

**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- |) | Case No. 12-3062-EL-RDR |
| Related Service Restoration Costs |) | |

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

**REPLY TO
DAYTON POWER AND LIGHT COMPANY’S
MEMORANDUM CONTRA
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”), filed a Motion to Dismiss a portion of the Application of the Dayton Power and Light Company (“DP&L” or “Utility”) that was filed on December 21, 2012. Specifically, OCC seeks dismissal of DP&L’s request for deferral of costs allegedly incurred as a result of the 2011 weather events — costs that DP&L can be expected to try to collect from its customers. DP&L filed its Memorandum Contra (“Memorandum Contra”) to OCC’s Motion to Dismiss on February 6, 2007. OCC hereby replies to DP&L’s Memorandum Contra,¹ and maintains that the Commission should dismiss DP&L’s 2011 storm cost deferral request, or at least provide ample opportunity for parties to conduct discovery and brief the issue.

¹ Ohio Adm. Code 4901-1-12(B)(2).

II. ARGUMENT

In its Memorandum Contra, DP&L failed to address many of the arguments asserted by the OCC. Instead, DP&L chose to revisit its own arguments in favor of its deferral request, each of which will be addressed accordingly. For the reasons explained below, and in OCC's Motion to Dismiss, this Commission should dismiss DP&L's request to defer costs allegedly associated with the 2011 storms.

A. OCC's Motion to Dismiss was Procedurally Proper and Timely Filed with the Commission.

DP&L argues that OCC's Motion to Dismiss should be denied because it is "without procedural basis."² Motions to dismiss, however, are routinely filed and sometimes granted by the Commission.³ For instance, FirstEnergy filed an application "for approval of certain transmission and distribution (T&D) projects for inclusion as part of its compliance with the 2009 energy efficiency benchmarks set forth in Section 4928.66(A)(1)(a), Revised Code."⁴ The Commission granted the intervening parties' (including the OCC) motion to dismiss, which argued that the application "violates Ohio Laws" because it "relies upon projects completed before 2009."⁵ In fact, DP&L has also taken advantage of the ability to file motions to dismiss

² DP&L Memorandum in Opposition to OCC's Motion to Dismiss, at 2-3.

³ See, e.g., *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, and the Toledo Edison Company*, Case Nos. 09-384-EL-EEC, 09-385-EL-EEC, 09-386-EL-EEC, 2009 Ohio PUC LEXIS 1166, Entry (Dec. 16, 2009); See also, *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, 2012 Ohio PUC LEXIS 666, Case No. 10-2929-EL-UNC, Opinion and Order (Jul. 2, 2012); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, 2004 Ohio PUC LEXIS 358, Entry at 1-3 (June 1, 2004).

⁴ *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, and the Toledo Edison Company*, Case Nos. 09-384-EL-EEC, 09-385-EL-EEC, 09-386-EL-EEC, 2009 Ohio PUC LEXIS 1166, Entry at 1 (Dec. 16, 2009)

⁵ *Id.* at 2.

before this Commission.⁶

Moreover, this argument, that motions to dismiss are “procedurally improper and should be denied,”⁷ has been raised on a prior occasion but did not garner favor with the Commission.⁸ In that case, the Commission ordered a review to determine the impact of AEP-Ohio’s proposed change of “the basis for compensation for capacity costs to a cost-based mechanism.”⁹ The Industrial Energy Users-Ohio (“IEU-Ohio”) filed a motion to dismiss asserting that “the Commission lacks statutory authority to authorize cost-based or formula-based compensation for AEP-Ohio’s FRR capacity obligations from CRES providers serving retail customers in the Company’s service territory.”¹⁰ The Retail Energy Supply Association (“RESA”) filed a memorandum in opposition arguing, in part, “that IEU-Ohio’s motion is procedurally improper and should be denied.”¹¹ While the Commission denied IEU-Ohio’s motion to dismiss, it was because it was “without merit” and not because it was procedurally improper.¹²

DP&L also cites to Ohio Civ. R. 12(B)(6) in support of its argument that OCC’s Motion to Dismiss is untimely because a motion to dismiss must be filed within twenty-eight days after a complaint is filed.¹³ However, under the Commission’s rules -- Ohio Adm. Code 4901-1-12 -- there is no such time limit placed on motions that are filed before the PUCO. In fact, this

⁶ *In the Matter of the Establishment of a Temporary Interim Rate for the Purchase of Power from the Montgomery County Energy from Waste Facility by the Dayton Power & Light Company*, Case no. 88-77-EL-UNC, 1988 Ohio PUC LEXIS 208, Entry (Feb. 17, 1988).

⁷ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, 2012 Ohio PUC LEXIS 666, Case No. 10-2929-EL-UNC, Opinion and Order at 8 (Jul. 2, 2012).

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 9.

¹² *Id.*

¹³ DP&L Memorandum in Opposition to OCC’s Motion to Dismiss, at 2-3.

Commission has permitted the filing of motions to dismiss well past the twenty-eight days contemplated in Ohio Civ.R. 12(b)(6). For instance, in *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, this Commission opened the action on December 8, 2010, but IEU-Ohio did not file its motion to dismiss until April 10, 2012.¹⁴ And in the *FirstEnergy* case, the Commission granted the intervening parties' joint motion to dismiss on June 24, 2009 – forty-seven days after FirstEnergy filed its application on May 8, 2009.¹⁵

Moreover, to the extent the twenty-eight day timeline applies in this context, it does not begin to run until the OCC filed its motion to intervene. While such an argument was not addressed in the *FirstEnergy* case, the Commission granted the intervenors' joint motion, which was filed outside of the twenty-eight days after FirstEnergy filed its Application, but within twenty-eight days of the parties filing their motions to intervene.¹⁶ Similarly, OCC's Motion to Dismiss was timely filed because OCC did not intervene as a party in this case until January 18, 2013, and filed the Motion to Dismiss a mere twelve days later.

For these reasons, OCC's Motion to Dismiss is procedurally proper and timely; therefore, it should be granted.

B. DP&L has not Demonstrated a Financial Need to Defer Costs Associated with the 2011 Storm Restoration, Which is a Reasonable Basis for Denying its Request for 2011 Storm Cost Deferral.

DP&L argues that it has the right “to **recover** the costs of storm damage without showing

¹⁴ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, 2012 Ohio PUC LEXIS 666, Case No. 10-2929-EL-UNC, Opinion and Order at 3, 8 (Jul. 2, 2012).

¹⁵ *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, and the Toledo Edison Company*, Case Nos. 09-384-EL-EEC, 09-385-EL-EEC, 09-386-EL-EEC, 2009 Ohio PUC LEXIS 1166, Entry at 1 (Dec. 16, 2009).

¹⁶ *Id.*

financial need.”¹⁷ DP&L cites to the stipulation filed in its 2009 Electric Security Plan (“ESP Stipulation”) to support this argument. 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.”¹⁸

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.”¹⁹ Thus, contrary to the Utility’s assertion, the ESP Stipulation does not “**expressly authorize[]** DP&L to recover the costs of storm damage.”²⁰ Rather, the Stipulation permits DP&L only the opportunity to **apply** for a rider, the approval of which is left to the discretion of the Commission.

While neither the aforementioned ESP Stipulation nor Order approving the Stipulation requires a showing of financial need for granting DP&L deferral authority, an excessive return is adequate grounds to deny DP&L’s request. In 2011, when DP&L’s major storm O&M costs were expensed by the Utility (in 2011), DP&L earned a 14.05% return on equity²¹ far exceeding the most recently approved return on equity of 11.30 %, authorized by the PUCO.²² Such a significant return on equity is a compelling reason to deny DP&L’s untimely request for deferral.

¹⁷ DP&L Memorandum in Opposition to OCC’s Motion to Dismiss, at 3 (emphasis added).

¹⁸ *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).

¹⁹ *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).

²⁰ DP&L Memorandum in Opposition to OCC’s Motion to Dismiss, at 3 (emphasis added).

²¹ OCC Motion to Dismiss, at 5 (Jan. 30, 2013).

²² *Id.*

C. Alternatively, the Commission Should Refrain from Issuing any Decision on DP&L's Request for 2011 Storm Costs Deferral Until the Parties have had Ample Time to Conduct Discovery and Analysis.

DP&L also argues that the Commission should deny OCC's alternative request that the Commission refrain from issuing a decision on or before February 8, 2013 (as requested by the Utility) in order to permit parties the opportunity to conduct discovery and fact-finding. In support, DP&L argues that OCC has delayed in propounding discovery.²³ However, this argument does not fully respond to OCC's Motion because OCC requested that the PUCO disregard DP&L's arbitrary deadline on two bases: (1) to permit time to do ample discovery, and (2) to permit the parties **and the Commission** time to do ample analysis.

DP&L further argues that "OCC has not raised any substantive objection to the amount of the costs."²⁴ OCC's argument, however, emphasized the point that the Commission should refrain from issuing any decision in order to allow time for discovery and analysis. Moreover, OCC has not been able to raise substantive objections due to the limited information that was provided in DP&L's Application. OCC is not raising substantive arguments in advance of apprising itself of further information, specifically, whether the nature of DP&L's request to defer 2011 storm costs is reasonable.

A Commission decision should not precede adequate discovery and case preparation. The PUCO should choose, instead, to permit the interested parties, as well as the Commission Staff, adequate time to conduct discovery and perform necessary fact finding sufficient to analyze DP&L's deferral request.

²³ It is ironic that after delaying well over a year to request this deferral, DP&L is now alleging that OCC is employing delay tactics. *See*, DP&L Memorandum in Opposition to OCC's Motion to Dismiss, at 4. DP&L also argues that "OCC has not served any discovery requests in this matter." However, OCC served discovery the day after DP&L filed its Memorandum Contra.

²⁴ DP&L Memorandum in Opposition to OCC's Motion to Dismiss, at 4.

III. CONCLUSION.

The Commission should grant OCC's procedurally proper Motion to Dismiss DP&L's request for authority to defer 2011 storm costs. DP&L's request is untimely and inappropriate given DP&L's 2011 return on equity. Alternatively, the PUCO should provide parties an ample opportunity to conduct discovery, under R.C. 4903.082, and time for the PUCO to properly analyze DP&L's claims and hear from all parties under R.C. 4903.09.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* was served on the persons stated below via electronic transmission this 13th day of February 2013.

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Summary: Reply Reply to Dayton Power and Light Company's Memorandum Contra by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Gina L Brigner on behalf of Schuler, Michael Mr.