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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton)
Power and Light Company for Approval of) Case No. 05-1090-EL-ATA
Tariff Changes Associated with Request to)
Implement a Storm Cost Recovery Rider.)

REPLY TO DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM CONTRA TO
MOTION TO DISMISS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On June 9, 2006, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Dismiss ("Motion"). OCC filed the Motion regarding the application ("Application") of The Dayton Power and Light Company ("DP&L" or "Company") for authority to implement a storm cost recovery rider ("Rider") associated with costs incurred to restore service to its customers due to winter storms in December 2004 and January 2005.¹

On June 27, 2006, DP&L filed a Memorandum in Opposition ("Memo Contra") OCC's Motion to Dismiss. Contrary to DP&L's assertion in its Memo Contra, OCC's Motion was timely filed,² DP&L's Application proposes a distribution rate increase that requires a rate case filing,³ and DP&L has not fully complied with the electric transition

¹ Application at Exhibit C-1.

² Memo Contra at 4.

³ Id at 4-5.

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plan (“ETP”) stipulation (“ETP Stipulation”)⁴ or the market development period (“MDP”) extension stipulation (“MDP Extension Stipulation”)⁵ that the Company relies on to effectuate its desired outcome.⁶ OCC hereby files its Reply to DP&L’s Memo Contra, pursuant to Ohio Adm. Code 4901-1-12.⁷ The OCC requests that the Commission reject DP&L’s arguments, and grant the OCC’s Motion to Dismiss.

II. ARGUMENT

A. OCC’S MOTION IS TIMELY.

OCC filed its Motion to Dismiss in a timely manner. On September 2, 2005, DP&L filed its Application with the Public Utilities Commission of Ohio (“PUCO” or “Commission”). The Company subsequently supplemented its Application on three different occasions, September 30, 2005,⁸ October 20,

⁴ *In re DP&L ETP Case*, Case Nos. 99-1687-EL-ETP, et al., Stipulation and Recommendation (June 1, 2000).

⁵ *In re MDP Extension Case*, Case Nos. 02-2779-EL-ATA, et al., Stipulation and Recommendation (May 28, 2003).

⁶ *Id.* at 5-9.

⁷ Pursuant to Ohio Adm. Code 4901-1-12(B)(2), the OCC has seven (7) days to Reply to DP&L’s Memo Contra. Because the OCC was served DP&L’s Memo Contra by mail, pursuant to Ohio Adm. Code 4901-1-07(B) an additional three days shall be added to the prescribed period of time.

⁸ The First Supplement to the Application was filed by DP&L to revise rates in Schedule 4 of the Application.

2005⁹, and the latest time on February 22, 2006.¹⁰ The Company, without citation regarding any legal requirement, argues that “OCC could have filed its Motion to Dismiss months ago, but did not.”¹¹ OCC was not required by the Commission’s rules or its entries to file its Motion within any particular time frame. The Commission rules do not prescribe a time limit for filing a Motion to Dismiss. Specifically, Ohio Adm. Code 4901-1-12 does not establish a deadline for filing a Motion to Dismiss.

The Commission has not established a procedural schedule, or issued any entries in this case setting forth any timeline. In light of the foregoing, the OCC’s Motion was timely and should be granted.

B. A RATE CASE FILING WOULD BE REQUIRED FOR THE PUCO TO LAWFULLY CONSIDER THE ISSUES IN THE APPLICATION.

In its Memo Contra, the Company incorrectly states that a rate case filing was not required “for two separate and independent reasons.”¹² Under the first

⁹ The Second Supplement to the Application included the recovery of depreciation expense over 3 years. This increased the revenue requirement to \$9,574,822.

¹⁰ The Third Supplement to the Application made the following changes to DP&L’s Application:

1. DP&L took a three year average historical storm cost from 2001-2003, this equaled \$3,628,247. This was set as the baseline for major storm expenses.
2. DP&L then subtracted this amount from the major storm damage from both 2004 and 2005. The incremental expense is \$12,844,501.
3. The new revenue requirement is set at \$8,601,815.

¹¹ Memo Contra at 4.

¹² *Id.*

reason given by the Company, DP&L relies exclusively on the MDP Extension Stipulation that in DP&L's view of the world authorizes DP&L to implement the Rider simply by making an ATA filing.¹³ However, DP&L's Application sidesteps the procedural safeguards required by statute, and correspondingly approved by the Commission when it adopted the ETP and MDP Extension Stipulations.¹⁴

The MDP Extension Stipulation, adopting the ETP Stipulation's procedures, confirmed the procedural requirements stated in the Revised Code. DP&L's argument regarding the MDP Extension Stipulation considers that stipulation in a vacuum, ignoring its connection with the ETP Stipulation that imposes upon DP&L the requirement that it must file for rate increases according to a rate proceeding under R.C. 4909.18 if the Company seeks to adjust its distribution rates. The ETP Stipulation stated:

The base electric distribution rates (unbundled as described above) will remain the same through December 31, 2006. * * * [S]uch distribution rates can be adjusted [as otherwise provided herein] by an application *under Ohio Revised Code §4909.18*.¹⁵

The period covered by the Commission-approved ETP Stipulation was extended to the end of 2008 in the MDP Extension Stipulation.¹⁶ The PUCO may

¹³ Id.

¹⁴ ETP Order at 27 (September 21, 2000). The provisions contained in the ETP Stipulation were adopted by reference in the MDP Extension Stipulation, and were approved by the Commission. MDP Extension Order at 31 (September 2, 2003).

¹⁵ *In re DP&L ETP Case*, 99-1687-EL-ETP, et al, ETP Stipulation at 3 (June 1, 2001) (emphasis added). This provision is quoted by DP&L, and cited as the basis for the Company's Application at 1.

¹⁶ MDP Extension Stipulation at 12.

not take any action on the Application without observing the statutory requirements that the Commission affirmed when it accepted the ETP and MDP-Extension Stipulations. Were DP&L to properly file an application, the Commission would be required to set this case for hearing and observe other procedural requirements associated with a distribution rate increase, pursuant to Chapter 4909 (filing and notice requirements and fixation of rates) of the Revised Code. Given that the Application was improperly filed, the Commission is required by law to disregard it.

Contrary to the Company's second argument, a rate case filing is required because the Rider proposed by DP&L is not a new rate for a new service. In its Memo Contra, DP&L relies on *City of Cleveland v. Pub. Util. Comm.*, (1981) 67 Ohio St. 2d 446 in support for its position that a rate filing is not required because the Rider will be a new rate. In *Cleveland*, Cleveland Electric Illuminating filed an application not for an increase in rates in an effort to place into its tariffs rates for street lighting service that had previously been billed under special contract arrangements with its municipal customers.

The Rider proposed by DP&L may be new, but the related service is plain-old-distribution-service (e.g. wires, poles, labor to work on wires and poles, etc.). In fact, DP&L's Third Supplement to its Application states that the Company took a three-year average historical storm cost from 2001-2003 that was used to establish the baseline for major storm expenses presumed to be in base rates. Implementing the Rider to collect storm-related costs in excess of an amount presumed to be in base rates does not constitute a new service, but rather

is an increase in rates for “old” distribution service. As such, an increase in rates charged for distribution service must adhere to the procedural requirements of Ohio’s rate-making statutes.¹⁷

Neither of DP&L’s arguments regarding procedural safeguards are correct, and DP&L’s Application should be dismissed for failure of DP&L to properly file its Application.

C. DP&L HAS NOT COMPLIED WITH THE ETP AND MDP EXTENSION STIPULATIONS.

OCC’s Motion contains three examples where the very Stipulations DP&L relies upon for the authority to implement the Rider have been breached by the Company in previous cases.¹⁸ DP&L states that the Commission has repeatedly considered and rejected OCC’s arguments that DP&L breached the ETP and MDP Extension Stipulations.¹⁹ While it may be that DP&L is growing weary of these arguments, OCC has grown weary of watching the Company repeatedly extract benefits from agreements and deny consumers the benefits of their bargain under the same stipulations. The Commission must put a stop to this one-sided interpretation of stipulations that serves the Company’s interest to the detriment of its customers.

The respective positions of OCC and the Company have been clearly established and argued in numerous pleadings in this case as well as others. In its

¹⁷ See, e.g., R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43.

¹⁸ Motion to Dismiss at 6-13.

¹⁹ Memo Contra at 5.

Memo Contra, the Company opines: "OCC's arguments on this point have not improved with age * * *." As DP&L points out in its Memo Contra, each of the violations of the stipulations has been challenged by OCC at the Ohio Supreme Court.²⁰ Ultimately, it will be the Justices' opinion on the quality of OCC's arguments that will decide the issue. However, this case is currently in the hands of the Commission which must decide whether or not the Company's present Application complies with Ohio law. As OCC argued in its Motion to Dismiss, DP&L has thus far obtained \$63 million in additional rate increases that will be charged to customers in violation of the provisions of the ETP and MDP Extension Stipulations.²¹ The cases are pending before the Ohio Supreme Court.²² The Commission should stop the emptying of consumers' pocketbooks, and grant OCC's Motion to Dismiss DP&L's Application.

III. CONCLUSION

OCC's Motion to Dismiss was timely filed, and the Commission should dismiss the Application in light of the statutory requirements violated by DP&L and in light of the Company's prior violations of its stipulations. DP&L has not proposed a rate for a new service, but a new rate for an established service. The

²⁰ Memo Contra at 6, 8, and 9.

²¹ Motion to Dismiss at 13.

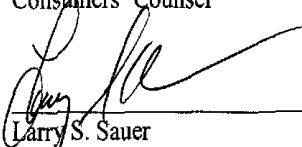
²² *OCC v. PUCO*, S. Ct. Case No. 05-945, Notice of Appeal (May 23, 2005) (Appeal of MVCC Cases PUCO Case No. 04-85-EL-CSS, et al); *OCC v. PUCO*, S. Ct. Case No. 06-788, Notice of Appeal (April 21, 2006) (Appeal of DP&L Rate Stabilization Surcharge Case, PUCO Case No. 05-276-EL-AIR); *OCC v. PUCO*, S. Ct. Case No. 05-1679, Notice of Appeal (September 9, 2005) (*In re Transmission Deferral Case* PUCO Case No. 04-1645-EL-AAM); *OCC v. PUCO*, S. Ct. Case No. 06-536, Notice of Appeal (March 14, 2006) (*In re Transmission Rider Case*, PUCO Case No. 05-844-EL-ATA).

Company has no authority under Ohio law to seek recovery of storm-related expenses outside of a traditional distribution rate proceeding.

DP&L relies on stipulations as its explanation for its Application, seeking special recovery that is not permitted by statute. DP&L relies on stipulations that the Company has disregarded for its own benefits and to the consumers' detriment. Under these circumstances, the OCC respectfully requests that the Commission grant its Motion to Dismiss DP&L's Application in order to prevent harm to DP&L's 450,000 residential customers.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Reply to DP&L's Memorandum in Opposition to Motion to Dismiss DP&L's Application* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 6th day of July 2006.


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