**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration CostsIn the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority. | )))))))) | Case No. 12-3062-EL-RDRCase No. 12-3266-EL-AAM |

**COMMENTS**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**June 17, 2013**

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**COMMENTS**

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# I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) files these Comments in response to the application of Dayton Power and Light Company (“DP&L” or “the Utility”) seeking authority to collect storm-related restoration costs from its customers (“Application”). Specifically, DP&L is requesting authority to charge customers over $65 million for Operation and Maintenance (“O&M”) expenses and capital expenditures related to major event storms in 2008, and 2012, as well as the Utility’s request for deferral of 2011 storm costs and the institution of a Storm Cost Recovery Rider (“Storm Rider”).

As further explained in the Comments below, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) should deny DP&L’s request for authority to collect O&M expenses from its customers for storm-restoration efforts. Such action by the PUCO is warranted because DP&L failed to prove that the storm costs were prudently incurred and reasonable. And in some cases, DP&L’s calculations are just wrong.

The PUCO should also deny DP&L’s request to collect capital expenditures in this proceeding. Any recovery of capital costs from customers because of storm-restoration efforts should only be permitted in an electric distribution rate case.

Furthermore, DP&L’s request for deferral of 2011 storm costs should also be denied outright because the deferral request was not timely filed and the Utility failed to allege or demonstrate financial need. Finally, the PUCO should deny DP&L’s request for a Storm Cost Recovery Rider or, in the alternative, require an annual baseline of $4 million and other consumer protections. Such protections are necessary so that DP&L’s customers do not pay for imprudent and unreasonable costs.

Alternatively, if the PUCO does not reject the Application in its entirety, then the PUCO should conduct an evidentiary hearing in order to fully examine the claims made by DP&L. To protect consumers, the PUCO should follow OCC’s recommendations below.

# II. BURDEN OF PROOF

In a case decided just last year, the Supreme Court of Ohio recognized that a utility, seeking to collect storm costs from its customers, bears the burden of proving that its expenses were prudently incurred and reasonable.[[1]](#footnote-1) And the Court emphasized that in order to reduce or disallow the collection of storm costs from customers, “[t]he Commission did not have to find the negative: that the expenses were imprudent.”[[2]](#footnote-2) Instead, the utility has to prove a positive point—that its expenses had been prudently incurred—in order to collect those costs from customers.[[3]](#footnote-3) Accordingly, if the evidence is “inconclusive or questionable,” the PUCO should reduce or disallow the collection of those costs from DP&L’s customers.[[4]](#footnote-4)

# III. COMMENTS

## A. DP&L Failed To Show That Any Of The Storms (For Which It Seeks Authority to Charge its Customers) Meet The Definition Of “Major Event” In Ohio Adm. Code 4901:1-10-01(Q).

Under Ohio Adm. Code 4901:1-10-01(Q) the definition of “major event” is any event that:

encompasses any calendar day when an electric utility’s system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 4.5 of standard 1366-2003 adopted by the institute of electric and electronics engineers (IEEE) in “IEEE Guide for Electric Power Distribution Reliability Indices.” The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility’s daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages.[[5]](#footnote-5)

There must be a major event that has occurred if the utility is to collect restoration costs from customers, The Utility bears the burden of establishing that a “major event” has taken place.

DP&L claims that its Major Event Day threshold (excluding transmission outages) has been exceeded for each of the storms for which it requests recovery and/or deferral.[[6]](#footnote-6) While DP&L did provide some information regarding the number of customers affected, the types of equipment affected for some of the storms and the total expenses it seeks to collect through the Rider, its Application contains no calculation of the number of customer-minutes interrupted for the days that DP&L claims meet the “Major Event Day” definition. DP&L’s Application also does not separate customer-minutes interrupted by the Transmission and Distribution functions.

Thus, DP&L failed to carry its burden of establishing that a “major event” – as defined in Ohio Adm. Code 4901:1-10-01(Q) – occurred on the days identified in the Application. DP&L’s failure to carry its burden should result in an outright denial of the Application as filed.

## B. DP&L Understated The Three-Year Average Of Operation And Maintenance Expenses Used To Reduce DP&L’s Deferred 2008 Major Storm Expenditures Which Results in Customers Paying More Than They Should For Storm Costs.

The PUCO authorized DP&L to defer a portion of the O&M major storm expenses related to the restoration work associated with the September 14, 2008 wind storm. Specifically, DP&L was authorized to defer “incremental O&M expenses associated with the September 14, 2008 wind storm, with carrying costs, \*\*\*”[[7]](#footnote-7) that exceed the three-year average service restoration O&M expenses for major storms.[[8]](#footnote-8) However, Schedule C-2 of the Application indicates that DP&L improperly under-stated the three-year average service restoration O&M expenses for major storm events. DP&L’s understatement means that it will be easier for it to exceed the threshold and thereby charge customers more than what they should have to pay for storm expenses.

In the Utility’s three-year average calculation, shown below, DP&L included a storm O&M expense amount of $1,573,662 for 2005.[[9]](#footnote-9) But DP&L understated the 2005 storm costs that it incurred for the restoration of its electric distribution system as a result of an ice storm that occurred in January of 2005. For purposes of determining the three-year average storm costs, DP&L should have included $6,094,093 of O&M storm restoration expenses for 2005.[[10]](#footnote-10)

The PUCO Staff also disagrees with DP&L’s use of $1,573,662 for 2005 (as well as the major O&M storm amounts DP&L used for 2006 and 2007) in its calculation of the three-year average of major storm restoration expense. In DP&L’s most recent Electric Security Plan (ESP II) proceeding,[[11]](#footnote-11) PUCO Staff Witness Mr. Lipthratt sponsored testimony that, in part, recommended the establishment of a Storm Damage Recovery Rider baseline.[[12]](#footnote-12) Included in his testimony was an “Attachment A” that contained the ten-year average of major storm costs for the Utility, which was used to support the PUCO Staff’s recommended baseline. Mr. Lipthratt’s ten-year average calculation included **$**6,094,093 for 2005 major storm expense.[[13]](#footnote-13) Mr. Lipthratt’s ten-year average calculation also included an amount for major O&M storm costs for 2006 and 2007 that differ from the O&M storm costs DP&L used in developing its three-year average calculation on its Schedule C-2 in this case.[[14]](#footnote-14) All annual major event O&M storm costs used by Mr. Lipthratt in his ten-year average calculation were storm costs identified by DP&L in response to an OCC discovery request in Case No. 12-2281-EL-AAM.[[15]](#footnote-15)

OCC’s recommended calculation of the three-year average of O&M storm expenses includes the same O&M storm costs that the PUCO Staff used in its baseline calculation (in the ESP II proceeding) which results in a three-year average of $2,893,949, as shown below. It is this expense amount that should be used to reduce the 2008 storm O&M expense deferral authorized by the PUCO for consideration of collection from customers in this case.

**Three-Year Average of O&M Storm Expense**

**To Deduct From Storm Year 2008 Costs**

|  |  |  |
| --- | --- | --- |
|  | **DP&L Calculated (a)** | **OCC Calculated (b)** |
| 2005 |  $ 1,573,662 |  $ 6,094,093 |
| 2006 |  2,563,493 |  872,528 |
| 2007 |  2,881,184 |  1,715,226 |
| Three-Year Total |  $ 7,018,339 |  $ 8,681,847 |
| **Three-Year Average** |  **$ 2,339,446** |  **$ 2,893,949** |

1. Schedule C-2 of DP&L’s Application.
2. Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at Attachment A (Mar. 12, 2013).

## C. Customers Should Not Pay For Operation And Maintenance Costs Related To Thirteen Storms In 2008 That DP&L Did Not Receive Authority To Defer As A Regulatory Asset.

### 1. The only storm costs that DP&L was authorized to defer were the incremental operation and maintenance expenses associated with the September 14, 2008 wind storm.

As discussed above, DP&L was authorized to defer “incremental O&M expenses associated with the September 14, 2008, wind storm, with carrying costs, \*\*\*”[[16]](#footnote-16) that exceed the three-year average service restoration O&M expenses for major storms.[[17]](#footnote-17) But DP&L is trying to charge its customers for a multitude of storm costs incurred in 2008 that the PUCO never authorized DP&L to defer. Specifically, DP&L is seeking Commission approval to charge its customers for costs of thirteen other storms in 2008.[[18]](#footnote-18)

The PUCO’s Finding and Order in Case No. 08-1332-EL-AAM explicitly states that DP&L was authorized to defer only incremental O&M costs related to the September 14, 2008 wind storm (Hurricane Ike) and the associated carrying costs.[[19]](#footnote-19) Nothing in that Finding and Order, however, approves the Utility’s request to defer O&M costs related to the other thirteen storms that the Utility claims to have occurred in 2008. Absent specific authorization from the Commission to defer the restoration O&M costs related to the “other” 2008 storms, DP&L is without authority to later come back and try to collect those costs from its customers.

### 2. DP&L is precluded by the doctrine of collateral estoppel from re-litigating its request to defer (for later charging to customers) operation and maintenance costs associated with “other storms” in 2008.

 The Supreme Court of Ohio characterized “collateral estoppel” as precluding the re-litigation of an issue that has been “actually and necessarily litigated and determined in a prior action \* \* \*.”[[20]](#footnote-20) “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”[[21]](#footnote-21)

The doctrine of collateral estoppel applies to hearings before the PUCO.[[22]](#footnote-22) According to the Court, “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.”[[23]](#footnote-23)

In a December 26, 2008 Application, DP&L sought PUCO approval to defer the “amount by which the total O&M expenses associated with the Hurricane Ike-related service restoration expenses *and other storms experienced in 2008* exceeds the three–year average service restoration O&M expenses associated with major storms.”[[24]](#footnote-24)But the PUCO only approved DP&L’s request to defer incremental O&M expenses associated with the windstorm of September 14, 2008.[[25]](#footnote-25) And DP&L did not file an application for rehearing.

This holding indicates the PUCO’s intent to deny DP&L’s request to defer O&M costs associated with the “other storms” that occurred in 2008. Refusing to grant DP&L’s entire deferral request for 2008, the PUCO implicitly indicated that storms other than Hurricane Ike did not meet the Commission’s criteria for deferral.

The PUCO has rejected DP&L’s request to defer costs related to “other storms” in 2008. Therefore, based on the doctrine of collateral estoppel, DP&L is precluded from re-litigating this issue. Accordingly, the PUCO should not revisit DP&L’s request to defer storm costs for any storm in 2008 other than the costs related to the wind storm of September 14, 2008.

Based upon the Commission’s holding in Case No. 08-1332-EL-AAM and the doctrine of collateral estoppel, the O&M storm expense of $3,574,934 related to the thirteen other storms of 2008 should not be collected from DP&L’s customers.[[26]](#footnote-26) DP&L should be authorized to collect no more than $10,767,101[[27]](#footnote-27) in deferred costs from its customers for O&M expense for Hurricane Ike costs if DP&L can prove that those costs were prudently incurred and reasonable.

## D. DP&L Has Failed To Deduct The Three-Year Average For Major Storm Operation and Maintenance Expenses From 2012 and 2011 Storm Expenditures.

In its Application, DP&L requests authority to collect from its customers O&M expenses for major storm events in 2012 and 2011. DP&L requests recovery of $4,763,244 from customers for 2012 distribution-related O&M expenses for restoring electric service as a result of a major storm that occurred in June of 2012.[[28]](#footnote-28) Similarly, DP&L seeks deferral of $10,035,297 in O&M expenses related to five major storms that occurred in 2011.[[29]](#footnote-29) However, DP&L has not reduced the 2012 storm O&M expense amount it seeks to recover in this case,[[30]](#footnote-30) or the 2011 storm cost deferral, by the three-year average of O&M expenses associated with major storms. Such a reduction of storm costs (by the three-year average of O&M major storm expenses) has been consistently ordered by the PUCO.[[31]](#footnote-31)

Customers should not have to pay for the total 2012 derecho storm costs when the PUCO has explicitly directed DP&L to reduce the total storm costs by the three-year average of O&M expenses associated with major storms. Similarly, DP&L customers should only be required to pay for 2011 O&M storm costs the PUCO determines to be appropriate in this case less the three-year of major storm costs.

Therefore, DP&L should be required to reduce its 2012 storm O&M expenses by the three-year average of major storm expenses per the PUCO’s prior orders. And to the extent this Commission permits the Utility to defer its 2011 major storm costs,[[32]](#footnote-32) the PUCO should similarly reduce the deferral amount by the three-year average of major storm costs. This will ensure that customers will not be required to pay more than what they should for the restoration of the Utility’s electric distribution system. The OCC’s calculation of the three-year average of storm costs that should be used to reduce 2012 and 2011 major storm expenses paid by DP&L’s customers is shown below.

**Three-Year Average of O&M Storm Expenses**

**To Deduct From Storm Costs for Years 2012 & 2011**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  |  |  |  |
| 2009 |  $ 774,841 |  | 2008 |  $ 15,950,806 |
| 2010 |  302,919 |  | 2009 |  774,841 |
| 2011 |  10,035,297 |  | 2010 |  302,919 |
| Three-Year Total |  $ 11,113,057 |  | Three-Year Total |  $17,028,566 |
| **Three-Year Average** |  **$ 3,704,352** |  | **Three-Year Average** |  **$ 5,676,189** |

Source: Case No. 12-2281-EL-AAM, 6th Supplemental Response, DP&L’s Response to OCC INT 2(e), “Service Restoration O&M Expense” Associated With Major Events For The Past 10 Years and Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at Attachment A (Mar. 12, 2013).

## E. DP&L Should Not Be Allowed To Charge Its Customers For Capital Costs Related To Storm Restorations In This Proceeding.

The PUCO should deny DP&L’s request for authority to recover the capital costs for Hurricane Ike (in 2008), the 2011 storms and the 2012 derecho storm. Additionally, the Commission should also deny DP&L’s request to defer and recover from customers capital costs associated with future storms.[[33]](#footnote-33)

Nothing in the Commission’s Findings and Orders in Case Nos. 08-1332-EL-AAM (for Hurricane Ike) or 12-2281-EL-AAM (for the 2012 Derecho storm) authorizes DP&L to defer or recover capital costs related to service restorations due to storms. And recent PUCO precedent shows that generally, in regard to storm cost deferrals and storm cost riders, the PUCO has authorized them for O&M expenses, not capital costs.[[34]](#footnote-34)

Instead, the Utility could seek capital plant cost recovery from its customers through the traditional distribution rate case process. As of December 31, 2012, DP&L’s distribution rates are no longer frozen.[[35]](#footnote-35) And in the ESP II proceeding, PUCO Staff Witness Mr. Lipthratt specifically recommended that capital costs related to major storm damage to the Utility’s electric distribution system be addressed in a future distribution rate proceeding.[[36]](#footnote-36) For these reasons, the PUCO should deny DP&L’s request that its customers pay for capital revenue requirements related to storms in this proceeding.

## F. DP&L Should Not Be Allowed Deferral of 2011 Major Incremental Storm Operation and Maintenance Expenditures, and Customers Should Not Be At Risk for Paying Such Costs.

### 1. DP&L’s request to defer 2011 major incremental storm Operation and Maintenance expenses is untimely.

The PUCO should not permit DP&L to defer the costs that are allegedly associated with the 2011 storms, because the Utility failed to timely file its request. DP&L stated that there were a number of storms that struck its service territory in 2011, the first of which took place on February 1, 2011, and the last of which took place on September 3, 2011.[[37]](#footnote-37) At best, DP&L waited nearly 15 months (at worst, 22 months) to seek permission to defer the costs associated with those storms. Despite having an opportunity to review its 2011 accounting records, and time to prepare and reflect upon its 2011 financial statements/financial performance, DP&L inexplicably waited almost another calendar year before filing its application seeking authority to defer the 2011 storm costs.

DP&L’s decision not to timely seek deferral of the costs associated with the 2011 storms is particularly peculiar because of the immediacy with which the Utility pursued the costs associated with 2008 and 2012 storms. The 2008 wind storms associated with Hurricane Ike struck Ohio on September 14, 2008. In response, DP&L filed an application requesting accounting authority to defer as a regulatory asset the portion of its Operations and Maintenance expenses associated with restoring electric service 103 days later on December 26, 2008.[[38]](#footnote-38) Similarly, after the June 29, 2012 derecho that struck Ohio, DP&L filed an application for authorization to defer costs only 42 days later on August 10, 2012.[[39]](#footnote-39) Even at that time, DP&L inexplicably chose not to include the costs of the 2011 storms with the 2012 application. Instead, DP&L waited until late December 2012 to file the instant Application.

In a 2003 Ohio American Water Company (“OAW”) rate case, the PUCO Staff recognized the importance of timeliness for deferral requests when OAW sought deferral authority for post 9/11 security costs two years after the costs were incurred. The PUCO Staff Report criticized the utility for a lack of timeliness:

The Staff and parties to the last base rate case (01-626-WW-AIR) accepted the Applicant’s estimated security costs of $50,000 as an on-going level of expenditures. If the Applicant believed that the **level of security costs included in the last case were insufficient, were of material nature, and resulted in financial harm to the Applicant, the prudent action would have been for the Applicant to timely file with the Commission a request for cost deferral.** The Applicant has taken no such action for over two years and now has filed a request for retroactive authority to defer incremental security costs that the Applicant has accumulated since January 1, 2002.[[40]](#footnote-40)

While OAW’s rate case was settled (and OCC does not cite to the resulting decision there), the PUCO Staff’s pre-settlement consideration of regulatory policy--that deferral requests should be done in a timely manner--is applicable in this case. In a similar manner, DP&L has not timely filed a deferral request; therefore, the PUCO should deny DP&L’s retroactive deferral request in this case.

### 2. DP&L has no financial need upon which to seek deferral (and possible payment by consumers) of the 2011 major incremental storm Operation and Maintenance expenses.

This PUCO should deny DP&L’s request for accounting deferral because the Utility failed to demonstrate financial need for the requested deferral. Where the PUCO has approved deferred accounting in the past, it has generally done so to avoid the possibility of significant financial harm to the applicant utility.[[41]](#footnote-41)

In the instant case, DP&L does not even hint that its financial condition in 2011 necessitates the granting of deferral accounting. The Application is completely silent as to any financial need supporting the requested accounting order. To the contrary, in 2011, when the major storm O&M costs were expensed by the Utility, DP&L earned a return on equity of 14.05%,[[42]](#footnote-42) well above its “most recently approved return” of 11.30% authorized by the PUCO.[[43]](#footnote-43) In fact, DP&L never disputed this fact when it was raised by OCC in its Motion to Dismiss.[[44]](#footnote-44)

In its response to OCC’s Motion to Dismiss, DP&L instead argued that the ESP Stipulation “expresslyauthorized DP&L to recover the costs of storm damage without showing financial need.”[[45]](#footnote-45) The ESP Stipulation, however, only confers the right to “apply for approval of separate rate riders to recover . . . [t]he cost[s] of storm damage.”[[46]](#footnote-46) Furthermore, the Commission’s Order approving the ESP stipulation explained that the stipulation conferred “DP&L’s right to seek emergency rate relief under Section 4909.16, Revised Code, and to apply to the Commission for approval of separate riders to recover \*\*\* the cost of storm damage.”[[47]](#footnote-47) Thus, the Stipulation (and Commission order) only permits DP&L the opportunity to **apply** for a rider, the approval of which is left to the discretion of the PUCO. The excessive return that the Utility earned in 2011 is adequate grounds for this Commission to deny DP&L’s deferral request.

Moreover, during a time where deferral requests have become all too commonplace, this Commission has expressed a general opposition to the creation of deferrals absent extraordinary circumstances. Specifically, this Commission has stated:

Further, **although this Commission is generally opposed to the creation of deferrals,** the extraordinary circumstances presented before us, which allow for AEP-Ohio to fully participate in the market in two years and nine months as opposed to five years, necessitate that we remain flexible and utilize a deferral to ensure we reach our finish line of a fully-established competitive electric market.[[48]](#footnote-48)

After nearly two years of silence, DP&L now seeks to defer and charge customers in the future for 2011 expenses allegedly incurred, irrespective of the fact that the Utility earned a return on equity in 2011 that well exceeded its authorized return. In addition, DP&L seeks to charge customers for carrying costs that, at a minimum, would be greatly increased as a direct result of DP&L’s decision to delay. Because the Utility has not supported its deferral request with an explanation of extraordinary circumstances that would now warrant PUCO authorization, the deferral request should, therefore, be denied.

## G. DP&L **Should Not Be Permitted To** Collect From Its Customers Any Portion Of The Straight-Time Labor Costs That The Utility Is Seeking In This Case.

The PUCO should deny DP&L’s request for authority to collect from customers any straight-time labor costs and related fringe benefits expenses because the Utility failed to establish that those costs were incremental in nature.[[49]](#footnote-49) DP&L has failed to prove that the straight-time labor costs (it seeks to collect from customers through the Rider) exceed the normal straight-time labor expense level that customers paid for in base rates which are paid irrespective of any major storm.

If there are no major storms, the Utility incurs a certain level of straight-time labor costs during a year. This level could be considered the utility’s “normal” or “regular” straight-time labor expense level. “Incremental” labor costs, on the other hand, are those costs that exceed the “normal” and/or “regular” costs, which would not have been incurred but for the storm.

This concept, that straight-time labor expense is not an incremental storm cost, has been accepted by the PUCO Staff and this Commission in evaluating other storm cost requests such as Duke Energy Ohio’s 2008 Hurricane Ike wind storm cost rider case. In that case, the PUCO Staff reduced Duke’s labor expense, because, as it explained, “the majority of the adjustments for labor expense were for straight-time employees because these expenses, and the associated overhead costs, would have been incurred whether there was a storm or not and would have been included in base rates.”[[50]](#footnote-50) The PUCO should similarly reduce DP&L’s claimed labor expense in this case to eliminate straight-time labor expense and associated fringe benefits.

If DP&L were to argue that its straight-time labor costs in the Application exceed its regular straight-time labor expense level, such that they are incremental in nature, it would be necessary for the PUCO to know the level of straight-time labor expense the Utility normally incurs. DP&L has not provided this information in its Application. Hence, DP&L – the party that has the burden of proof in this proceeding – has not carried its burden of establishing that the straight-time labor expense and related fringe benefits claimed in the Application are incremental expenses. Therefore, the PUCO should exclude all straight-time labor costs and associated fringe benefits expense from the storm costs that it seeks to charge to customers.

## H. DP&L Should Not Be Permitted To Collect Costs From Its Customers That Are Associated With Overtime Pay To The Utility’s Salaried Employees Involved In The Storm Restoration Effort.

It appears that a portion of the overtime labor costs that the Utility seeks to recover through the Rider is not recoverable because it was paid to some of DP&L’s salaried employees that participated in the storm restoration effort.[[51]](#footnote-51) The PUCO does not permit utilities to charge their customers for supplemental pay given to salaried employees involved in storm restoration efforts when those employees do not ordinarily receive overtime pay and the supplemental pay is given at the utility’s discretion.[[52]](#footnote-52) The Supreme Court upheld the PUCO’s decision.[[53]](#footnote-53)

DP&L’s customers should not pay for the supplemental compensation that DP&L chose to pay its salaried employees who worked on storm restoration. For that reason, DP&L should be required to identify and reduce the storm costs it seeks to charge customers, by the amount of overtime labor costs and fringe benefits expenses paid to DP&L’s salaried employees.

## I. The PUCO Should Reject DP&L’s Request To Establish A Rider To Collect The Costs Of Future Storm Damage From Customers.

The PUCO should reject DP&L’s request to establish a Storm Cost Recovery Rider (“Storm Rider”).[[54]](#footnote-54) Specifically, DP&L requests that the Commission authorize a Storm Rider (on a going-forward basis) so that DP&L can defer “all costs associated with major storms” until it has collected all of the storm costs from its customers.[[55]](#footnote-55)

The PUCO should deny DP&L’s proposed Storm Rider because it is unreasonable. It is unreasonable because such a proposal would permit DP&L to track changes in only one expense element (i.e., major storm costs) of its total revenue requirement. In tracking only this one expense item, the presumption is that DP&L is entitled to collect, from customers, major storm-related costs incurred that are higher than the amount of those particular costs included in the determination of distribution rates. That is a mistaken presumption and contrary to how ratemaking should balance the interests of customers and utility investors.

A utility should be required to prove to the PUCO that the level of costs it incurs across all cost categories, absent recovery from customers, would result in financial harm. For ratemaking purposes, the utility should not be allowed the asymmetry of cherry-picking a collection of single items of cost when the totality of its costs and revenues might not justify a rate increase. But the proposed Storm Rider would permit DP&L to meet a much lower standard—that its major storm costs are higher than the annual baseline amount. That is unfair to customers.

The result is that DP&L’s proposal does not allow the PUCO to consider potentially offsetting expense reductions or revenue increases, which could indicate that the increased storm damage costs have not harmed the Utility’s bottom line as was the case for DP&L in 2011. Thus, customer rates might increase even though the Utility is earning as much, or more, than it was authorized to earn.

Furthermore, the Commission should deny the Utility’s proposal to create a deferral. The PUCO is, in general, opposed to the creation of deferrals.[[56]](#footnote-56) And there are no “extraordinary circumstances” that would necessitate the use of a deferral in this case.[[57]](#footnote-57) Accordingly, the PUCO should reject DP&L’s proposed Storm Rider.

## J. If The PUCO Authorizes DP&L To Charge Customers for A Storm Damage Recovery Rider, Then The Storm Rider Should Include Consumer Protections, Including A $4 Million Annual Baseline.

### 1. The Storm Rider should be used to only collect those amounts of major storm Operation and Maintenance costs that exceed $4 million annually. If the amount expensed for major storm O&M restoration is less than $4 million, then DP&L should refund to customers the difference between the major storm annual expense and $4 million.

As stated above, OCC urges the PUCO to reject DP&L’s proposal for a Storm Rider on a going forward basis. But if the Commission does authorize a Storm Rider for future storm costs, then the Commission should structure the Storm Rider so that DP&L’s customers are protected.

Most importantly, the PUCO should require an annual baseline amount of $4 million as proposed by the PUCO Staff in DP&L’s most recent Electric Security Plan (ESP II) proceeding.[[58]](#footnote-58) Establishing this baseline would eliminate the need to calculate the three-year storm cost average. Thus, DP&L would be allowed to defer the annual amount of “major storm O&M cost that exceeds the baseline, or to refund the difference between the amount expensed for major storm O&M restoration and the baseline, should the annual expense be less than the baseline.”[[59]](#footnote-59) In addition, any capital costs incurred as a result of a major storm would be addressed in a future electric distribution base rate case, not through the Storm Rider.[[60]](#footnote-60)

In the ESP II proceeding, the PUCO Staff correctly determined that the amount of the baseline should be $4 million.[[61]](#footnote-61) Evidence shows that this amount ($4 million) is based on the average annual level of costs incurred by DP&L for storm damage from 2002 to 2011 ($3,977,641) and a recent (2009-2011) three-year average.[[62]](#footnote-62) Accordingly, if the PUCO authorizes a Storm Rider for future storm costs in this case, then it should include an annual baseline of $4 million.

### 2. The PUCO should require additional consumer protections if it authorizes DP&L to collect future storm costs through a Storm Rider from customers.

If the PUCO approves a Storm Rider, which OCC opposes, then the Commission should protect customers as recommended by the PUCO Staff in the ESP II proceeding. In this regard, the PUCO should require the following:

1. Find that DP&L may defer only “major storm”-related incremental distribution O&M expenses,[[63]](#footnote-63) that DP&L would not have incurred absent the major storm and that are incremental to normal DP&L O&M expenses;
2. Find that “[t]he determination of whether a storm is deemed to be ‘major’ or not is determined by the methodology outlined in the IEEE Guide for Electric Power Distribution Reliability Indices, as set forth in Rule 4901:1-10-10(B), O.A.C;”[[64]](#footnote-64)
3. Prohibit the inclusion of any capital expenditures in the Storm Rider;[[65]](#footnote-65)
4. Require DP&L to maintain a detailed accounting of all storm expenses within its storm deferral account, including detailed records of all incidental costs. The capital costs should be recorded separately and are not to be recovered through the Storm Damage Recovery Rider, but rather should be reviewed and considered as part of future base distribution rate cases. DP&L should provide this information annually for Staff to audit to determine if additional proceedings are necessary to establish recovery levels or refunds as necessary;[[66]](#footnote-66)
5. Order DP&L to file an application by December 31st of each year during the ESP commencing a proceeding where:
* DP&L has the burden of proof to demonstrate that all the major storm costs were prudently incurred and reasonable:
* Any interested party and the PUCO Staff have the opportunity to file comments on the annual application within 90 days after it is filed;
* If any objections are not resolved by DP&L, then an evidentiary hearing will be scheduled;
* Parties will be provided ample time to conduct discovery; and
* Parties will be provided the opportunity to present testimony before the Commission.[[67]](#footnote-67)

The consumer protections above have been established in PUCO precedent. Specifically, these protections were mandated by the PUCO when it approved a Storm Damage Recovery Mechanism for AEP-Ohio.[[68]](#footnote-68) Accordingly, if the PUCO approves the Storm Rider, then DP&L’s customers should be afforded the same protections as AEP-Ohio’s customers.

## K. DP&L’s Customers Should not pay for Transmission Expenses Related to Storm Restoration Efforts.

 A portion of the costs that DP&L seeks to collect from its customers is associated with DP&L’s Transmission Operations. For example, from DP&L’s response to OCC First Set RPD-16 and RPD-17, it can be calculated that $255,559 of capital costs for Transmission Operations can be found for what is referred to as 2008 Ike #1. The total amount of capital costs for Transmission Operations for Hurricane Ike is $276,522. It also appears that data for other storms also reflect capital costs associated with Transmission Operations.

The collection of transmission costs from customers is inappropriate in a distribution rider case. Therefore, DP&L should be required to identify and remove from its request those storm costs that are not related to the distribution function. DP&L should therefore exclude all transmission-related costs (capital and O&M). The PUCO should not authorize DP&L to collect these amounts from customers in this case.

# IV. Conclusion

The Supreme Court of Ohio has established that DP&L has the burden of proving that the storm costs it seeks to collect from customers were prudently incurred and reasonable. But the information DP&L provided to support its Application does not show that the storms meet the definition of “major event” in the PUCO’s rules. And DP&L’s information is not adequately detailed to show whether the costs were prudently incurred and reasonable. For these reasons, the PUCO should deny the Application.

Alternatively, if the PUCO does not deny the Application in its entirety, the Commission should not allow DP&L to collect from customers the amounts it seeks. Though discovery to date in this case, OCC has been able to quantify only some of the costs that should be disallowed. Because other costs (that DP&L seeks to collect from its customers) that should be disallowed have not yet been quantified through discovery, the PUCO should conduct an evidentiary hearing to fully examine the claims DP&L made in its Application. To protect consumers, the PUCO should adopt OCC’s recommendations.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

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**CERTIFICATE OF SERVICE**

 The undersigned hereby certifies that a true and correct copy of the foregoing Comments has been served upon the below-named persons via electronic service this 17th day of June, 2013.

*/s/ Melissa R. Yost*

 Melissa R. Yost

 Deputy Consumers’ Counsel

**SERVICE LIST**

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1. *In Re Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8. [↑](#footnote-ref-1)
2. *Id.*  [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. Ohio Adm. Code 4901:1-10-01(Q). [↑](#footnote-ref-5)
6. *See* Application at 2, 4, 5. [↑](#footnote-ref-6)
7. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order, (January 14, 2009) at paragraph 4. [↑](#footnote-ref-7)
8. *Id.* at paragraphs 2 and 4. [↑](#footnote-ref-8)
9. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Schedule C-2, (December 21, 2012). [↑](#footnote-ref-9)
10. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm Related Service Restoration Costs,* Case No. 12-2281-EL-AAM, Sixth Supplemental Response, DP&L’s Response to OCC INT 2. [↑](#footnote-ref-10)
11. PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-11)
12. Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at 5 (Mar. 12, 2013). [↑](#footnote-ref-12)
13. Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at Attachment A (Mar. 12, 2013). [↑](#footnote-ref-13)
14. Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at Attachment A (Mar. 12, 2013). [↑](#footnote-ref-14)
15. Direct Testimony of PUCO Staff witness David M. Lipthratt, PUCO Case No. 12-426-EL-SSO at Attachment A (Mar. 12, 2013). [↑](#footnote-ref-15)
16. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order, (January 14, 2009) at paragraph 4. [↑](#footnote-ref-16)
17. *Id.* at paragraphs 2 and 4. [↑](#footnote-ref-17)
18. Application at 3-4. [↑](#footnote-ref-18)
19. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedures for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order at 2 (Jan. 14, 2009). [↑](#footnote-ref-19)
20. *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36, 41; 684 N.E.2d 312 (Oct. 8, 1997). [↑](#footnote-ref-20)
21. Restatement of the Law, Second, Judgments, Section 27. [↑](#footnote-ref-21)
22. *Superior’s Brand Meats, Inc. v Lindley*, 62 Ohio St.2d 133, 403 N.E.2d 996, (1980), syllabus. Office of Consumers’ Counsel v. Pub. Util. Comm., 16 Ohio St.3d 9, 10, 475 N.E.2d 782, (1985). [↑](#footnote-ref-22)
23. *Superior’ Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133(syllabus). [↑](#footnote-ref-23)
24. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Application, (December 26, 2008) at paragraph 3. (Emphasis added.) [↑](#footnote-ref-24)
25. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order, (January 14, 2009) at paragraph 4. [↑](#footnote-ref-25)
26. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm- Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Calculation of Total Storm O&M, Schedule C-1, (December 21 , 2012). [↑](#footnote-ref-26)
27. $13,661,050 (2008 Hurricane Ike O&M, Schedule C-1) - $2,893,949 (Three-Year Average of O&M Storm Expense) = $10,767,101. [↑](#footnote-ref-27)
28. Application Schedule C-1. [↑](#footnote-ref-28)
29. Application Schedule C-1. [↑](#footnote-ref-29)
30. DP&L acknowledges that the PUCO ordered it to defer only the 2012 derecho costs less the three year average of major storm, it states that “However, DP&L requests recovery through the Storm Cost Recovery Rider of the total 2012 derecho cost.” Application at 5-6. [↑](#footnote-ref-30)
31. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Service Restoration Costs,* Case No. 12-2281-EL-AAM, Finding and Order, at page 3, paragraph (8) (December 19, 2012); *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order, (January 14, 2009) at paragraphs 2 and 4. [↑](#footnote-ref-31)
32. OCC maintains that DP&L should be prevented from seeking deferral of its 2011 storm costs because its request was untimely and the Utility failed to show financial need. *See infra*, Section III (F) of these Comments. [↑](#footnote-ref-32)
33. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs,* Case No. 12-3062-EL-RDR, Prefiled Testimony of Dona R. Seger-Lawson, at page 6. [↑](#footnote-ref-33)
34. *See In the Matter of the Application of the Columbus S. Power Co. and Ohio Power Co.*, Pub. Util. Comm. No. 06-412-EL-UNC, 2006 Ohio PUC LEXIS 455, at \*4 (August 9, 2006). (Approving storm costs riders that were “designed to recover a portion of non-capitalized costs related to the storm damage December 2004 and January 2005.”); *In the Matter of the Application of the Ohio Edison Co.*, Pub. Util. Comm. No 07-551-EL-AIR, 2009 Ohio PUC LEXIS 58, at \*93 (January 21, 2009). (Granting limited authority for the deferral of “expenses” associated with storm damage.); *In the Matter of the Application of Columbus S. Power Co. and Ohio Power Co.*, Pub. Util. Comm. No. 08-1301-EL-AAM, 2008 Ohio PUC LEXIS 775, at \*5 (December 19, 2008). (Authorizing the deferral of incremental “O&M expenses associated with the September 14, 2008, wind storm.”); *In the Matter of the Application of Duke Energy Ohio*, Pub. Util. Comm. No. 08-709-EL-AIR, 2009 Ohio PUC LEXIS 33, at \*5 (January 14, 2009). (Authorizing the deferral of incremental “O&M expenses associated with the September 14, 2008, wind storm.”). [↑](#footnote-ref-34)
35. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order,( June 24, 2009), Approving Stipulation, (February 24, 2009), at page 10, paragraph 18. [↑](#footnote-ref-35)
36. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Prefiled Testimony of Mr. David M. Lipthratt, at page 8, (March 12, 2013). [↑](#footnote-ref-36)
37. *Id.* at 4-5. [↑](#footnote-ref-37)
38. *Id.* at 3. [↑](#footnote-ref-38)
39. *Id*. at 5. [↑](#footnote-ref-39)
40. *In the Matter of the Application of Ohio-American Water Company To Increase its Rates for Water and Sewer Service Provided to its Entire Service Area,* Case Nos. 03-2390-WS-AIR, et al., Staff Report at 20 (September 30, 2004) (Emphasis added.) [↑](#footnote-ref-40)
41. *See, e.g. In the Matter of the Commission’s Investigation into the Financial Impact of FASB Statement No. 106, “Employer’s Accounting for Postretirement Benefits Other than Pensions*,” Case No. 92-1751-AU-COI, Finding and Order, at 19 (Feb. 25, 1993); *Cincinnati Gas & Electric Company*, Case No. 92-946-EL-AAM, Entry, at 1-2 (Oct. 1, 1992); *Ohio Edison Company*, Case No. 88-144-EL-AAM, Entry, at 1-2 (Feb. 2, 1988); *Cleveland Electric Illuminating Company*, Case No. 87-109-EL-AAM et al., Entry, at 2 (Feb. 2, 1988); *Ohio Edison Company*, Case No. 87-995-EL-AAM et al., Entry, at 2 (Oct. 20, 1987). [↑](#footnote-ref-41)
42. DP&L Annual Report 2011 filed 4/17/12 in Case No. 12-0001-EL-RPT.

|  |  |  |  |
| --- | --- | --- | --- |
| 2011 Net Income Before Preferred Dividends | Pg 117 |  $ 193,214,970  |  |
| Less: Preferred Dividends | Pg 118 |  $ 866,781  |  |
| 2011 Net Income After Preferred Dividends |  |  $ 192,348,189  |  |
|  |  | 12/31/11 | 12/31/10 |
| Total Proprietary Capital  | Pg 112 |  $ 1,380,734,977  |  $ 1,402,333,872  |
| Less: Total Preferred Stock  | Pg 112 |  $ 22,850,800  |  $ 22,850,800  |
| Total Common Equity  |  |  $ 1,357,884,177  |  $ 1,379,483,072  |
|  |  |  |  |
| Average Total Common Equity |  |  $ 1,368,683,625  |  |
| Return on Equity: |  |  |  |
| (2011 Net Income/Average Common Equity) |  | 14.05% |  |

 [↑](#footnote-ref-42)
43. 12/21/12 Direct Testimony of DP&L Witness Campbell at 8 and Application, Schedule D-1, line 4. [↑](#footnote-ref-43)
44. Motion to Dismiss the Application of the Dayton Power and Light Company Requesting Approval of Certain Accounting Authority to Defer 2011 Storm Costs by The Office of the Ohio Consumers’ Counsel (“OCC Motion to Dismiss”), 4-5 (Jan. 30, 2013). [↑](#footnote-ref-44)
45. The Dayton Power and Light Company’s Memorandum in Opposition to OCC’s Motion to Dismiss, at 3 (Feb. 6, 2013). [↑](#footnote-ref-45)
46. *In the Matter of the Application of The Dayton Power and light Company For Approval of its Electric Security* Plan, Case No. 08-1094-EL-SSO, *DP*&L ESP Stipulation at 10-11 (Feb. 24, 2009) (emphasis added). [↑](#footnote-ref-46)
47. *In the Matter of the Application of The Dayton Power and light Company For Approval of its Electric Security* Plan, Case No. 08-1094-EL-SSO, Opinion and Order at 5-6 (Jun. 24, 2009) (emphasis added). [↑](#footnote-ref-47)
48. *In the Matter of the Application of Columbus Southern 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 No. 11-346-EL-SSO, et al., Opinion and Order at 36 (August 8, 2012) (Emphasis added). [↑](#footnote-ref-48)
49. DP&L Response to Staff Data Request #1. [↑](#footnote-ref-49)
50. *In the Matter of the Application of Duke Energy Ohio to Establish and Adjust the Initial Level of its Distribution Reliability Rider,* Case No. 09-1946-EL-RDR, Opinion and Order at 10 (January 11, 2011) [↑](#footnote-ref-50)
51. For example, in DP&L’s Response to Staff Data Request #1, portions of Internal Labor are identified by various categories, including “Incentive – MGT/PT/CO-OP” and “Bonus/NonProd-Wholly.” [↑](#footnote-ref-51)
52. *See* *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of Its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Opinion and Order (January 11, 2011) at page 13. [↑](#footnote-ref-52)
53. *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 489-490; 2012 Ohio 1509; 967 N.E.2d 201. [↑](#footnote-ref-53)
54. Application at 2. [↑](#footnote-ref-54)
55. *Id.* [↑](#footnote-ref-55)
56. *In the Matter of the Application of Columbus Southern Power Company*, Case No. 11-346-EL-SSO *et al.*, 2012 Ohio PUC LEXIS 738 at \*88, Opinion and Order (Aug. 8, 2012). [↑](#footnote-ref-56)
57. *Id.*  [↑](#footnote-ref-57)
58. Post-Hearing Brief of PUCO Staff at 25, PUCO Case No. 12-426-EL-SSO, [↑](#footnote-ref-58)
59. Direct Testimony of PUCO Staff witness David M. Lipthratt at 5, PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-59)
60. Direct Testimony of PUCO Staff witness David M. Lipthratt at 7, PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-60)
61. Direct Testimony of PUCO Staff witness David M. Lipthratt at 6, PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-61)
62. Post-Hearing Brief of PUCO Staff at 25, PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-62)
63. *See* Direct Testimony of PUCO Staff witness David M. Lipthratt at 7, PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-63)
64. *Id.* at 6-7. [↑](#footnote-ref-64)
65. *Id.* at 8. [↑](#footnote-ref-65)
66. *Id.* at 7. [↑](#footnote-ref-66)
67. *Id.* at 8. [↑](#footnote-ref-67)
68. *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 No. 11-346-EL-SSO *et al.*, Opinion and Order at 68-69 (Aug. 8, 2012). [↑](#footnote-ref-68)