

**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.)	

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
INTERSTATE GAS SUPPLY, INC.**

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December 23, 2019

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Interstate Gas Supply, Inc. ("IGS Energy" or "IGS") respectfully submits this Application for Rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission") on November 21, 2019 for the following reasons:

- A. The Supplemental Order (¶ 84) is unlawful and unreasonable inasmuch as it authorized DP&L to modify its Supplier Tariff to impose discriminatory collateral requirements without record support in violation of R.C. 4903.09 and R.C. 4928.143(C)(1). These discriminatory collateral requirements should be deemed withdrawn with the ESP application. The Supplemental Order unlawfully and unreasonably determined that IGS' is attempting to relitigate this matter; the issues decided DP&L's distribution rate case are not the same as the issues presented in this proceeding.**

- B. The Supplemental Order (§ 84) unlawfully and unreasonably authorized DP&L's \$5 switching fee. The Supplemental Order impermissibly authorized the fee without rendering findings of fact and conclusions of law based upon the record in violation of R.C. 4903.09. *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87 (1999). The fee is discriminatory, violates state policy, and precedent inasmuch as DP&L assesses the fee to shopping customers while providing the same service for free to customers that take service under the SSO. R.C. 4928.02(A); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 2006-Ohio-2110. The Supplemental Order unlawfully and unreasonably determined that IGS' is attempting to relitigate this matter; the issues decided DP&L's distribution rate case are not the same as the issues presented in this proceeding.**
- C. The Supplemental Order (§ 84) is unlawful and unreasonable inasmuch as it authorized the continuation of unsubstantiated and exorbitant historical usage fees despite evidence that they are harming the competitive market. The Supplemental Order violated R.C. 4903.09 for failure to identify record evidence to support the fee. The Supplemental Order unlawfully and unreasonably determined that IGS' is attempting to relitigate this matter; the issues decided DP&L's distribution rate case are not the same as the issues presented in this proceeding.**
- D. The Supplemental Order (§ 84) is unlawful and unreasonable inasmuch as it rejected IGS' proposal to establish an unbundling rider. This matter was not addressed in the distribution rate case, given that the Commission has no statutory authority to establish rate adjustment clauses under R.C. 4909.18. That authority exists only in an ESP case. The Supplemental Order's failure to address this matter was arbitrary and unreasonable. *Forest Hills Utility Co. v. Pub. Util. Comm.*, 31 Ohio St. 2d 46 (1972).**

As discussed further in the Memorandum in Support, IGS respectfully requests that the Commission grant this Application for Rehearing and correct the errors identified herein.

Respectfully submitted,

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)	Case No. 16-0395-EL-SSO
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)	

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

MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

I. INTRODUCTION

On November 21, 2019, the Commission issued a Supplemental Opinion and Order (“Supplemental Order”) modifying and approving the Amended Stipulation and Recommendation (“Stipulation”) filed in the above-captioned proceeding. Interstate Gas Supply, Inc. (“IGS”) commends the Commission for eliminating the inaptly named Distribution Modernization Rider (“DMR”). Following the elimination of the DMR, however, The Dayton Power and Light (“DP&L”) filed a notice of withdrawal of its Electric Security Plan (“ESP”) application. The notice was granted on December 18, 2019.

IGS recognizes that DP&L’s withdrawal presents some uncertainty with respect to the status of matters decided in this docket. Therefore, as a precautionary matter, IGS

respectfully asserts that the Supplemental Order erred in several respects that the Commission should either clarify or correct on rehearing.

While the Supplemental Order represents a step in the right direction for the customers of DP&L, it missed an important opportunity to level the playing field between default service and the retail market. Specifically, the Supplemental Order:

- Authorized DP&L's unsubstantiated modifications to the Supplier Tariff with respect to collateral that CRES providers must post with DP&L;
- Rejected IGS' suggestion to reduce or at least equally apply switching fees between shopping and SSO customers;
- Rejected IGS' suggestion to reduce or eliminate the unsubstantiated \$150 fee for historical usage; and
- Rejected IGS' suggestion to establish a rider to unbundle and allocate default service-related costs embedded in distribution rates.

Although IGS presented detailed testimony and legal arguments on these matters, the Supplemental Order declined to address any of these important issues on the merits. Rather, the Supplemental Order sidestepped these issues and, instead, concluded that "IGS is seeking to relitigate claims which were fully litigated and decided in DP&L's most recent distribution rate case."¹

¹ Supplemental Order at ¶ 84.

While the above subjects may have been addressed, in part, in DP&L's distribution rate case,² the specific issues litigated in that case—and decided in the Commission's order—were not the same. Moreover, neither the distribution rate case nor this case provided a substantive decision based upon findings of fact or conclusions of law based upon the record with respect to any of the issues presented above. The combined impact of these two orders is to deprive IGS of the opportunity for a fair hearing in either forum. IGS understands that the Commission has a lengthy docket and must deal with several complicated matters. Given that fact, IGS assumes that the Commission's action with respect to these matters was unintentional and that the Commission would not deliberately deprive IGS of a fair opportunity to address matters that directly impact the competitive market.

On rehearing, the Commission should substantively address IGS' arguments, issue findings of fact and conclusions of law based upon the record.

II. BACKGROUND

On March 14, 2017, a group of parties entered into a Stipulation in this proceeding. Although IGS was at one point a signatory party, on October 19, 2018, after the Commission materially modified the Stipulation, IGS withdrew. IGS was given an opportunity to oppose the Stipulation in a hearing that commenced on April 1, 2019.

In opposition to the Stipulation, IGS raised four arguments to improve the competitive market. The Supplemental Order disregarded each on the basis that IGS' is

² *In the Matter of the Application of the Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case Nos. 15-1830-EL-AIR, *et al.*, Opinion and Order (Sep. 26, 2018) (hereinafter "Distribution Order").

attempting to relitigate matters decided in DP&L's distribution rate case. Given the Supplemental Order's reliance upon the Distribution Order, the arguments that IGS presented in both cases must be placed in the appropriate context.

In the distribution rate case, IGS raised concerns regarding collateral, switching fees, historical usage fees, and SSO-related costs proposed for recovery in distribution rates. But the order in that proceeding did not provide a substantive analysis of those issues. Indeed, a closer examination shows that the issues addressed by the Commission were quite different.

III. ARGUMENT

A. The Supplemental Order (¶ 84) is unlawful and unreasonable inasmuch as it authorized DP&L to modify its Supplier Tariff to impose discriminatory collateral requirements without record support in violation of R.C. 4903.09 and R.C. 4928.143(C)(1). These discriminatory collateral requirements should be deemed withdrawn with the ESP application. The Supplemental Order unlawfully and unreasonably determined that IGS' is attempting to relitigate this matter; the issues decided DP&L's distribution rate case are not the same as the issues presented in this proceeding.

DP&L has collateral obligations to account for the possibility that a CRES provider defaults on their obligations.³ DP&L's ESP application proposed to modify DP&L's calculation of CRES provider collateral requirements.⁴ Under DP&L's ESP proposal, CRES providers without an investment grade long-term bond would be required to post

³ IGS Ex. 1017 at 4.

⁴ *Id.* at 4-5; App. Vol. I, DP&L Alternative Generation Supplier Coordination Tariff, Sheet No. G8 (the "Supplier Tariff"), at 26-27 (PDF Pages 95-96).

collateral based upon a set formula.⁵ DP&L indicated that it plans to require a set formula despite the fact that its current and proposed tariff states that “[t]he amount of the security required must be and remain *commensurate with the financial risks placed on the Company by that supplier, including recognition of that supplier’s performance.*”⁶

The proposed modification substantially and discriminatorily increased collateral requirements for privately held companies like IGS that present minimal risk of default. Although the Stipulation recommended that the Commission authorize the revised collateral calculation, DP&L failed to submit any testimony or record evidence to support the change. The Commission authorized the modification on October 20, 2017 as part of a stipulation that was authorized at an earlier stage of this case. The Opinion and Order contained no analysis or citations to the record to justify DP&L’s proposed collateral requirements.

After IGS was given a supplemental hearing to oppose the Stipulation, IGS presented testimony and briefs in opposition to the proposed modifications to DP&L’s collateral requirements. Nevertheless, the Commission rejected IGS’ challenge to DP&L’s proposal to modify its Supplier Tariff on a finding that “IGS is seeking to relitigate claims which were fully litigated and decided in DP&L’s most recent distribution rate case.”⁷ The modified Supplier Tariff, however, was never proposed or authorized in the distribution rate case—it was authorized here in this case as part of a Stipulation.

⁵ *Id.*

⁶ IGS Ex. 1017 at 6; App. Vol. I, DP&L Alternative Generation Supplier Coordination Tariff, Sheet No. G8 (the “Supplier Tariff”), at 27 (PDF Page 96).

⁷ Supplemental Order at ¶ 84.

While the Distribution Order rejected IGS' proposal to modify DP&L's collateral terms, the Commission's reasoning implied the burden rested on IGS to disprove the reasonableness of DP&L's *already authorized Supplier Tariff and collateral calculation*. The Distribution Order concluded "Staffs decision to forgo review of the Supplier Tariff was not unreasonable."⁸ And IGS had not presented sufficient evidence to modify provisions authorized in the ESP case:

The Commission finds that the evidence in the record does not support *modification* of the credit and collateral requirements in the Supplier Tariff. As DP&L notes, the Supplier Tariff does not distinguish between public and private companies; the Supplier Tariff provides that companies, public or private, which have established their creditworthiness by obtaining an investment grade credit rating need not post collateral. The record demonstrates that there is nothing to stop private companies from obtaining credit ratings.⁹

The Distribution Order, however, cited no evidence to support DP&L's collateral requirements. Rather, it assumed that they were reasonable and indicated that IGS had failed to satisfy its evidentiary burden to modify them.

As noted above, the tariff under review in the distribution rate case was authorized *in the ESP proceeding* on October 20, 2017 as part of a stipulation. Since IGS withdrew from that Stipulation on October 19, 2018, IGS now has a blank slate to challenge each and every element of the Stipulation—including the proposed collateral requirements. Even assuming that the standard of review applied by the Commission in the Distribution Order was lawful, such a deferential standard in this proceeding cannot withstand appellate review.

⁸ Distribution Order at ¶ 36.

⁹ *Id.* at ¶ 47(emphasis added).

In this case, DP&L was required to support each element of the Stipulation with record evidence: “[t]he burden of proof in the proceeding shall be on the electric distribution utility.” R.C. 4928.143(C)(1). Stipulations are “considered merely as recommendations to the Commission and, while entitled to substantial weight, they must be supported by the evidence of record to withstand scrutiny.” *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 563 (1994). More importantly, “[t]he agreement of some parties is no substitute for the many procedural protections reinforced by the evidentiary support requirement.” *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, ¶ 19.

The Commission must issue orders based upon findings of fact derived from the record evidence. R.C. 4903.09. DP&L has not marked the application as an exhibit in this proceeding. DP&L also has not provided any testimony or evidence to support its proposed modification of the collateral requirements.¹⁰ Given that DP&L failed to provide evidence to support its proposed modification—and the Supplemental Order failed to identify any evidence—the Supplemental Order violated R.C. 4903.09 and R.C. 4928.143(C)(1).

Moreover, the evidence that is in record demonstrates that DP&L’s proposed collateral requirements are unreasonable, and any risk to DP&L could be ameliorated through less burdensome means.¹¹ It simply does not make sense to increase the cost of doing business in the DP&L service territory without compelling record evidence.

¹⁰ Tr. Vol. VII 1318-19.

¹¹ IGS Ex. 1017 at 9-10.

To that end, IGS recommended that the Commission direct DP&L to consider specific metrics to apply as a reduction to the otherwise applicable collateral calculation. Using these metrics, DP&L may ensure that financially strong CRES providers are not required to post collateral that exceeds the risk they impose. Mr. Crist recommended that DP&L apply its proposed collateral calculation, and then reduce the total amount of collateral based upon three factors (1) Capital Structure; (2) Diversity of Portfolio; and (3) Past Performance.¹² Specifically, Mr. Crist recommended that DP&L consider the following factors to ensure that the posted credit is commensurate with the risk posed by the CRES provider:

- **Capital Structure:** the lack of debt is an indication of financial strength; thus, for each percent of a supplier's capital structure that is composed of equity over 50%, a 1% reduction in collateral.
- **Diversity of Portfolio:** diversity in business ensures that market dynamics are less likely to negatively impact cash flows; thus, for each percent of a supplier's total business portfolio (revenues) that relates to nonelectric-related business, a corresponding 1% reduction in collateral.
- **Past Performance:** an entity's ability to meet its obligations over time is reflective of that entity's ability to meet its ongoing obligations through different market dynamics; thus, a supplier should receive a 1% discount for each year that they have met their obligations in the DP&L service territory.¹³

The adoption of these guidelines will ensure that DP&L is consistent with the spirit of the tariff and the purpose behind collateral—to require CRES providers to post credit commensurate with the associated risk. Accordingly, the Supplemental Order unlawfully

¹² *Id.* at 7-8.

¹³ *Id.*

and unreasonably authorized DP&L to increase its collateral requirements without record support.

The utter lack of a record to support the change aside, on December 18, 2019, the Commission authorized DP&L to withdraw its application in this proceeding in its entirety. Given that fact, the terms and conditions proposed under the ESP—including DP&L’s proposed collateral requirements—are similarly withdrawn. On rehearing, the Commission should clarify that the collateral requirements proposed in the ESP case are no longer applicable. DP&L cannot withdraw its application and retain the benefits of proposals that are no longer before the Commission. Should DP&L wish to modify its collateral requirements in the future, it must justify the change in an appropriate filing before the Commission.

To the extent that DP&L’s proposed changes to the Supplier Tariff are not deemed withdrawn in their entirety, the Commission should adopt more reasonable and less burdensome collateral requirements as proposed by IGS.

B. The Supplemental Order (¶ 84) unlawfully and unreasonably authorized DP&L’s \$5 switching fee. The Supplemental Order impermissibly authorized the fee without rendering findings of fact and conclusions of law based upon the record in violation of R.C. 4903.09. *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87 (1998). The fee is discriminatory, violates state policy, and precedent inasmuch as DP&L assesses the fee to shopping customers while providing the same service for free to customers that take service under the SSO. R.C. 4928.02(A); *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 2006-Ohio-2110. The Supplemental Order unlawfully and unreasonably determined that IGS’ is attempting to relitigate this matter; the issues decided DP&L’s distribution rate case are not the same as the issues presented in this proceeding.

DP&L assesses customers a \$5 fee to switch from the SSO to a CRES provider or to switch from one CRES provider to another.¹⁴ The terms of the fee are discussed in two places: (1) the Supplier Tariff (G8); and (2) Tariff D34. In this case, DP&L proposed certain changes to the Supplier Tariff. In the distribution rate case, DP&L proposed to modify Tariff D34 so that customers returning to the SSO do not pay a \$5 fee.

IGS challenged the switching fee in both cases, arguing that it should be eliminated, or, at a minimum, applied equally to all customers whether they switch to the SSO or a CRES provider. Regarding IGS' challenge, the Distribution Order relied upon *this case* to disregard IGS' argument:

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.***¹⁵

Although the Distribution Order pointed to this case for authority, the Supplemental Order disregarded IGS' argument in this case on the basis that "IGS is seeking to relitigate claims which were fully litigated and decided in DP&L's most recent distribution rate

¹⁴ IGS Ex. 1014 at 7.

¹⁵ Distribution Order at ¶ 43.

case.”¹⁶ The issue, however, was clearly not litigated—or, even if it was, it was not substantively addressed—in the Distribution Order.

In essence, each order imprudently attempts to rely on the other as the basis to avoid addressing IGS’ arguments on the merits. Now that DP&L has withdrawn its application in this proceeding, the error in the Distribution Order is further exacerbated.

The Supplemental Order’s reasoning amounts to what can only be viewed as a shell game—IGS has been forced to chase the proverbial pea in multiple cases, yet it appears that IGS is deprived of an opportunity to resolve this issue on the merits in *any* forum. The Distribution Order relied upon this case to avoid addressing switching fees. Now this case relies upon the Distribution Order to avoid answering difficult questions here. The combined effect of the orders is to prevent IGS from litigating the reasonableness of DP&L’s switching fee amount and terms ***in any proceeding***, which is a violation of R.C. 4903.09 and the precedent set forth in *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87 (1998).

Under R.C. 4903.09, the Commission must issue findings of fact and conclusions of law based upon the record within the case. In *Tongren*, the Court admonished the Commission for inappropriately relying upon matters that were allegedly resolved in a prior case. The Court stated, “[i]n the second case, the commission relied on its consideration of these issues in the first case. Since its consideration of those issues in the first case constituted reversible error for lack of support in the record, the commission’s reliance thereon likewise constituted reversible error in the second case.” *Tongren* at 85 Ohio St. 3d 93. Given that the Distribution Order is not based upon record

¹⁶ Supplemental Order at ¶ 84.

evidence—since it relies upon this case, which also contains no findings of fact or conclusions of law—the Supplemental Order erred.

Also, importantly, IGS filed a subsequent application for rehearing in the distribution rate case noting that DP&L proposed changes to the switching fees (in Tariff D34) in that case (discriminatorily eliminating their application to customers returning to the SSO while leaving them in place for all other customers). In other words, while the Distribution Order relied upon *this case*, the changes that IGS objected to were actually specifically authorized in the distribution rate case. Whereas the switching fees proposed in this case relate to the reference to such fees in the Supplier Tariff. The combined impact of these orders is to modify the terms of DP&L's switching fee structure and to reject IGS' argument for parity without record evidence.

IGS and shopping customers have been aggrieved by the Commission's error. The fee, which is only imposed on customers seeking to proactively choose a CRES provider, enables DP&L to create an uneven and discriminatory playing field that provides an indirect subsidy to SSO service in violation of Ohio law.¹⁷ Ohio law does not require complete uniformity across all rates and fees but does require uniform rates and fees when a utility is performing "like and contemporaneous service under substantially the same circumstances and conditions."¹⁸ The customers that are switching, and thus incurring the fee, are similarly situated to the utility in that they need the utility to adjust their account to reflect their action—a power exclusively reserved by DP&L. The fact that

¹⁷ See R.C. 4928.02(A) (state policy is to ensure nondiscriminatory and reasonably priced retail electric service).

¹⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 2006-Ohio-2110, ¶ 23.

a customer is leaving or entering the SSO should not impact the administrative costs of effectuating a switch. Indeed, DP&L could not identify any distinguishing differences during cross-examination.¹⁹

In the case of the switching fee, DP&L is surely performing the “like and contemporaneous service” of administratively changing the appropriate sections of a customer’s account to ensure they receive the generation service provider they have selected. The fact that the change is made from the SSO to a CRES provider or from a CRES provider to another supplier is immaterial. Despite direct interrogatories on the subject, DP&L failed to provide any evidence to prove that there are no costs incurred when a customer returns to the SSO pool from competitive service.²⁰ Additionally, DP&L was unable to provide any evidence as to the actual costs incurred by DP&L when switching a customer from the SSO pool to competitive service.²¹

The absence of any evidence to support the need for a switching fee should bolster the recommendation of witness White to eliminate the switching fee in its entirety. Under a cost-causation approach, the applicable fees should be recovered from the entity that caused the fee.²² DP&L was unable to provide any evidence as to the actual costs associated with the switching fee and furthermore unable to differentiate any cost

¹⁹ Tr. Vol. VII at 1322.

²⁰ IGS Ex. 1014 at Ex. MW-1 (DP&L Response to IGS-INT-9-11.)

²¹ *Id.*

²² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order (Aug. 8, 2012) at 55 (holding that “[t]he PIRR balance was incurred primarily by OP customers, and according to cost causation principles, the recovery of the balance should be from OP customers.”).

differences between removing or adding a customer to the SSO pool. The customers, for whom the fee is incurred, are all similarly situated to the DP&L insofar as they only need DP&L to adjust their accounts to reflect their preferred commodity supplier.

The Commission should continue to foster a nondiscriminatory and open electric market in accordance with state policy by either eliminating the switching fee in its entirety or, in the alternative, require DP&L to apply the fee in a non-discriminatory manner. No evidence was provided by DP&L to support the fee and furthermore no distinction was shown between customers leaving or entering the SSO to justify the discriminatory manner by which the switching fee is applied.

C. The Supplemental Order (¶ 84) is unlawful and unreasonable inasmuch as it authorized the continuation of unsubstantiated and exorbitant historical usage fees despite evidence that they are harming the competitive market. The Supplemental Order violated R.C. 4903.09 for failure to identify record evidence to support the fee. The Supplemental Order unlawfully and unreasonably determined that IGS' is attempting to relitigate this matter; the issues decided DP&L's distribution rate case are not the same as the issues presented in this proceeding.

The Application proposed to modify the Supplier Tariff to authorize DP&L to impose a \$150 fee on suppliers seeking to access twelve months of hourly load data (historical usage information). DP&L attempted to justify this exorbitant fee by referring to its merger case that was settled nearly eight years ago.

In the Supplemental Order, the Commission concluded that IGS is attempting to relitigate matters decided in the Distribution Order. In that case, the Commission concluded that the \$150 fee was authorized as part of a settlement in DP&L's merger proceeding (Case No. 11-3002-EL-MER) and that "the Commission is bound by certain institutional constraints to provide an explanation before such order may be changed or

modified.”²³ The decision further stated that it had not been demonstrated that circumstances have changed to support modifying the fee. The order concluded that “[t]he 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.”²⁴

While IGS took issue with the legal standard applied by the Commission in the distribution rate case, in this case—for the sake of trying to improve the competitive market—IGS provided evidence to demonstrate that the negative impact of the fee warranted modification. IGS did not seek to relitigate the same issues; rather, IGS sought to work within the legal standard for modification established by the Commission in the Distribution Order. For example, in Case No. 11-3002-EL-MER, the Commission noted that the stipulation leading to the \$150 fee was intended “to provide for a reduction in barriers to competition by CRES providers.”²⁵ But, as IGS testimony demonstrates, the fee remains a significant barrier to competition in DP&L’s service territory.

Of course, in this case, IGS identified that DP&L’s historical usage fees have added up to millions of dollars over the past several years, which “ultimately must be passed onto customers.”²⁶ Indeed, “these costs have become so exorbitant that a CRES provider must provide potential contract pricing to a customer without incurring the \$150

²³ Distribution Order at ¶ 42.

²⁴ *Id.*

²⁵ *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER at ¶ 25 (Nov. 22, 2011).

²⁶ IGS Ex. 1014 at 9.

price, which simply cannot be justified every time there a prospective customer request a price.”²⁷ When CRES providers price contracts without actual customer historical usage, “it is much more difficult to tailor a product to the specific customer’s needs.”²⁸ And it results in a decline in competitive offers to customers, because “the non-customized offer must build in more risk.”²⁹ DP&L’s own witness conceded as much during the hearing.³⁰ Ultimately, customers and the retail market lose out. Therefore, evidence exists in the record to demonstrate that DP&L’s historic usage fee has negatively impacted competition in a manner sufficient to justify modification of the charge. Despite IGS’ testimony, the Supplemental Order summarily concluded that IGS is simply seeking to relitigate the same issue.

The continued existence of such a burdensome fee continues to suppress the retail electric market in DP&L’s service territory. DP&L witness Schroder testified that the fee should be viewed as “helping and supporting improved systems so [the \$150 historical usage fee] could be done cheaper,” yet the fee has remained unchanged since its inception 8 years ago in case no. 11-3002-EL-MER.³¹ DP&L provided no justification for the exorbitantly unreasonable fee despite interrogatories on the matter.³²

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Tr. Vol. VII at 1324-26.

³¹ *Id.* at 1326, Ln. 2-5.

³² See DP&L Response to IGS-INT-9-7.

To the extent that IGS' efforts undertaken (under the standard for modification the Commission established in the distribution case) are deemed to be estopped, *any future efforts to change the fee would likewise suffer the same fate*. But such a conclusion would contradict the Distribution Order's reasoning that the fee is subject to change to the extent a party can demonstrate a "decline in competition" or "failure to achieve goals set by the Commission."³³

The Commission should eliminate the historical usage fee insomuch as the fee is unreasonable and has created a financial barrier for CRES seeking to tailor products for specific customers on a competitive basis. DP&L provides no basis for the high cost to suppliers and the Commission failed to address IGS' argument based upon the record. "A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St. 3d 163, 166 (1976). Because the Supplemental Order failed to identify evidence in the record to support the charge, the order erred, and the charge should be eliminated on rehearing.

D. The Supplemental Order (¶ 84) is unlawful and unreasonable inasmuch as it rejected IGS' proposal to establish an unbundling rider. This matter was not addressed in the distribution rate case, given that the Commission has no statutory authority to establish rate adjustment clauses under R.C. 4909.18. That authority exists only in an ESP case. The Supplemental Order's failure to address this matter was arbitrary and unreasonable. *Forest Hills Utility Co. v. Pub. Util. Comm.*, 31 Ohio St. 2d 46 (1972).

At an earlier stage of this proceeding, the Retail Energy Supply Association entered into a Stipulation that recommended:

³³ Distribution Order at ¶ 42.

In DP&L's filed distribution rate case (Case No. 15-1830-EL-AIR), there will be an evaluation of costs contained in distribution rates that may be necessary to provide standard service offer service. Any reallocation of costs to the standard service offer as a result of this evaluation will be revenue neutral to DP&L.³⁴

To this end, in the distribution rate case, IGS raised concerns regarding DP&L's proposed recovery of default service-related costs in distribution rates. IGS quantified this subsidy to exceed \$11 million per year. To level the playing field, IGS recommended:

unbundling costs incurred to process and administer SSO service from distribution rates and allocating those costs to SSO customers directly via the creation of two new riders: a credit rider for all customers allowing them to avoid distribution costs that support the SSO administrative processing costs and an avoidable rider that collects those costs directly from SSO customers.³⁵

The distribution rate case did not render a substantive decision on IGS' unbundling arguments. Instead, the Order determined that IGS' proposal to reallocate these costs cannot be adopted because "R.C. 4909.18 does not authorize the creation of rate adjustment clauses."³⁶

Interestingly, the Distribution Order acknowledged that the rider IGS proposed could be authorized in an ESP case:

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.***³⁷

³⁴ Joint Ex. 1 at 9.

³⁵ Distribution Order at ¶ 22.

³⁶ *Id.* at ¶ 30.

³⁷ *Id.* at ¶ 31.

Naturally, given the Commission's stated concern in the Distribution Order, IGS suggested that the Commission simply follow its own legal advice and establish a rider in this case. IGS contends that by doing so, any legal misgivings that may exist in the distribution rate case would be moot.

Although the Distribution Order acknowledged that an ESP case is the appropriate place to establish an unbundling rider, the Supplemental Order concluded that IGS' recommendation for the establishment of such a rider is an attempt to relitigate the distribution rate case.³⁸ The Supplemental Order erred in that respect, given that the legal frameworks applicable to ESPs and distribution rate cases are completely different and the matters decided in both cases were different. As the Commission noted, it lacks authority under R.C. 4909.18 to authorize rate adjustment clauses. Therefore, IGS' proposal could not be adopted in DP&L's distribution rate case as the Commission suggests. Thankfully, no such limitation applies in this case.

Moreover, the Stipulation in this proceeding specifically raises the possibility that SSO costs proposed for recovery in distribution rates may be reallocated to the SSO. It would be wholly illogical and unreasonable to undertake that exercise without putting in place a structure to fairly and equitably reallocate any costs identified in the distribution case. As such, IGS' current proposal is relevant in that it raises serious questions as to whether the Stipulation is in the public interest and/or violates any regulatory practice or principle.

³⁸ Supplemental Order at ¶ 84.

IGS recognizes that DP&L has been permitted to withdraw its application in this proceeding. IGS anticipates that parties may contest the Commission's determination to permit DP&L to withdraw its application. Therefore, to the extent that DP&L's ESP remains in effect as a result of such a challenge, the Commission should establish a rider to facilitate the unbundling contemplated by the Stipulation in this proceeding.

IV. CONCLUSION

IGS urges the Commission to grant this Application for Rehearing and correct the errors identified herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Interstate Gas Supply, Inc.* was served this 23rd day of December via electronic mail upon the following:

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in

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

Summary: Application for Rehearing and Memorandum in Support electronically filed by Mr. Evan F Betterton on behalf of Interstate Gas Supply, Inc.