

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 16-0395-EL-SSO
The Dayton Power and Light Company for
Approval of Its Electric Security Plan :

In the Matter of the Application of : Case No. 16-0396-EL-ATA
The Dayton Power and Light Company for
Approval of Revised Tariffs :

In the Matter of the Application of : Case No. 16-0397-EL-AAM
The Dayton Power and Light Company for
Approval of Certain Accounting Authority :
Pursuant to Ohio Rev. Code § 4905.13

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

Interstate Gas Supply, Inc.'s ("IGS") response to The Dayton Power and Light Company's ("DP&L") Motion to Strike the Notice of Withdrawal demonstrates that IGS is taking inconsistent positions. On the one hand, IGS tells the Commission that footnote 6 (p. 13) of the Amended Stipulation and Recommendation ("Stipulation") was included to "insulate[] against the risk that another party cites to an isolated stipulation provision in another case." IGS Opposition, p. 9. On the other hand, IGS asserts that it supported Sections VI.1.a.ii and that the alteration of that provision had a materially adverse effect on IGS. *Id.* at 8-12. The Commission should not allow IGS to use footnote 6 so that IGS can claim that it did not support Section VI.1.a.ii in other cases, but claim that it did support that provision in this case.

As DP&L has shown,¹ IGS's Notice of Withdrawal should be struck for two separate and independent reasons.² First, IGS is not a Signatory Party with respect to Section VI.1.a.ii of the Stipulation, given the express term in the Stipulation that, "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). Meaning must be given to that footnote, which excepts IGS as a Signatory Party for purposes of the Reconciliation Rider. Thus, IGS has no right to withdrawal from the Stipulation based on a modification of that provision. Stipulation, § XI.5 (granting Signatory Parties, but not Non-Opposing Parties, the right to withdraw, subject to certain conditions).

IGS offers various extraneous reasons (pp. 8-9) why it opted out of Section VI.1.a.ii, first explaining why it inserted the footnote. IGS appears to want to have its cake and eat it too – arguing that it is a Signatory Party, while in the same paragraph explaining that IGS wants to be able to argue in other cases that it did not support Section VI.1.a.ii. IGS further argues that it is a Signatory Party by citing to the testimony submitted by Matthew White. However, as IGS stated earlier this week in another DP&L case, "[i]n interpreting a stipulation, the Commission 'must focus on the meanings of the Stipulation's provisions,'"³ and "[w]hen the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties."⁴ Accord: In re Ohio Power Co., Case No. 14-1693-EL-RDR, et al., Fifth Entry on Rehearing (Apr. 5, 2017) ("the intentions of any particular signatory party do not

¹ Oct. 26, 2018 The Dayton Power and Light Company's Motion to Strike Notice of Withdrawal from the Amended Stipulation ("Motion to Strike").

² DP&L had argued that IGS' notice was premature in light of OCC's Application for Rehearing. The Commission denied that application, rendering that argument moot.

³ In re DP&L, Case No. 15-1830-EL-AIR, et al., Interstate Gas Supply, Inc. and Retail Energy Supply Association's Memorandum Contra Application for Rehearing of The Office of the Ohio Consumers' Counsel (Nov. 5, 2018), p. 3 (quoting Monongahela Power Co. v. Pub. Util. Comm., 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 6).

⁴ Id. (quoting Sunoco, Inc. (R&M) v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37 (emphasis added)).

change the settlement agreement set forth by all of the signatory parties in the stipulation, which speaks for itself, and . . . the parties' motives in deciding whether to sign a stipulation do not affect the Commission's determination of whether the stipulation is reasonable") (emphasis added). The fact remains that based on the words in the Stipulation, IGS withheld support from Section VI.1.a.ii of the Stipulation. Because IGS declined to join Section VI.1.a.ii, it cannot withdraw from the Stipulation under Section XI.5 based on the Commission's modification of that provision. Oct. 20, 2017 Opinion and Order, ¶ 63; Sept. 19, 2018 Third Entry on Rehearing, ¶ 46, 51-52, 55, 64, 66.

Second, IGS cannot credibly argue that the Commission's modification of Section VI.1.a.ii is material, i.e., "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary 998 (8th ed. 2004).⁵ While IGS maintains (p. 11) that the bypassability of the Reconciliation Rider was "one of the most important provisions in the Amended Stipulation," IGS expressly did not support that provision. As previously mentioned, IGS stated one business day after it filed its Opposition to DP&L's Motion to Strike that "[w]hen the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties."⁶ Footnote 6 is very clear, and IGS's reliance on external matters (e.g., its own subsequent filings, the filings of other parties) is irrelevant. Moreover, IGS cannot cite other parties' applications for rehearing to show materiality, particularly parties who (a) actually joined that provision as a Signatory Party, and/or (b) did not seek to withdraw from the Stipulation. Section VI.1.a.ii cannot be material to IGS because it expressly did not support that provision.

⁵ IGS apparently disputes DP&L's reliance on Black's Law Dictionary (p. 11), yet goes on to cite only <https://thelawdictionary.org>.

⁶ Id. (quoting Sunoco, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37).

For each of these separate and independent reasons, the Commission should grant DP&L's Motion to Strike IGS' Notice of Withdrawal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Reply in Support of Its Motion to Strike Notice of Withdrawal from the Amended Stipulation has been served via electronic mail upon the following counsel of record, this 7th day of November, 2018.

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Summary: Reply The Dayton Power and Light Company's Reply in Support of Its 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