

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The : Case No. 12-3062-EL-RDR
Dayton Power and Light Company for :
Authority to Recover Certain Storm-Related :
Service Restoration Costs :
:

In the Matter of the Application of The : Case No. 12-3266-EL-AAM
Dayton Power and Light Company for :
Approval of Certain Accounting :
Authority :

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO OCC'S
MOTION TO DISMISS THE APPLICATION OF DP&L REQUESTING
APPROVAL OF CERTAIN ACCOUNTING AUTHORITY TO DEFER STORM COSTS**

I. INTRODUCTION AND SUMMARY

DP&L's Application in this case asked for various forms of relief, including but not limited to a request that DP&L be permitted to defer certain costs associated with its 2011 storm restoration efforts. The Office of the Ohio Consumers' Counsel ("OCC") asks the Commission to dismiss DP&L's request that it be permitted to defer those costs. The Commission should deny OCC's motion to dismiss for the following separate and independent reasons:

First, unlike Ohio R. Civ. P. 12(B), the Commission's rules do not provide for the filing of a motion to dismiss. Further, OCC's motion was filed forty days after DP&L filed its Application, and is thus not timely.

Second, OCC's motion is founded on a false premise. Namely, OCC assumes that DP&L seeks to impose carrying costs on its 2011 storm restoration costs retroactive to the incurrence of those costs. That is not so. DP&L seeks permission to apply carrying costs prospectively upon receipt of a Commission order approving deferral of the 2011 storm O&M costs.

Third, the Commission should reject OCC's argument that DP&L has not established that it has a need to defer the storm costs because: (1) the Stipulation from DP&L's then-controlling Electric Security Plan provided that DP&L could recover such storm costs and does not require a showing of need; and (2) DP&L does not recover major storm costs in its current distribution rates.

Fourth, DP&L has asked for a decision on its request to defer the 2011 storm costs by February 8, 2013, so that the deferral can be included in DP&L's upcoming filings with the Security and Exchange Commission. The Commission should reject OCC's request that it delay deciding whether DP&L may defer the 2011 storm costs, as that request is nothing but a delay tactic by OCC. Specifically, OCC could have filed its motion to dismiss much sooner, and has yet to serve any discovery requests in this matter. Its assertion that it needs more time to respond to DP&L's request is a product of OCC's own delay.

II. THE COMMISSION'S RULES DO NOT PROVIDE FOR A MOTION TO DISMISS

The Ohio Civil Rules provide that a party may file a motion to dismiss within twenty-eight days after a complaint is filed. Ohio R. Civ. P. 12(B). The Commission's rules do not provide for the filing of a similar motion, and the Commission should thus reject OCC's

motion as being without procedural basis. Further, OCC filed its motion forty days after DP&L filed its Application, so OCC's motion is not timely.

III. DP&L SEEKS TO RECOVER CARRYING COSTS ON A PROSPECTIVE BASIS

OCC asserts (pp. 2-3) that DP&L has unreasonably delayed in filing its request to defer the 2011 storms costs and that DP&L should not be permitted to recover carrying costs associated with the 2011 storms on a "retroactive" basis. OCC's motion is based upon a false premise, because DP&L intends to apply carrying costs only prospectively upon receipt of a Commission order approving its request to defer the 2011 storm costs. The Commission should thus deny OCC's motion to dismiss since it is based upon a flawed premise.

IV. THERE IS NO REQUIREMENT THAT DP&L DEMONSTRATE FINANCIAL NEED; IN ANY EVENT, DP&L NEEDS THE DEFERRAL TO MAINTAIN ITS FINANCIAL INTEGRITY

OCC argues (p. 4) that DP&L's request for a deferral should be denied because DP&L has failed to demonstrate a financial need for the request. The Commission should reject that argument for the following separate and independent reasons:

First, the controlling Stipulation – which OCC signed – permits DP&L to recover the costs of storm damage without showing financial need. Specifically, the February 24, 2009 Stipulation and Recommendation in Case No. 08-1094-EL-SSO created an Electric Security Plan for DP&L through December 31, 2012, and was thus the controlling Stipulation at the time the storm costs at issue were incurred. That Stipulation expressly authorizes DP&L to recover the costs of storm damage, and does not require DP&L to make any showing of financial need. Stipulation, ¶ 18(B).

Second, as demonstrated in DP&L's January 18, 2013 Application for Rehearing, pp. 2-4 (Case No. 12-2281-EL-AAM), DP&L's current distribution rates do not include recovery of major storm costs. It is thus appropriate that DP&L be permitted to defer its 2011 storm costs in this case.

V. **THE COMMISSION SHOULD DENY OCC'S REQUEST TO DELAY THE SCHEDULE**

OCC asks (pp. 6-7) for alternative relief, namely, that the Commission delay DP&L's proposed schedule. OCC claims that it needs additional time to conduct discovery and to consider the issues in this case. The Commission should deny OCC's request because it is nothing more than a delaying tactic by OCC. In fact, OCC's claims (p. 6) that DP&L's request for a ruling by February 8, 2013 on DP&L's request for deferral is unreasonable because that deadline is only 49 days after the filing and the discovery rules permit a party twenty days to respond to discovery requests; that argument is misleading because it fails to disclose that OCC has not served any discovery requests in this matter.

OCC's request for delay is further unreasonable because OCC has not raised any substantive objection to the amount of the costs. The only objection that OCC has raised on the merits is that DP&L's purported requests for the recovery of retroactive carrying costs was unreasonable, but OCC's argument on that point was shown above to be incorrect.

The Commission should thus conclude that OCC has had sufficient time to raise objections to DP&L's request to defer the 2011 storm costs, and should grant DP&L's request by February 8, 2013, so that DP&L can include the deferral in its upcoming SEC filings.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to OCC's Motion to Dismiss the Application of DP&L Requesting Approval of Certain Accounting Authority to Defer Storm Costs has been served via electronic mail upon the following counsel of record, this 6th day of February, 2013:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to OCC's Motion to Dismiss the Application of DP&L Requesting Approval of Certain Accounting Authority to Defer Storm Costs electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company