BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF THE DAYTON POWER AND LIGHT COMPANY

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I. INTRODUCTION AND SUMMARY

It is undisputed that DP&L incurred over $37 million in expenses (including carrying costs; excluding capital) to respond to unusual and non-recurring storms in 2008, 2011 and 2012.[1] Long-standing Commission precedent establishes that unusual and non-recurring expenses will not be recovered through a utility's base rates. DP&L's existing distribution rates therefore do not include a recovery for the $37 million in expenses that DP&L incurred to respond to those unusual and non-recurring storms, and DP&L should have been permitted to recover that full $37 million (less the small amounts that Staff concluded were not prudently incurred).

Further, as DP&L demonstrated in its Initial Brief (pp. 17-18), DP&L should have been permitted to recover $30.8 million if a three-year average methodology was to be employed.

The Stipulation and Recommendation in this case limits DP&L's recovery to $22.3 million. That $22.3 million figure is millions of dollars less than the amount that DP&L should have been permitted to recover, and should be approved without modification.

OCC is, however, not content with DP&L's voluntary agreement to forego the recovery of millions of dollars of prudently-incurred costs. OCC wants even more. As demonstrated below, the Commission should reject OCC's arguments and should approve the Stipulation without modification.

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[1] DP&L Schedule B-1, Line 29; DP&L Ex. 1, p. 4 (Nickel); DP&L Exs. 44-47 (photographs of the storm damage); Tr. 276-77 (Yankel); Tr. 396 (Effron); Tr. 514-15 (Duann).

II. THE STIPULATION SATISFIES THE COMMISSION'S THREE-PART TEST

A. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES

The testimony of DP&L witness Dona Seger-Lawson demonstrates that the Stipulation was the product of serious bargaining among capable, knowledgeable parties. DP&L Ex. 7, pp. 6-7. OCC nevertheless argues (pp. 5-6) that the Signatory Parties "do not represent diverse interests" because no residential customer representative signed the Stipulation.

As an initial matter, "represents diverse interests" is not part of the three-part test that the Commission uses and the Supreme Court has approved. In any event, as the Commission knows, the Staff signed the Stipulation. Joint Ex. 1, p. 5. OCC's witnesses admitted that Staff does not favor utilities or customers, that Staff balances the interests of the utility and its customers, and that Staff was aware of the arguments that OCC advanced in this case. Tr. 335 (Yankel); Tr. 534 (Duann). The fact that Staff signed the Stipulation thus demonstrates that residential customers were protected.

The Commission should therefore conclude that the Stipulation satisfies the first criterion of its three-part test.

B. THE STIPULATION, AS A PACKAGE, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST

Ms. Seger-Lawson's testimony also demonstrated that the Stipulation benefits the public interest since the agreed-upon recovery amount was a reduction of more than 33% from the amount that DP&L sought to recover. DP&L Ex. 7, p. 7. As demonstrated below, the Commission should reject OCC's arguments that the Stipulation does not satisfy that criterion.

1. DP&L's Distribution Rates Do Not Recover Costs of Unusual and Non-Recurring Storms

It is undisputed that DP&L's last distribution rate case was in 1991. DP&L Ex. 5, p. 3 (Seger-Lawson); OCC Brief, p. 9. It is also undisputed that that case was resolved via a "black box" settlement, and it is thus impossible to determine the precise level of storm costs that are recovered in DP&L's distribution rates. DP&L Ex. 5, p. 3 (Seger-Lawson); OCC Brief, p. 9.

OCC argues (p. 9) that the storm costs that DP&L sought to recover in this case "very well could be a part of [DP&L's] distribution base rates." The Commission should reject that argument because, long before DP&L's 1991 rate case, the Commission had established a precedent that unusual and non-recurring costs -- including storm costs -- should not be recovered through a utility's base rates. In re the Application of Ohio Edison Co. to Increase Certain of Its Filed Schedules, Pub. Util. Comm. No. 82-1025-EL-AIR, 1983 Ohio PUC LEXIS 40, at *89 (Sept. 14, 1983) ("Test year operating income should be reflective of the results of normal operations for the company. The impact of unusual or nonrecurring events should be excluded from the determination of expenses if they are not reflective of what the company is reasonably expected to experience.") (available at DP&L Ex. 26, p. 26); In re the Application of The Dayton Power &Light Co. for Auth. to Modify & Increase Its Rates, Pub. Util. Comm. No. 82-517-EL-AIR, 1983 Ohio PUC LEXIS 70, at *69 (Apr. 27, 1983) (Commission approved Staff proposal "to reduce test year operating expenses by $1,224,032 to account for abnormally high level of storm damage expense included by the company") (available at DP&L Ex. 27, p. 24); In re the Application of the Ohio-Am. Water Co. to Increase Rates for Water Serv. Provided to Its Entire Serv. Area, Pub. Util. Comm. No. 79-1343-WW-AIR, 1981 Ohio PUC LEXIS 3, at *19 (Jan. 14, 1981) ("The record in this case indicates that the severe storm occurred in 1977 that generated the expense at issue and there have not been recurring storms of such a nature every year. Thus, the Commission can only conclude that this was an unusual and non-recurring expense and should be excluded from the cost of service of the applicant.") (available at DP&L Ex. 28, p. 7).

It is undisputed that the storms at issue here were unusual and non-recurring. DP&L Ex. 1, p. 4 (Nickel); DP&L Exs. 44-47 (photographs of the storm damage); Tr. 276-77 (Yankel); Tr. 396 (Effron); Tr. 514-15 (Duann).

OCC also argues (p. 8) that allowing DP&L to recover its storm costs constitutes single-issue ratemaking. The Commission should reject that argument for two reasons. First, as DP&L demonstrated in its Initial Brief (p. 3), Commission and Supreme Court precedent allow a utility to recover the costs that it incurs to respond to unusual and non-recurring storms. Expenses associated with such storms will be excluded from base rates through the normalization process, and therefore, a utility would not have an opportunity to recover expenses associated with unusual and non-recurring storms if the utility was not given an opportunity to recover those expenses outside of base rates. Second, as also demonstrated in DP&L's Initial Brief (p. 4), OCC signed, and the Commission approved, a series of Stipulations that authorize DP&L to recover those storm expenses in addition to DP&L's base distribution rates.

The Commission should thus conclude that DP&L's existing distribution rates would not include the recovery of unusual and non-recurring storm costs, and it is thus appropriate that DP&L recover costs associated with unusual and non-recurring storms in this case.[2]

2. **DP&L's Historic Earnings Are Irrelevant**

OCC (p. 1) opens its brief with the following statement: "The question before the PUCO is whether it should approve an agreement that would result in customers of the Dayton Power and Light Company paying eighteen (18) times more for storm restoration costs than the amount recommended by those who audited the costs — the PUCO Staff." OCC Brief, p. 1 (footnotes omitted). OCC makes the same argument through its brief. OCC's statements suggest that Staff concluded in its Audit Report that only $1 million of DP&L's storm costs were actually and prudently incurred. That simply is not true. DP&L provided supporting documentation for millions of dollars in storm restoration costs to both the PUCO Staff and OCC for review. A very small amount of the audited costs was found to be imprudently incurred.

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[2] OCC argues (pp. 23-24) that the three-year average methodology must be employed in this case because DP&L is bound by the doctrine of collateral estoppel from re-litigating the issue of whether its existing distribution rates include some recovery of major storm costs. As an initial matter, the argument is irrelevant, because as DP&L demonstrated in its Initial Brief (pp. 17-18), DP&L should have been permitted to recover $30.8 million under the three-year average method. In addition, OCC is wrong about the application of collateral estoppel, for two reasons.

First, in that case, the Commission said that allowing DP&L to recover the full amount of its major storm costs "could" or "may" allow for a double recovery of storm costs. February 13, 2013 Entry on Rehearing, ¶ 7 (Case No. 12-2281-EL-AAM) (OCC cites to wrong case number). The Commission did not hold that allowing full recovery "would" amount to double recovery. The Commission thus allowed DP&L to defer the amounts that were "probable" for recovery (i.e., 70% to 80% probable for recovery), and left the issue of whether full recovery would be double recovery to be decided in this case. As DP&L has demonstrated in this case, it should have been permitted to recover the full amount of its 2011 and 2012 storm costs. In particular, in the Commission's Entry in Case No. 12-2281-EL-AAM (¶ 7), it relied upon the fact that DP&L used a three-year average methodology in its Application to defer 2008 storm expenses. However, as DP&L demonstrated at hearing, the definition of "major" storm changed in 2010 so that the definition became more stringent. Tr. 53 (Nickel). It was thus reasonable to apply a three-year average to DP&L's 2008 major storm expenses (DP&L agrees that some of those expenses were not unusual and non-recurring) but to not apply the three-year average to major storm expenses from 2011 and 2012.

Second, even if the Commission had decided this issue in Case No. 12-2281-EL-AAM, the Commission can reconsider its prior decisions at any time, provided that it explains its reasons for doing so. Ohio Consumers' Counsel v. Pub. Util. Comm., 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 14 ("The commission may change or modify earlier orders as long as it justifies any changes.").

In addition, in the Staff Audit Report, Staff (p. 2) recommended (among other things) that (1) DP&L be denied recovery of its 2008 and 2011 storm costs based upon DP&L's historic return on equity; and (2) DP&L be denied recovery of its 2011 storm costs because of DP&L's delay in seeking deferral of its 2011 storm costs.

As to DP&L's historic return on equity, DP&L's Initial Brief (pp. 18-22) demonstrated that DP&L's historic returns cannot be a basis for denying DP&L's request for cost recovery in this case. In short, DP&L's Initial Brief demonstrated that:

1. No Precedent: Controlling precedent establishes that historic returns cannot serve as a basis to deny recovery of prudently-incurred costs. DP&L Initial Brief, pp. 18-19. OCC's witnesses admitted that they were not aware of any precedent supporting their request that DP&L be denied recovery of costs based upon DP&L's historic returns, and OCC does not cite any such precedent in its Brief.[3]

2. Stipulations: OCC signed Stipulations that permit DP&L to recover its storm costs; those Stipulations do not condition DP&L's recovery of storm costs based upon DP&L's historic earnings, and in fact, provide that the SEET could first be applicable to DP&L in 2013 for 2012 (OCC does not claim that DP&L's 2012 earnings were excessive). DP&L Initial Brief, p. 20.

3. Investor Reliance: Investors rely upon the Commission's practice of allowing utilities to recover their prudently-incurred storm costs. DP&L Initial Brief, p. 21.

4. Cost of Capital: OCC's argument that DP&L be denied recovery of its prudently-incurred storm costs based upon DP&L's historic earnings would lead to a higher cost of capital. DP&L Initial Brief, pp. 21-22.

5. Future Storm Recovery: OCC's argument would undermine the goal of restoring service as quickly as possible after major storms. DP&L Initial Brief, p. 22.

[3] OCC claims (p. 12) that "[t]he explicit consideration of a utility's earnings in determining whether to allow or disallow the collection of deferred expenses is not a new concept – it is well recognized and applied." However, OCC cites only to the Staff's comments and audit report in the currently-pending case.

As to DP&L's delay in seeking a deferral of its 2011 storm costs, DP&L's Initial Brief (pp. 23-25) demonstrated that delay cannot be a basis for denying DP&L's request for cost recovery in this case. In short, DP&L's Initial Brief demonstrated:

1. A deferral order is not required: There is no requirement that a utility seek a deferral order, so DP&L should not be penalized for a delay in doing something that it was not required to do in the first place. DP&L Initial Brief, p. 23.

2. No deadline: There is no deadline for seeking a deferral order, so DP&L's delay in doing so cannot be a basis for denying recovery. DP&L Initial Brief, pp. 23-24.

3. No harm to customers: OCC's witnesses conceded that there was no harm to DP&L's customers resulting from the delay. DP&L Initial Brief, p. 24.

4. Saved carrying costs: Customers saved carrying costs due to DP&L's delay in seeking a deferral of its 2011 storm costs. DP&L Initial Brief, p. 24.

5. No benefit to DP&L: There was no financial benefit to DP&L due to the delay. DP&L Initial Brief, p. 24.

OCC also argues (p. 17) that DP&L "failed to establish how and why it delayed its request to defer the 2011 storm costs, which allowed over $4 million in carrying charges to accrue on the 2008 storm costs." That argument makes no sense. The accrual of carrying charges on DP&L's 2008 storm costs has nothing to do with whether and when DP&L sought to defer its 2011 storm costs. The two things are entirely unrelated.[4]

[4] In addition, the $4 million figure is obviously wrong. OCC cites (p. 15 n.46) Dona Seger-Lawson's testimony at Tr. 425 for that $4 million figure. As Ms. Seger-Lawson explains on that page, $4 million was the total accrual of carrying charges between 2008 and the time that DP&L filed its Application in this matter. DP&L sought to defer its 2011 storm costs in its December 21, 2012 Application. Thus, there was a delay of about a year -- from 2011 to the end of 2012. Even if we assume that the delay in seeking to defer the 2011 storm costs was somehow causally connected to the accrual of carrying charges for the 2008 storm costs (a nonsensical assumption), then DP&L accrued carrying charges for four years on the 2008 storm costs, and delayed only one year seeking a deferral of the 2011 storms.

OCC also relies (p. 14) upon the fact that DP&L elected not to file a distribution rate case by the July 1, 2014 deadline that the Commission established in another case. DP&L's decision not to file a distribution rate case now is entirely irrelevant in this case. As DP&L has demonstrated in this case, its base distribution rates would not recover unusual and non-recurring storm expenses, and it should be permitted to recover those expenses in this case. DP&L's decision not to file a distribution rate case before July 1, 2014 is simply irrelevant here.

One last point on this topic: OCC's brief relies heavily and repeatedly on the Staff Audit Report and comments. OCC Initial Brief, pp. 1-3, 5-8, 10-11, 20, 22, 24-30, 45. Staff, however, signed the Stipulation and has submitted a brief arguing that it should be approved. Staff has thus obviously concluded that the Stipulation is a reasonable compromise of competing positions.

In short, there is no reason to deny DP&L recovery of its 2008 and 2011 storm costs. The evidence shows that DP&L should have been permitted to recover $37 million (DP&L Schedule B-1, Line 29), $30.8 million (DP&L's Initial Brief, pp. 17-18), or $23.4 million (Staff Audit Report, p. 3). The Stipulation permits DP&L to recover $22.3 million (Joint Ex. 1, p. 2), which is less than the amount supported by the evidence, and is therefore reasonable and should be approved without modification.

3. Adjustments to DP&L's Recovery Amount

In OCC's Brief (pp. 21-34), OCC makes a number of arguments regarding adjustments that should be made to DP&L's request for recovery. Then, on page 46, OCC includes a calculation that purportedly shows that if DP&L were permitted to recover its 2008, 2011 and 2012 storm costs, then that recovery should be limited to $11,336,948. OCC's chart on page 46 is riddled with flaws. Specifically:

1. Line 2: On line 2, OCC makes a $554,503 adjustment for "2008 Three-Year Average." However, as demonstrated in DP&L's Initial Brief (pp. 7-12), if a three-year average is to be employed, then unusual and non-recurring storms (or the years in which they occurred) should be excluded from the average; otherwise, DP&L would not be able to recover all of its prudently-incurred storm costs. DP&L's witnesses have explained that unusual and non-recurring storms should be excluded from a three-year average (DP&L Ex. 6, pp. 15-19 (Seger-Lawson); Tr. 133 (Campbell)). OCC's witnesses never disputed that point; nor did OCC dispute that point in its initial brief. The reason that OCC has not disputed the point is that, as a matter of simple math, DP&L is correct.

DP&L's Initial Brief (pp. 12-13) demonstrated that the $554,503 deduction on line 2 of page 46 of OCC's Brief was not appropriate, since it results from including unusual and non-recurring storms in the average. The Commission should thus reject that deduction as unreasonable.

2. Line 3: On line 3, OCC includes a deduction of $3,574,934 for non-major storms in 2008. However, as DP&L's Initial Brief (pp. 13-14) demonstrated, $2,289,756 of that amount was associated with major storms (applying the current definition retroactively). OCC witness Yankel conceded that (a) he had no basis to disagree with the testimony of DP&L witness Nickel that $2,289,756 was associated with major storms (Tr. 290); and (b) that if that amount was associated with major storms, then it should be added back to the calculation

(Tr. 291-92). The $3,574,934 deduction that OCC shows on line 3 is thus unreasonable, and should be rejected.

3. Line 4: On line 4, OCC shows a $10,035,297 deduction for "2011 Total Major Storm O&M Costs." It is unclear why OCC subtracted the "Total" 2011 storm costs on line 4, when OCC states on the previous page (p. 45) that it is assuming that 2011 storm costs would be recoverable (as they should be since, as demonstrated above, OCC's arguments regarding DP&L's historic returns and delay in seeking a deferral are meritless).

In any event, OCC's witness Yankel showed a three-year average deduction of $4,193,617 for 2011. OCC Ex. 16, AJY-2. As demonstrated in DP&L's Initial Brief (pp. 14-15), that deduction was also unreasonable because it includes unusual and non-recurring storms in the three-year average.

4. Line 5: On line 5, OCC has a $3,482,366 deduction for the 2012 three-year average. As demonstrated in DP&L's Initial Brief (p. 15), that deduction is unreasonable because it includes unusual and non-recurring storms in the three-year average.

5. Line 11: On line 11, OCC has a $1,265,875 deduction for "Carrying Charges during recovery period." In footnote 135, OCC attempts to explain the deduction, but says only "carrying charge during the recovery period should be disallowed." Why should they be disallowed? OCC never explains. Carrying charges compensate DP&L for the time value of

money, and have always been recoverable during the recovery period. This is yet another unreasonable deduction by OCC.[5]

6. Line 13: On line 13, OCC deducts $831,361 for management labor. As demonstrated in DP&L's Initial Brief (pp. 16-17), $494,124 of DP&L's total management labor costs is associated with payments that DP&L was contractually obligated to pay management for storm-team duty. The Commission has authorized AEP to recover substantially similar costs. April 2, 2014 Opinion and Order, pp. 24-26 (Case No. 12-3255-EL-RDR). That deduction thus is unreasonable as well.

7. Line 16: On line 16, OCC shows a $614,099 deduction for mutual assistance. As shown in DP&L's Initial Brief (p. 16), that deduction is without merit because the costs that DP&L incurs to provide mutual assistance to other utilities are incremental costs, and thus would not be included in DP&L's base rates.

In short, the chart on page 46 of OCC's Initial Brief is riddled with flaws and should be rejected. DP&L's Initial Brief (pp. 17-18) demonstrated that DP&L should have been permitted to recover at least $30.8 million (and that is assuming that a three-year average methodology should be employed). The $22.3 million figure in the Stipulation is therefore conservative, appropriate and should be approved.

[5] The Stipulation provides that DP&L will recover $22.3 million, and that additional carrying costs will not be accrued. Joint Ex. 1, p. 2. To make an apples-to-apples comparison, the Commission would need to compare that $22.3 million figure to the total amount that DP&L would have recovered in litigation. The total amount that DP&L would have recovered in litigation would have included carrying costs in the recovery period.

C. THE STIPULATION DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE

Ms. Seger-Lawson's testimony also demonstrates that the Stipulation does not violate any important regulatory principle or practice. DP&L Ex. 7, pp. 7-8.

OCC argues (pp. 37-44) that the Stipulation violates important regulatory principles because it is a "black box" settlement. OCC asserts that a "black box" settlement is unlawful and unreasonable because OCC cannot determine how the recovery amount was calculated, and thus cannot determine which costs were included and which were excluded.

As an initial matter, the Stipulation states that it included recovery of 2008, 2011 and 2012 storm costs. Joint Ex. 1, p. 2. OCC's claim that it cannot tell whether costs for particular years were included is simply not accurate.

More importantly, the issue for the Commission is whether the $22.3 million figure in the Stipulation is reasonable or not. The Commission can make that determination by comparing the $22.3 million figure to the amount of recovery that the evidence supported. As demonstrated in DP&L's Initial Brief (pp. 17-18), DP&L should have been able to recover at least $30.8 million, and the $22.3 million figure is thus conservative, appropriate and should be approved.

Further, the fact that the Stipulation is a "black box" settlement has not prevented OCC from making arguments about the reasonableness of the $22.3 million figure. Indeed, on page 46 of its brief, OCC created a detailed spreadsheet that purportedly shows that DP&L should have been able to recover only $11 million. OCC's spreadsheet is badly flawed (as shown above), but that is beside the point. The point is that DP&L provided all of its underlying cost data to OCC, and OCC has more than enough information to evaluate the $22.3 million figure in the Stipulation.

The Commission should thus reject OCC's argument that the "black box" Stipulation in this case does not provide sufficient information to allow the Commission to determine whether the $22.3 million figure is reasonable.

Finally, OCC argues (p. 35) that the Stipulation violates an important regulatory principle based upon a report Staff issued in a 2003 case that was settled. In that case, the utility was seeking to defer additional security costs that it had begun to incur four months before it had signed a Stipulation in which it had agreed to limit its recovery of security costs to $50,000 per year. September 30, 2004 Staff Report of Investigation, p. 20 (Case No. 03-2390-WS-AIR). The Staff, unsurprisingly, recommended that the deferral be rejected because the request to defer the security costs should have been made before the applicant signed a Stipulation that limited its recovery of security costs to $50,000. Id. There are no similar facts here, and the case simply is not on point.

III. CONCLUSION

In the Stipulation in this case, DP&L has agreed to forego recovery of millions of dollars of prudently-incurred costs that it should have been permitted to recover. The Commission should reject OCC's arguments and should approve the Stipulation, without reducing the $22.3 million figure.

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