohio Partners for Affordable Energy at 4 (Aug. 27, 2018) ("The standard service offer does not create a subsidy."); Reply Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 6 (Aug. 27, 2018) (the Marketers' "notion that non-SSO customers subsidize the SSO has no factual basis"); DP&L Reply Brief at 2 ("The Commission Should Not Shift Costs to the SSO.").

²⁸ See OCC Ex. 1 at 8.

²⁹ See The Dayton Power and Light Company's Post-Hearing Brief at 7 (Aug. 17, 2018) ("An evaluation was done by DP&L as well as the PUCO Staff, with both concluding that no costs should be shifted to the SSO.").

Third, the PUCO did not adopt IGS's \$11 million number. And with good reason. The \$11 million calculation was seriously flawed. The Marketers' witness (Mr. Hess) based his calculations on the Staff Report, even though the Settlement made no fewer than five separate adjustments to the Staff Report.³⁰ He used the wrong tax rate and the wrong gross revenue conversion factor.³¹ He used the wrong rate of return.³² He used the wrong exhibit with his filed testimony, which included errors and internal inconsistencies.³³ And he used revenue data from December 31, 2015 and customer count numbers from March 31, 2016, even though more recent data was available.³⁴ With all of these errors, the PUCO rightfully declined to adopt Mr. Hess's \$11 million surcharge to customers.

The Marketers' argument can be summarized as follows: our witness testified that SSO customers should pay an additional \$11 million, and therefore, the PUCO must order SSO customers to pay an additional \$11 million. This ignores the abundant evidence demonstrating the legal and factual flaws in the Marketers' proposal. The PUCO's rejection of the Marketers' proposal is not against the manifest weight of the evidence. To the contrary, the record evidence overwhelmingly supports the PUCO's conclusion.

³⁰ See OCC Reply Brief at 7.

³¹ *Id.*

³² *Id.* at 7-8.

³³ *Id.* at 8-9.

³⁴ *Id.* at 9.

III. CONCLUSION

All customers benefit from DP&L's standard service offer. The Marketers' proposal in this case is a self-serving attempt to exclusively increase costs for SSO customers so that those customers will be incented to shop for generation with Marketers and improve Marketers' profitability. DP&L wrote that:

The marketers' goal is not to benefit customers; instead, the marketers' goal is to increase the SSO price so more customers will shop; The fact that the marketers goal is to increase their own profits is further demonstrated by the marketers' multiple references to their own costs, which are entirely irrelevant to the issues in this case.³⁵

Marketers prefer to improve their bottom line by attacking the competitively-sourced SSO and proposing arbitrary cost-shifting to SSO customers. The PUCO rightfully rejected the Marketers' proposal in the Order and it should likewise reject their applications for rehearing. For the benefit of the public, the PUCO should preserve and protect the Settlement from material modification by the Marketers.

Respectfully submitted,

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³⁵ DP&L Reply Brief at 4.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 5th day of November 2018.

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Summary: Memorandum Memorandum Contra The Marketers' Application for Rehearing by The Office of The Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.