BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider.	)))	Case No. 12-2881-EL-FAC

***** PUBLIC VERSION *****

REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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TABLE OF CONTENTS

PAGE

BEFORE
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Dayton Power and Light Company to	)	Case No. 12-2881-EL-FAC
Establish a Fuel Rider.	)	

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I. INTRODUCTION

In this proceeding, the Public Utilities Commission of Ohio ("PUCO" or "Commission") must determine whether the costs paid by The Dayton Power & Light Company's ("DP&L" or the "Utility") Standard Service Offer ("SSO") customers for fuel for 2012 were prudently incurred.[1] Ohio law protects customers from paying costs that DP&L fails to show were prudent.[2]

This case pertains to the management/ performance and financial audit of DP&L's 2012 fuel purchases ("2012 Audit") by EVA and Larkin (collectively, "Auditors"). The Auditors identified a number of issues with the Utility's Fuel Rider for 2012, and the amounts DP&L's SSO customers were ultimately charged.[3] In this regard, the Auditors recommend a total disallowance of $4.8 million[4] from the Utility's Fuel Rider for 2012 fuel charges paid by DP&L's SSO customers. The Auditors made two

[1] *In the Matter of the Application of the Dayton Power and Light Company To Establish a Fuel Rider*, Case No. 12-2881-EL-FAC, 2012 Audit Report at 1-2 (June 14, 2013) (hereinafter "2012 Audit Report").

[2] R.C. 4928.143(B)(2)(a).

[3] 2012 Audit Report at 1-16.

[4] Management Disallowance 1 was for $3.4 million dollars (see Case No. 12-2881-EL-FAC, Transcript Volume II at 329 (Smith)) and Management Disallowance No. 2 totaled $1.4 million dollars (see Case No. 12-2881-EL-FAC,Transcript Volume II at 299-300 (Smith)) for a total of $4.8 million.

disallowance recommendations for the 2012 audit period. Management Disallowance No. 1 was for $3.4 million dollars,[5] and Management Disallowance No. 2 totaled $1.4 million dollars.[6] These disallowance recommendations encompass both adjustments for optimizations inappropriately claimed by the Utility and an adjustment based on the Utility's imprudent management decisions.[7]

DP&L maintains that the Utility acted prudently and consistently with its obligations with respect to all costs reflected in the Fuel Rider for 2012.[8] Accordingly, the Utility disputes the Auditors' recommended disallowances. The PUCO Staff maintains that the Auditors "appropriately analyzed DP&L's fuel purchases [for 2012] and made [their] recommendations"[9] and suggests that the Commission adopt the Auditors' recommendations in the 2012 Audit Report.[10] The PUCO Staff also contends that DP&L's challenges to the Auditor's findings of imprudence lack merit. OCC agrees with the PUCO Staff.

The OCC submits this Reply Brief on behalf of DP&L's approximately 374,000 residential customers. In accordance with the Auditors' findings, the PUCO should order DP&L to credit the Fuel Rider in the amount of $4.8 million for inappropriate trading and optimization activities and for failing to prudently implement the least cost methodology for the benefit of SSO customers. DP&L has not met its burden of proof in this case.

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[5] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC,Transcript Volume II at 329 (Smith) (January 28, 2014).

[6] Id. at 299-300 (Smith).

[7] 2012 Audit Report at 1-16.

[8] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 49.

[9] Case No. 12-2881-EL-UNC, Staff Initial Brief at 20.

[10] Id.

II. ARGUMENT

A. DP&L Has Not Met Its Burden Of Proof Because It Failed To Satisfy The Standard For Prudency.

As discussed in OCC's Initial Brief, DP&L bears the burden of proving that the fuel costs it collected from customers were prudently incurred and reasonable.[11] DP&L has not met its burden in this proceeding in regard to $4.8 million[12] charged to the Utility's Fuel Rider for 2012 and paid by DP&L's SSO customers.

The Auditors found that DP&L acted imprudently when it failed to exercise an "in-the-money" option to purchase high-sulfur Illinois Basin Coal ("ILB") in October 2010 for delivery in 2012.[13] The Auditors concluded that if a utility has an option that is "in-the-money"[14] it would be imprudent for that utility to fail to exercise the option.[15] The Auditors also found that DP&L's decision to purchase one million tons of low-sulfur coal in the last four months of 2010 was imprudent.[16] Those findings are correct.

The PUCO Staff correctly points out that the 2011 Fuel Rider Stipulation (resolving Case No. 11-5730-EL-FAC) specifically reserved the Auditors' right to review, audit and challenge certain coal purchases for imprudence.[17] The disallowance of $3.4 million related to the Utility's imprudence[18] should be credited to the Fuel Rider for

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[11] Case No. 12-2881-EL-UNC, OCC Initial Brief at 3-4.

[12] Management Disallowance 1 was for $3.4 million dollars (see Case No. 12-2881-EL-FAC, Transcript Volume II at 329 (Smith)) and Management Disallowance No. 2 totaled $1.4 million dollars (see Case No. 12-2881-EL-FAC,Transcript Volume II at 299-300 (Smith)) for a total of $4.8 million.

[13] 2012 Audit Report at 4-12.

[14] The terms "in-the-money" and "out-of-the-money" mean the market alternative is cheaper or more expensive, Case No. 12-2881-EL-FAC, Transcript Volume II at 355 (Medine) (January 28, 2014).

[15] 2012 Audit Report at 4-12.

[16] Id. at 1-9.

[17] Case No. 12-2881-EL-UNC, Staff Initial Brief at 2.

[18] 2012 Audit Report at 1-9.

DP&L's SSO customers. For the reasons explained below, the evidence supports a PUCO-finding that these management decisions were imprudent and customers should not have to pay the costs of such imprudent decisions.

1. DP&L Witness Crusey's "after-the-fact analysis" does not satisfy the prudency standard.

A prudent decision, for purposes of evaluating utility rate-making decisions in Ohio, is defined as "one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known **at the time the decision was made.**"[19] (Emphasis added). And the Commission has explained the prudency standard as follows:

> One area encompasses the facts and circumstances known or reasonably anticipated at the time the decision was made and whether such facts and circumstances were taken into proper consideration in the decision-making process. A second area involves the inquiry of whether any intervening circs occurred or facts become known which impacted the initial decision's results, whether intervening factors caused or should have caused management to re-think the initial decision, and whether any action or inaction, in light of the intervening factors, was appropriate. A third area is an examination of the actual results achieved by virtue of the decision.[20]

Thus, the factors the PUCO should consider in determining whether DP&L's decision not to exercise the ILB option in 2010 was prudent are: 1) what analysis, if any, was done by the Utility in 2010 when the decision was made[21] 2) what was known by the

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[19] *City of Cincinnati v. Pub. Util. Comm.*, (1993) 67 Ohio St.3d 523, 527-528, 620 N.E.2d 826, 830.

[20] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, Case No. 02-220-GA-GCR, 2005 Ohio PUC LEXIS 674 at 8 (citing *In the Matter of the Regulation of the Fuel Cost Adjustment Clause Contained within the Rate Schedules of the Ohio Power Company and Related Matters*, Case No. 79-234-EL-FAC, Entry on Rehearing (Oct. 15, 1980)).

[21] See, for example, *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters , 2005 Ohio PUC LEXIS 674,* * where the PUCO determined that "hindsight should not be used in determining prudence."

Utility at the time the decision was made 3) whether the Utility took those facts into consideration when it made its decision, and 4) what were the results/consequences of the decision the Utility made. But DP&L failed to present any analysis conducted in 2010 that explained what the Utility did to determine whether or not the option was "in-the-money." Instead, DP&L presented testimony through witnesses David Crusey and James Heller to justify the decision for purposes of this proceeding (after-the-fact).

It is reasonable to conclude that there is no analysis conducted in 2010 by DP&L that supports the Utility's position (now) that the ILB option was out-of-the-money. If any analysis existed that: 1) supported the actions of the Utility and 2) was performed in 2010—DP&L would have presented it to the Auditor during the 2010 Audit,[22] or at least in this proceeding to satisfy its burden of proof. The PUCO has previously held that the lack of adequate documentation regarding a decision undergoing a prudence review raises serious doubts about a decision's prudence.[23] The only documentation DP&L produced to support its 2010 decision was direct testimony by Mr. Crusey and Mr. Heller. But there was no testimony as to any steps DP&L took in 2010 to determine whether the ILB coal option for delivery in 2012 was in-the-money.

Specifically, Mr. Crusey contends that at the end of October, when DP&L made the decision not to exercise the option for the high-sulfur coal, DP&L reviewed the market prices for coal, and concluded that the option was "not in-the-money."[24] But as

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[22] *In the Matter of the Application of the Dayton Power and Light Company To Establish a Fuel Rider*, Case No. 09-1012-EL-FAC, (April 29, 2011) (hereinafter "2010 Audit Report").

[23] See, e.g., *In the Matter of the Regulation of the Elec. Fuel Component Contained Within the Rate Schedules of the Cleveland Elec. Illum. Co. & Related Matters*, Pub. Util. Comm. No. 91-108-EL-EFC, 1992 WL 127211260 (Feb. 20, 1992) ("adequate documentation" is required in order to review the prudence of a utility's business decisions).

[24] Case No. 12-2881-EL-UNC, Direct Testimony of David Crusey at 32-33, DP&L Exhibit 1.

OCC explained in its Initial Brief, Mr. Crusey offered no record of any analysis DP&L actually conducted in 2010 to support his contention. He offered no documents discussing the analysis or any supplier response to a Request for Proposal soliciting market offers, nor did he offer any documents related to any analysis of the contract option available to DP&L verses the then market price of ILB coal.[25] The only evidence witness Crusey offered to support DP&L's decision not to exercise the option in the contract was an "analysis" Mr. Crusey conducted for the purpose of his testimony in this case.[26] The PUCO Staff concluded that DP&L failed to perform any contemporaneous analysis of the option under contract at the time the decision was made.[27] The PUCO Staff asserts that "DP&L failed to perform the minimum analysis to confirm whether the option was indeed "out of the money."[28] The PUCO Staff is correct in that regard.

DP&L points to the analyses completed by Mr. Crusey and Mr. Heller to support its contention that DP&L acted prudently in determining the option was "out-of-the-money."[29] DP&L relies on the direct testimony of Mr. Crusey to support its prudency argument because "Mr. Crusey was responsible for the decision at the time it was made."[30] But DP&L fails to explain (or provide documentation to support) what Mr. Crusey did in 2010 in order to ensure that the decision (not to exercise the option) was prudent. In addition, Mr. Heller was retained six to eight weeks prior to the

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[25] Case No. 12-2881-EL-UNC, OCC Initial Brief at 13-14.

[26] Case No. 12-2881-EL-UNC, Direct Testimony of David Crusey at 31.

[27] Case No. 12-2881-EL-UNC, Staff Initial Brief at 5.

[28] Id. at 6.

[29] See Case No. 12-2881-EL-UNC, DP&L Initial Brief at 12-14.

[30] Id. at 12.

commencement of the evidentiary hearing[31] for purposes of "review[ing] the decision after the fact" to determine whether or not it was reasonable.[32] DP&L argues that Mr. Heller's testimony is persuasive because, given the uncertainties; it was prudent for DP&L to leave "open" purchases of ILB coal.[33] But Mr. Heller's testimony is flawed for the same reason that Mr. Crusey's testimony is flawed—Mr. Heller never addresses what analysis DP&L undertook in October 2010. Mr. Heller could not address DP&L's 2010 actions because he was not involved in the decision making process.[34] In addition, DP&L could not have provided Mr. Heller with the analysis it conducted in 2010, because the Utility has not produced any analysis performed in 2010 regarding the option to purchase ILB coal.

Both Mr. Crusey and Mr. Heller's analyses are flawed because they are after-the-fact analyses that look back into time to justify a decision. The PUCO should find that DP&L did not meet its burden of proof because the Utility failed satisfy the prudency standard.

2. Witness Crusey's "after-the-fact" analysis is flawed because it failed to consider adjustments for sulfur dioxide, transportation costs, and operational costs of the scrubbers.

OCC explained in its Initial Brief that the analysis Mr. Crusey presented is flawed because it did not include a price adjustment for the level of sulfur dioxide ("SO_2") in the coal, and did not account for any differential in transportation costs to deliver coal to the

[31] Transcript Volume I at 143 (Heller).

[32] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 12.

[33] Id. at 24.

[34] Transcript Volume I at 143 (Heller).

generating facility.[35] In addition to the lack of an adjustment for SO_2 or transportation, the PUCO Staff also correctly points out in its brief that Mr. Crusey's analysis also failed to take into account the added operational costs to the scrubbers.[36] As Auditor Medine explained, "the value of the sulfur to the company is actually based upon the variable operating costs of the scrubber as a function of the sulfur content."[37] Ms. Medine went on to point out that the variable operating cost due to a half pound difference in SO_2 is not irrelevant. "It's something that one would evaluate in a prudent position."[38] But Mr. Crusey's analysis accounted for only a Btu adjustment in his effort to justify the prudency of DP&L's decision not to exercise the ILB coal option in 2010 for delivery in 2012.[39] That limited analysis prompted the Staff to question whether the Utility even understood how to conduct an appropriate analysis.[40] OCC shares this concern.

DP&L contends in its initial brief that "unquantified adjustments for other factors do not support a conclusion that the ILB coal option was in-the-money."[41] DP&L is wrong. First, the onus is not on the intervening parties to quantify these factors and show that DP&L's costs were imprudently incurred. And the Supreme Court of Ohio has made that clear. Specifically, Duke Energy sought reimbursement for roughly $30.7 million in costs associated with damages caused by Hurricane Ike.[42] The PUCO limited Duke's

[35] Case No. 12-2881-EL-UNC, OCC Initial Brief at 16-19.

[36] Case No. 12-2881-EL-UNC, Staff Initial Brief at 6.

[37] Transcript Volume II (Medine) at 357.

[38] Id. at 358.

[39] Direct Testimony of David Crusey at 32-22 (October 31, 2013).

[40] Case No. 12-2881-EL-UNC, Staff Initial Brief at 6.

[41] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 14-16.

[42] *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶2.

recovery to only $14.1 million (based in part on OCC's evidence).[43] Duke then appealed the decision to the Supreme Court of Ohio and argued, much like DP&L's argument above, that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent."[44] The Supreme Court held that argument by Duke's was "irrelevant because those parties did not bear the burden of proof."[45] The Court explained that it is the Utility that has to "prove a positive point: that its expenses had been prudently incurred *** [t]he commission did not have to find the negative: that the expenses were imprudent."[46] As a result, the Supreme Court upheld the Commission's decision to disallow much of the $30 million that Duke sought to recover from customers for storm damage, flatly rejecting any presumption of prudence.

Similarly, DP&L has the burden to show that it considered these factors and that when considering these factors the option was "not in-the-money;" therefore, the costs collected from customers were prudent. And the PUCO does not have to find the negative—that the ILB coal option was "in-the-money" and its costs were imprudent[47]-- in order to disallow costs.

Second, the issue here is not one of quantification. Rather, the concern is that, assuming *arguendo* that there was an analysis performed in 2010—there is no evidence to show that DP&L considered SO_2 and transportation costs in any such analysis in 2010. If any analysis was conducted by the Utility in 2010, it has not been presented as evidence in this hearing.

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[43] Id. at ¶6.

[44] Id. at ¶9.

[45] Id.

[46] Id. at ¶8.

[47] See id.

And OCC's position on quantification is consistent with the PUCO Staff that argues that: "DP&L failed to perform the minimum analysis to confirm whether that option was indeed 'out of the money.'"[48] The PUCO Staff then points out the specific flaws in DP&L's after-the-fact analysis conducted in 2013:

> DP&L gave no value to the sulfur difference and did the analysis on a FOB barge basis rather than delivered to the plant. DP&L did not consider the variable operating costs of the scrubber in evaluating the quality characteristics for the specific coal under option which were lower than the ICAP price upon which it claims to have relied even though there was no contemporaneous evidence of this fact, which is an industry standard when evaluating coals with different sulfur contents… DP&L did not solicit bids to determine the market price which is the standard procedure in the industry. DP&L did not contract with any other suppliers at that time to fill its open position to hedge target levels.[49]

The PUCO should reject DP&L's argument that adjustments for SO_2 and transportation costs are insignificant in this case because there is no quantification in the record for these factors. Quantification is not the issue. The issue is one of prudency. The testimony by Auditor Emily Medine and the findings in the 2012 Audit Report support OCC's position that DP&L's decision whether or not the 2010 ILB coal option was in-the-money cannot be prudent because $SO_{2.}$ transportation, and operation costs were not considered by the Utility. DP&L has not shown that its decision was prudent and SSO customers should be credited \$3.4 million through a disallowance to the 2012 Fuel Rider.

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[48] Case No. 12-2881-EL-UNC, Staff Initial Brief at 6.

[49] Id.

3. DP&L's decision to purchase NYMEX coal rather than trigger the ILB option in 2010 was imprudent.

DP&L states that there is evidence in the record that the decision to purchase NYMEX contracts between September 3, 2010 and December 9, 2010, was made independently from the decision not to exercise the ILB Option on October 31, 2010.[50] The Utility supports this position by explaining that the NYMEX purchases actually began September 3, 2010, more than seven weeks before the October 31, 2010, option exercise date.[51] But a review of the Utility's supply portfolio at that point in time provides a more accurate picture. According to DP&L, the projections throughout 2010 were that Stuart Station would need 2.5 million tons or more of low-sulfur coal in 2012.[52] By September 2010, the forecast of low-sulfur coal needs for 2012 at Stuart Station had been reduced to only 37.5 percent, with corresponding high-sulfur needs of 62.5 percent.[53] This is significant because, as the Utility admitted, by December 2010, DP&L already had 2.14 million tons,[54] or 85 percent, of its low-sulfur coal under contract for delivery in 2012 to Stuart Station.[55]

During this same time period, when DP&L chose not to exercise the option to purchase up to 750,000 tons of high-sulfur coal in October 2010, the Utility had only 1.75 million tons of high-sulfur coal under contract for delivery in 2012 to Stuart Station.[56] In the last quarter of 2010, DP&L's high-sulfur needs for 2012 were forecasted to be

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[50] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 20.

[51] Id.

[52] Id. at 10.

[53] Transcript Volume I (Crusey) at 58.

[54] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 25 (Footnote 15).

[55] 2.14 million tons= 85% of 2.5 million.

[56] Transcript Volume I (Crusey) at 58.

approximately 4.0 million tons.[57] Therefore, in the last quarter of 2010, DP&L's high-sulfur coal under contract for delivery in 2012 was only 44 percent of the Utility's total high sulfur needs for 2012.[58] Simply stated, in the last four months of 2010, DP&L chose to contract for almost twice the percentage of its low-sulfur coal needs (85 percent) as its high-sulfur coal needs (44 percent), even though from 2008 through 2012 the Utility was spending upwards of $65 million on capital projects in order to continually increase the amount of lower-priced high-sulfur coal it could burn.[59] Because of the large capital expenditures dedicated to increasing high-sulfur coal usage at the generating facilities, it is logical to surmise that the percentage of high-sulfur coal burn would have increased in 2012 beyond the levels forecasted in 2010.

And further evidence that DP&L's decision to purchase the amount of low-sulfur coal (versus high-sulfur coal discussed above) was imprudent is the amount of high-sulfur of coal that could have been utilized based on the actual 2010 burn rate of high-sulfur coal at Stuart Station. In 2010, Stuart Station averaged a high-sulfur burn rate of 61 percent for the entire year.[60] And according to Mr. Crusey's testimony, the blend assumption for Stuart Station through the first half of 2010 was 50 percent high-sulfur and 50 percent low-sulfur.[61] If that blend assumption was accurate, then actual burn rate for high-sulfur coal over the last half of 2010 would had to have been much higher in order to average a 61 percent high-sulfur burn rate for the entire year. Based on these

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[57] Transcript Volume I at 29. (6.5 million tons total projected burn for 2012. 6.5 million tons x 0.625 (percent of high sulfur coal) = 4.0 million tons).

[58] 1.75 million tons / 3.95 million tons = 44%.

[59] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 18.

[60] Transcript Volume I at 81.

[61] DP&L Exhibit 1 and 1A (David Crusey Direct Testimony) at 17 – Table DJC-2.

figures, DP&L's reported 2010 end-of-the-year projection of a high-sulfur coal burn rate for 2012 of only 62.5 percent was extremely conservative, since it had already virtually achieved that same level in 2010.

As the PUCO Staff correctly points out, the evidence shows that DP&L was not seriously pursuing high-sulfur coal.[62] DP&L did not solicit bids to determine the market price for high-sulfur coal, which is the standard procedure in the industry.[63] And DP&L did not contract with any other suppliers at that time to fill its open high-sulfur coal position to hedge target levels.[64] Evidence shows that DP&L had a financial incentive to maximize the purchase of low-sulfur coal. Without purchasing low-sulfur coal that DP&L could later resell and replace with a high-sulfur coal for the generating plants to eventually burn, there would have been virtually no optimization gains for 2012.[65]

4. Any decision that is detrimental for customers is not prudent.

DP&L argues that the Commission should find that its decision not to exercise the ILB option in 2010 was prudent.[66] But DP&L's argument fails to explain how DP&L's decision was reasonable for SSO customers who are tasked with paying the Utility's Fuel Rider. DP&L's decision not to exercise the 2010 option, choosing instead to purchase low-sulfur NYMEX coal that it would later sell and claim an optimization gain, was to the detriment of customers.[67] In the 2010 Audit Report the Auditors stated (and DP&L confirmed) that the Utility did no analysis in 2010, or subsequently, to determine whether

[62] Case No. 12-2881-EL-UNC, Staff Initial Brief at 6.

[63] Id.

[64] Id. at 7.

[65] Transcript Volume I at 83.

[66] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 12.

[67] Case No. 12-2881-EL-UNC, OCC Initial Brief at 20.

DP&L's strategy was in the best interest of jurisdictional customers. That was a required action that the Auditors believed were a minimum requirement to determine prudence.[68] This decision by the Utility disadvantaged customers not only because DP&L purchased a more expensive low-sulfur coal instead of exercising the option in 2010, but also because DP&L purchased a high-sulfur ILB coal in 2011 that was $[redacted] per ton more expensive than the high-sulfur ILB coal it could have purchased under the 2010 option.[69]

The PUCO Staff concludes that "the evidence demonstrates that DP&L did not want to contract for high-sulfur coal at the time [the Utility decided not to exercise the option]." [70] The PUCO Staff explained that DP&L was aware that such a purchase would limit its ability to generate optimization gains.[71] In addition, the evidence shows that Mr. Crusey had an interest in creating optimization gains because his compensation was tied to the level of optimizations.[72] The Utility should have considered more than its ability to generate optimization gains. DP&L should have considered what its decision would cost its SSO customers.

DP&L's imprudent decisions are directly responsible for its failure to exercise a competitive supply option which resulted in DP&L's imprudent purchase of low-sulfur coal rather than supplies of less expensive high-sulfur coal. This decision cost DP&L's SSO customers money. The Utility should not be permitted to profit from imprudent decisions at the expense of SSO customers. The Auditors recommend that DP&L's Fuel

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[68] Case No. 12-2881-EL-UNC, Staff Initial Brief at 3.

[69] 2012 Audit Report at 1-10.

[70] Case No. 12-2881-EL-UNC, Staff Initial Brief at 7.

[71] Id.

[72] See Staff Initial Brief at 7 and Transcript Volume I at 95. Mr. Crusey testified: "[w]e have had three fuel audits for 2010, 20111, and 2012. And I believe during the first fuel audit, I had had a personal goal of obtaining an optimization value of a certain amount."

Rider be adjusted to reflect a total disallowance of $3.4 million related to the Utility's failure to exercise the option.[73] The evidence supports that Auditors' recommendation.

B. The Auditors Correctly Recommended A Disallowance For 2012 Optimizations A, H, And I.

1. DP&L is incorrect when it claims "new rules" related to optimizations were presented by the auditors in the 2012 audit report.

DP&L argues that Optimization Gain Treatment for Optimization 2012-A should be allowed even though all the purchases of NYMEX coal for 2012 deliveries were entered into prior to when the current form of fuel rider was created January 1, 2010.[74] The Utility argues that the Audit Report reflects the creation of a "new rule" that is contrary to prior DP&L Stipulations.[75] This is not the case. The Auditors simply recognized that the optimization gain associated with 2012-A was conducted prior to the start of the Fuel Rider.[76] The Auditors therefore recommended a disallowance and acknowledged to missing a similarly structured optimization gain in the 2010 Audit[77] (which should have been disallowed).

Similarly, DP&L argues that all of Optimization 2012-H and portions of Optimization 2012-I are being proposed for disallowance based on "a newly invented theory" by the Auditors that the sale of a coal contract and purchase of a replacement contract does not constitute an optimization if those transactions are separated in time.[78]

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[73] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC,Transcript Volume II at 329 (Smith) (January 28, 2014).

[74] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 32.

[75] Id. at 33.

[76] 2012 Audit Report at 4-4.

[77] Transcript Vol. II at 402 (Medine).

[78] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 38.

This is not a newly-created rule or theory. DP&L has conveniently forgotten the concept of an optimization that it presented in its Application to Establish a Fuel Rider.[79] In that Application, DP&L said that it would "make coal sales at either a nominal gain or nominal loss that will be offset by a replacement purchase at a lower price"[80] and that "no optimization transaction will take place unless the net effect of the transaction results in a net decrease of costs to the retail customer."[81] Unless the Utility had a replacement purchase arranged to replace coal it was selling, there was no planned offset and no optimization transaction. All DP&L had when it sold coal it had under contract without a replacement coal was a simple sale - not an optimization transaction. There is no "new rule" being created by the Auditors, rather, the Auditors are simply following the concept of an optimization established by DP&L in its own Application to Establish a Fuel Rider. The Utility went on to explain the concept of an optimization in its Application by explaining that "DP&L would consider selling the original coal and replacing it with the alternative supply."[82] Again this statement is describing a congruent, fluid transaction that is joined together, not one that is separated by months, or even a year.

The Utility goes on to argue that based on projections of need, DP&L could easily have purchased, in late 2011 and 2012, the replacement high-sulfur coal that it expected to need.[83] And, given the liquid nature of the NYMEX coal market, DP&L contends that it could have sold the NYMEX coal on the very same day.[84] It appears from these

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[79] OCC Exhibit 2 (DP&L Application to Establish a Fuel Rider, Case No. 09-1012-EL-UNC).

[80] OCC Exhibit 2 at 7 (DP&L Application to Establish a Fuel Rider).

[81] Id.

[82] Id.

[83] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 39.

[84] Id.

statements that generating optimization gains was more important to the Utility than prudently managing its coal costs to SSO customers. If DP&L had an optimization transaction in place that would have reduced costs for SSO customers, then it should have done so. Looking for opportunities to manufacture optimization gains, which would only add costs to SSO customers, is contrary to the concept DP&L presented in its Application for a Fuel Rider that the PUCO approved.

2. DP&L's Res Judicata and Collateral Estoppel arguments are meritless and unsupported and should therefore be rejected by the Commission.

DP&L argues that the doctrines of res judicata and collateral estoppel should be applied to preclude disallowances for 2012 Optimizations A, H, and I.[85] The Supreme Court of Ohio has characterized collateral estoppel as precluding the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action."[86] And under Ohio law, res judicata means that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."[87] Thus, in order for DP&L to prevail on its issue and claim preclusion argument, DP&L must demonstrate that the underlying issues for 2012 Optimizations A, H, and I were: 1) actually litigated, 2) determined in a prior action, and 3) a valid judgment was rendered by the PUCO on these issues. DP&L failed to meet this burden.

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[85] Id. at 41.

[86] *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision* (1997), 80 Ohio St.3d 36, 41, 684N.E.2d 312.

[87] *Grava v. Parkman Tshp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus. In *Grava*, the Court defined a single transaction or occurrence as one "based on a claim arising from a nucleus of facts that was the subject matter of his first application." Id. at 383.

The table below summarizes the Auditors' reasons for the recommended disallowances of 2012 Optimizations A, H, and I claimed by the Utility and the corresponding amounts:

Optimization[88]	Auditors' Reasons for Recommended Disallowance	Amount
2012 Optimization A	The transaction took place before DP&L's Fuel Rider existed.	[redacted]
2012 Optimization H	The sale of the low-sulfur coal was disconnected with the purchase of the high-sulfur coal so it was not possible to connect the two transactions as being part of a single optimization.	[redacted]
2012 Optimization I	The sale of the low-sulfur coal does not correlate with the purchase of the replacement coal. In addition over half of the low-sulfur contracts sold were imprudently acquired.	[redacted]

DP&L argues in its Initial Brief that the disallowances proposed for Optimizations 2012 A, H, and I should be barred by the doctrines of collateral estoppel and res judicata because these underlying issues were resolved (or should have been resolved) in prior Fuel Rider proceedings.[89] The Utility alleges that the Auditors disallowances of 2012 Optimizations A, H, and I have created new optimization "rules."[90] DP&L is wrong. The issues presented by 2012 Optimizations A, H, and I were neither directly at issue in either of the prior DP&L Fuel Rider proceedings, nor were they directly addressed by the Commission in those cases. In addition, DP&L fails to include any citation to the contrary. The Utility's argument should be rejected.

[88] The Auditors' reasons for recommended disallowances are described in the 2012 Audit Report at 4-1 through 4-16, and the dollar figures in the "Amount" column are taken from the 2012 Audit Report at 6-87, Table 6-51.

[89] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 41.

[90] Id. at 43.

i. The Doctrines of Res Judicata and Collateral Estoppel do not apply to 2012 Optimizations A, H, and I because the PUCO never evaluated or issued an opinion on 2012 optimizations in past fuel rider proceedings.

DP&L makes a disjointed and unsupported argument that the doctrines of res judicata and collateral estoppel prohibit disallowances of 2012 Optimizations A, H, and I. Specifically, DP&L argues that "Optimizations A, H, and I resulted in benefits to customers, were in compliance with the rules established in all prior Stipulations and cannot be fairly applied to DP&L after it is too late for DP&L to adjust its processes to comply with the new rules."[91] DP&L is wrong, and the doctrines of res judicata and collateral estoppel are not applicable here.

First, a decision has not been rendered by the PUCO with regard to 2012 Optimizations A, H, and I because these optimizations are specific to the 2012 audit period. Thus, these 2012 Optimizations were not ripe for Commission consideration and review until after the 2012 audit concluded. Second, there is no language in the 2010 and 2011 Stipulations,[92] or the Commission's Orders approving the 2010 and 2011 Stipulations, that addresses or resolves the issues presented by 2012 Optimizations A, H, or I. DP&L does not cite to any provision of the Stipulations or the PUCO's Orders that shows these issues were previously considered and decided by the Commission. Instead of citing to facts, DP&L makes a general argument that it followed the "rules" of past Fuel Rider proceedings, without ever citing to the "rules" it is referencing.

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[91] Id. at 41.

[92] "2010 and 2011 Stipulations" as used herein, refers to the 09-1012-EL-FAC and 11-5730-EL-FAC Stipulations. The 09-1012-EL-FAC Stipulation is included as Exhibit DJC-1 to David Crusey's Direct Testimony, and the 11-5730-EL-FAC Stipulation is included as Exhibit DJC-2 to David Crusey's Direct Testimony.

The Ohio Supreme Court has held "where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding."[93] The parties to this proceeding could not have had an "ample opportunity" to litigate issues that were not raised by the Auditors until the conclusion of the 2012 audit period. In addition, DP&L has failed to demonstrate where identical issues were decided in the 2010 and/or 2011 Fuel Rider cases.

The PUCO can choose to apply the doctrine of collateral estoppel, but it requires specificity when using stipulations as its basis. For example, in a case involving an application for approval of tariff changes, the PUCO rejected the OCC's argument that collateral estoppel barred the application because of a prior stipulation. The Commission looked to the common law definition of estoppel, but found that the stipulation did not *specifically* prohibit the issues raised in the application and allowed the application to go forward.[94] By implication, the Commission may follow the doctrine of collateral estoppel, but it requires that prior stipulations specifically address the issue. Again, DP&L failed to cite to any specific provisions in the 2010 and 2011 Stipulations (or Commission Orders approving the Stipulations) that would preclude the PUCO from disallowing 2012 Optimizations A, H, and I in this proceeding. That is because there are no provisions to support DP&L's argument.

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[93] *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133 (1980) (syllabus).

[94] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a PJM Administrative Fee*, No. 05-844, 2006 Ohio PUC LEXIS 147, at *5.

Third, DP&L's argument is contrary to the very terms of the 2010 and 2011 Stipulations it signed. In this regard, both Stipulations contain provisions that state:

> The Signatory Parties' agreement to this Stipulation, in its entirety, shall not be cited or interpreted in a future proceeding before this Commission as their agreement to only an isolated provision of this Stipulation or to any position, argument, or recommendation presented in this proceeding.

Despite this provision, DP&L attempts to use the 2010 and 2011 Stipulations, generally, to support its argument that the Utility, PUCO Staff and OCC have already agreed to certain specific "rules" for 2012 Optimizations in the 2010 and 2011 Stipulations. DP&L is wrong. The 2010 and 2011 Stipulations prohibit the use of the Stipulations to show a Signatory Party agreed to an "isolated provision." Thus, DP&L is not permitted use the fact that the Staff and OCC signed the 2010 and 2011 Stipulations to show that OCC and the Staff agreed to specific "rules" for 2012 Optimizations.

Finally, the 2010 and 2011 Stipulations prohibit their use as precedent in future proceedings.[95] Specifically, the 2010 and 2011 Stipulations state:

> Except for purposes of enforcement of the terms of this Stipulation, this Stipulation (and the information and data contained therein or attached) and Commission rulings that adopt the Stipulation shall not be cited as precedent in any future proceeding for or against any Party, or the Commission itself.[96]

DP&L is not using the 2010 and 2011 Stipulations for purposes of enforcement (again DP&L failed to cite to any provisions of the 2010 and 2011 Stipulations that are applicable in this case). Rather, the Utility is attempting to use the 2010 and 2011

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[95] See Exhibit DJC-1 to David Crusey's Direct Testimony at 2 and Exhibit DJC-2 to David Crusey's Direct Testimony at 2.

[96] Id.

Stipulations as precedent for how the PUCO should decide this proceeding. This is contrary to the language of the 2010 and 2011 Stipulations DP&L agreed to.

ii. The underlying issues for 2012 Optimizations 2012 A, H, and I were not addressed in the 2010 and 2011 stipulations, nor were these issues addressed in the PUCO's opinions adopting the 2010 and 2011 stipulations.

The 2011 Fuel Rider Stipulation provides a "black box" settlement amount ($2 million) that DP&L agreed to credit to the Fuel Rider. In other words, the amount the Signatory Parties agreed that DP&L would credit to the Fuel Rider for 2011 is not specifically linked to any one specific optimization or issue.[97] In this regard, the 2011 Stipulation states:

> The Signatory Parties agree that in the first quarterly filing after a Commission order adopting this Stipulation, DP&L will credit the Fuel Rider in the amount of $2.0 million dollars (i.e. Standard Service Offer customers will receive a reduction in otherwise calculated rates).[98]

Given the nature of the 2011 Stipulation, it is challenging for DP&L to successfully argue that the specific issues related to 2012 Optimizations A, H, and I have already been decided and/or litigated (or agreed to through a Stipulation). DP&L fails to cite to any provisions of the 2010 or 2011 settlements that show 2012 Optimizations A, H, and I should be precluded.

The 2010 Stipulation credited the Fuel Rider in the amount of $4.3 million dollars "to reverse the effects of DP&L's inclusion of Accounts 403 and 512 for the year 2010 in

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[97] See Direct Testimony of David Crusey, DJC-1 at 5 (Stipulation from Case No. 09-1012-EL-FAC), and Direct Testimony of David Crusey, DJC-2 at 6 (Stipulation from Case No. 11-5730-EL-FAC).

[98] Direct Testimony of David Crusey, DJC-2 at 6 (Stipulation from Case No. 11-5730-EL-FAC).

its calculations."[99] Thus, the $4.3 million credit is not linked to any optimization or "rule" on optimizations, but instead is connected to DP&L's inclusion of two Accounts in its Fuel Rider.

In addition, the general issue of optimizations was clearly still being developed at the time the 2010 Stipulation was entered into, as paragraph 4(a) states:

> The Parties agree that DP&L will continue to refine the optimization analysis to demonstrate the benefits to jurisdictional customers from optimizing a then-existing position, which will be available for review by the auditor for the 2011 Audit.[100]

This provision discredits DP&L's argument that it "rigorously complied" with every optimization rule that it agreed to in the 2010 and 2011 Stipulations.[101] Clearly, the 2010 Stipulation left open the optimization process and "rules," and explains that the Auditors would again review DP&L's optimization practices during the 2011 Audit.

Although the 2010 and 2011 Fuel Rider Stipulations provide some restrictions on what types of optimizations the Utility could claim in 2012, the Stipulations do not say the list is "exhaustive" or that the only "rules" that can apply to future audits are detailed in the Stipulations. To the contrary, Paragraph F in the 11-5730-EL-FAC Fuel Rider Stipulation specifically states that the "Signatory Parties explicitly reserve the right to challenge the calculations of any optimization of contracts for coal deliveries in 2012, regardless of the execution date of the optimization transactions."[102]

Simply because DP&L believes it "complied with every optimization rule that it agreed to in the 2011 and 2012 Stipulations" does not mean the Auditors were somehow

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[99] Direct Testimony of David Crusey, DJC-1 at 5 (Stipulation from Case No. 09-1012-EL-FAC).

[100] Direct Testimony of David Crusey, DJC-2 at 8 (Stipulation from Case No. 09-1012-EL-FAC).

[101] Case No. 12-2881-EL-UNC, DP&L Initial Brief at 43.

[102] Id.

precluded from recommending the disallowances associated with 2012 Optimizations A, H, and I for reasons other than those included in the 2010 and 2011 Stipulations. In fact, examination of the PUCO's Request for Proposal for an Auditor for this proceeding shows that the PUCO sought an Auditor to analyze, interpret and make specific recommendations with respect to the structure, policies, and procedures of the Utility's fuel procurement, fuel utilization, power purchases, and related functions.[103] DP&L never raised any issues in regard to that RFP. And the Auditors complied with this directive. DP&L has cited no precedent to the contrary, and DP&L's argument should be denied.

iii. DP&L's reliance on the Duke capacity case as precedent is flawed and misguided.

DP&L's reliance on the Duke Energy Ohio ("Duke") Capacity Case (Case 12-2400-EL-UNC) as precedent for its argument is nonsensical. The Duke Capacity case is not applicable to this proceeding in any respect and DP&L fails to establish its applicability. In the Duke Capacity Case, the PUCO found that Duke had not sustained its burden of proof because its Application contravened the terms of its Electric Security Plan ("ESP") and Base Transmission Rate/Regional Transmission Organization Stipulations.[104] The PUCO found that Duke had specifically and explicitly agreed to a capacity price in its ESP Stipulation. Then, in Case 12-2400-EL-UNC, Duke filed an Application seeking a different capacity charge. The PUCO determined that the

[103] Case No. 12-2881-EL-FAC, Entry, RFP at 3 (January 9, 2013).

[104] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 51 (February 13, 2014).

doctrines of res judicata and collateral estoppel applied because the issue of Duke's capacity price had already been decided in the Duke ESP Stipulation.[105]

The facts from the Duke Capacity Case are not at all analogous to this case. DP&L has failed to articulate any similarities and its reliance is misplaced. DP&L has also failed to provide any citation to the 2010 and 2011 Fuel Rider Stipulations that precludes the disallowance of 2012 Optimizations A, H, and I (unlike the parties to the Duke Capacity Case).

III. CONCLUSION

DP&L's imprudent and self-serving decisions in regard to coal purchases have cost SSO customers more money because they pay for the Utility's fuel costs through the Fuel Rider as part of their electric bills. The PUCO should adopt the Auditors' recommended $3.4 million disallowance based on the Utility's imprudent decisions. In addition, the PUCO should deny DP&L any gains from the 2012 optimizations that the Auditors correctly found to be improper. This disallowance totals $1.4 million.

DP&L has failed to meet its burden of proof in this case. For this reason the PUCO should, in accordance with the Auditors' recommendations, disallow $4.8 million in imprudent and unreasonable fuel costs (incurred in 2012) that have been included in the Fuel Rider that SSO customers pay. Accordingly, the Fuel Rider should be credited $4.8 million plus carrying costs, where applicable.

[105] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 51 (February 13, 2014).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Brief by the Office of the Ohio Consumers' Counsel, Public Version,* was served on the persons stated below via electronic transmission, this 14th day of March, 2014.

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