**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 Services Restoration Costs. | ) ) ) ) | Case No. 12-3062-EL-RDR |
| In the Matter of the Application The Dayton Power and Light Company for Approval of Certain Accounting Authority. | ) ) ) ) | Case No. 12-3266-EL-AAM |

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**REPLY BRIEF**
**BY**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Melissa R. Yost, Counsel of Record
Deputy Consumers' Counsel
Larry S. Sauer
Michael J. Schuler
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-1291 (Telephone-Yost)
(614) 466-1312 (Telephone-Sauer)
(614) 466-9547 (Telephone-Schuler)
yost@occ.ohio.gov
sauer@occ.ohio.gov
schuler@occ.ohio.gov


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## I. INTRODUCTION

The proposed settlement of this case—that would result in customers of the Dayton Power and Light Company[1] paying eighteen (18) times more for storm restoration costs than the amount recommended by those who audited the costs—the PUCO[2] Staff—does not meet the three prong test that the PUCO relies upon when reviewing a stipulation for approval. It should be rejected.

The settlement agreement at issue was signed by DP&L, the PUCO Staff, and only 1 customer representative—Kroger. DP&L did all the heavy lifting in support of the settlement, calling three witnesses at hearing for four witnesses who drafted testimony in these cases.[3] Kroger did not sponsor a witness, or file a brief in support of the Stipulation. The PUCO Staff did not sponsor a witness, but filed a brief. However, in

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[1] ("DP&L" or "Utility").

[2] Public Utilities Commission of Ohio.

[3] DP&L witness Campbell sponsored DP&L Ex. No. 6 Testimony in Response to the Staff Audit Report of Michael Barrett (January 17, 2014).

the PUCO Staff's Brief, the Staff failed to successfully reconcile the positions taken in Staff Audit Report that was filed on January 3, 2014, with the positions taken in the settlement.

The Office of the Ohio Consumers' Counsel ("OCC") recommends that the PUCO limit DP&L's charges to slightly more than $1 million, for the Utility's approximately 455,000 residential customers. That position is consistent with the PUCO Staff's recommendations in its Audit Report and Comments.

## II. ARGUMENT

### A. The Signatory Parties To The Settlement Do Not Represent Diverse Interests Because No Representative Of Residential Customers Agreed That Customers Should Pay DP&L $22.3 Million More For Storm Damage In 2008, 2011, And 2012.

The PUCO Staff attempted to defend the settlement process by stating:

> The settlement discussions were marked by an arm's-length negotiation process. All parties were represented by able counsel and skilled technical advisers, and had ample opportunities to participate in the settlement process. During the pendency of the negotiations, **parties circulated proposals to one another which they thought would best achieve their respective interests and objectives**. In short, everyone had a seat at the bargaining table; no party was excluded.[4]

However, it is impossible to ascertain how the Signatory Parties individually have been able to achieve their respective interests and objectives when they agreed to the Stipulation and then only the Utility defended the Stipulation. Diverse interests are not represented, when only one entity defends the Stipulation. OCC, in part, refused to sign the Stipulation because of the strong positions taken by PUCO Staff in the Audit Report.

[4] PUCO Staff Merit Brief at 3 (July 24, 2014) (emphasis added).

And those positions in the Staff Audit Report have not been refuted by the party who developed those positions –the PUCO Staff.

And simply because all parties "had a seat at the bargaining table" does not mean that the final result contained the Stipulation represents the diverse interests of the parties invited to the bargaining table. To the contrary, the Signatory Parties to the Settlement do not represent diverse interests.[5] The largest segment of DP&L's customer base -- residential customers --is not represented among the signatory parties to the Stipulation.[6] In fact, not a single residential consumer representative signed onto the Stipulation. A Stipulation that does not reflect the interests of residential customers is not diverse, especially when the non-residential stipulators agreed that residential customers will absorb the lion's share of the agreed-to amount of $22.3 million for storm restoration expenditures.[7]

### B. The Settlement—That Permits DP&L To Collect $22.3 Million From Customers For Storm Damage—As A Package, Does Not Benefit Customers Or The Public Interest.

#### 1. Based on PUCO precedent, a Stipulation does not benefit customers and is contrary to the public interest when the settlement amount is substantially more than the amount quantified by any signatory party in the record.

DP&L attempts to allege that two customer benefits result from the Stipulation.[8] One of the two alleged benefits to consumers under the Stipulation is that "as a result of the Stipulation, DP&L will recover over $12 million less than the amount of the expenses

[5] OCC Ex. 16 (Direct Testimony of Tony Yankel Testimony) at 10 (May 23, 2014).

[6] OCC Merit Brief at 5 (July 24, 2014).

[7] OCC Ex. 16 (Direct Testimony of Tony Yankel Testimony) at 10 (May 23, 2014).

[8] DP&L Merit Brief at 5 (July 24, 2014).

that it sought to recapture in this case."[9] But the PUCO has focused on the positions of the signatory parties when deciding whether to approve a settlement.[10] Such focus—in this case—warrants the rejection of the proposed Stipulation.

In its April 2, 2014 Opinion and Order in the AEP storm damage case, the PUCO found that the settlement benefits customers because it provides a lower fixed charge than AEP Ohio proposed in its application in this case.[11] One consideration for this finding was that the settlement's $6 million reduction in the revenue requirement was more than the reduction publicly advocated by any party that signed the Stipulation. Specifically, the PUCO held:

> Upon consideration of the parties' arguments, the Commission finds that the evidence of record indicates that, as a package, the stipulation benefits ratepayers and the public interest. The stipulation recommends that AEP Ohio be authorized to recover incremental major storm costs of $54.8 million, an amount that is substantially lower than the amount quantified by any signatory party in the record.[12]

In that case the PUCO established precedent that if a settlement permits a utility to collect an amount of money for storm damage from customers that is less than the amount that any party signing the settlement quantified—then that stipulation benefits customers and the public interest. In applying that 4-month old precedent consistently, the outcome would be for the PUCO to reject the proposed Stipulation in this case. Conversely, the settlement proposed in this case requires customers to pay substantially more (approximately 18 times more) to have their electric restored than the findings identified in a full audit by a

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[9] DP&L Merit Brief at 5 (July 24, 2014).

[10] PUCO Case No. 12-3255; Opinion and Order (April 2, 2014) at 14.

[11] PUCO Case No. 12-3255; Opinion and Order (April 2, 2014) at 14.

[12] PUCO Case No. 12-3255; Opinion and Order (April 2, 2014) at 14.

signatory party—the PUCO Staff. The PUCO should apply its precedent consistently, which would require the rejection of a settlement that does not benefit customers and is not in the public interest.[13]

Additionally, the PUCO Staff misrepresents the alleged benefits of the Stipulation to consumers by stating "the amount of the recovery recommended in the Stipulation, $22.3 million, is less than DP&L's request and also less than Staff's recommended amount."[14] In its Audit Report, the PUCO Staff recommended that, if recovery is authorized for all storms identified in the application, DP&L should be permitted to recover $23,407,216, **adjusted accordingly for carrying charges**.[15] However, Staff makes no adjustment for carrying charges in its Brief. By virtue of removing carrying charges during the recovery period that DP&L agreed to forego, the PUCO Staff's alternative and much higher recommendation than its primary recommendation (no collection for the entire amount of 2008 and 2011 of storm-related costs) in the Audit Report would still be at least $1.3 million lower than what the PUCO Staff agreed to settle this case. OCC provides the following calculation for the PUCO's consideration:

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|---|---|---|
| 1) | The PUCO Staff Audit Report Recommendation: | $23,407,216 |
| 2) | Carrying Charge % (historic and recovery period): | 24.67%[16] |
| 3) | Carrying Charge $ (historic and recovery period): | $5,774,507 |

[13] OCC Ex. No. 23 (Testimony of Daniel Duann, Ph.D. In Opposition to the Stipulation) at 6-7 (May 24, 2014).

[14] Id.

[15] PUCO Staff Merit Brief at 4 (July 24, 2014) (emphasis added).

[16] OCC Ex. No. 16 (Testimony of Anthony Yankel In Opposition to the Stipulation) at 5 (May 23, 2014). The carrying charge percentage of 24.67% is based on DP&L's proposed total O&M expenses of $29,695,078 and associated carrying charges of $7,356,576.

4) Carrying charges during the recovery period: $2,459,362[17]

5) Adjusted PUCO Staff Audit Report Recommendation: $20,947,854[18]

6) Adjusted PUCO Audit Report Recommendation in Excess of Stipulation: $1,352,146[19]

The fact that the PUCO Staff did not calculate the required carrying charge adjustment is problematic for its argument that the Stipulation benefits customers and is in the public interest because the Stipulation clearly is not. Even at this much lower dollar threshold, the Stipulation cannot be considered to be a benefit to customers or in the public interest; therefore, the PUCO should reject the Stipulation.

**2. A reduction of the capital costs is not a benefit to consumers achieved through the Stipulation.**

DP&L and the PUCO Staff state that the Stipulation benefits customers and is in the public interest. Both reach this conclusion by citing one reason in common – DP&L is not recovering its capital costs incurred restoring service due to the major storms in 2008, 2011, and 2012.[20] DP&L specifically couches this benefit as follows: "DP&L agreed to forego recovery in this case of its capital expenditures to respond to the storms at issue."[21] But DP&L's explanation is not consistent with the facts in this case. It was the PUCO that denied DP&L recovery of its capital costs in this proceeding, and DP&L

[17] The carrying charge during the recovery period is based on the percentage (42.59%) of forecasted carrying cost of $3,120,239 (see page 1 of 1 $PC-3 of DP&L's Application) out of total carrying cost of $7,326,576. This estimated carrying charge during the recovery period should be disallowed, and it is calculated as following: $5,774,507 * 0.4259 = $2,459,362.

[18] Line 1 – Line 4.

[19] $22,300,000 - $20,947,854 = $1,352,146.

[20] DP&L Merit Brief at 5; See also PUCO Staff Merit Brief at 4 (July 24, 2014).

[21] DP&L Merit Brief at 5 (July 24, 2014).

never sought rehearing on that PUCO decision.[22] DP&L did not forego this recovery. The PUCO Staff stated its position as follows:

> Ratepayers and the public interest benefit from this stipulation. Initially, DP&L came in with a request to recover $64,646,644 in storm-related costs. **The Commission then reduced this amount to $37,021,654 by denying DP&L's request to recover capital expenditures**.[23]

The PUCO Staff's position is closer aligned with the facts of the case. Nevertheless, it is disingenuous for any party to suggest that DP&L agreeing (in a settlement) to follow a PUCO Entry is a benefit of the Stipulation. This is particularly true where the Stipulation does not prevent DP&L from later seeking to collect those capital costs from its customers. Those same capital costs will inevitably reappear in the Utility's next distribution rate case application; thus, proving to be no benefit to customers.

#### 3. The Signatory Parties fail to prove that the amount of operation and maintenance costs included in the Stipulation benefit consumers or advances the public interest.

A discussed above, one of the alleged benefits to consumers under the Stipulation is that "as a result of the Stipulation, DP&L will recover over $12 million less than the amount of the expenses that it sought to recover in this case."[24] However, this case is not about what DP&L agreed not to collect from customers, but rather how much additional money will DP&L be collecting from its customers. And that amount must be prudently incurred, just and reasonable.

The Supreme Court of Ohio ("Court") has examined the burden of proof for a utility to show that its expenses to repair storm damage were prudently incurred and

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[22] Entry at 7-8 (October 23, 2012).

[23] PUCO Staff Merit Brief at 4 (July 24, 2014).

[24] DP&L Merit Brief at 5 (July 24, 2014).

reasonable.[25] 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."[26] Instead, **the utility** has to prove a positive– that its expenses had been prudently incurred and reasonable – in order to collect those costs from customers.[27] DP&L did not meet its burden of proof that the major storm restoration costs were prudently incurred and reasonable. Therefore, the Stipulation should be rejected.

### C. The Stipulation Violates Ohio Law And The Regulatory Principle Because DP&L Can Only Collect Just And Reasonable, As Well As, Prudent Major Storm Costs From Customers.

The "black box"[28] nature of the Stipulation in this case necessarily prevents the Signatory Parties from carrying their burden of establishing that the Settlement meets the third prong of the test established in *Consumers' Counsel*. DP&L compounds this problem by relying on misinterpretations of PUCO precedent in an attempt to refute OCC's positions. At no point, however, does DP&L carry its burden of demonstrating that the Stipulation is in accordance with the PUCO statutes and precedent.

[25] *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, ¶8.

[26] Id.

[27] Id.

[28] "Black box" meaning it is impossible to determine how much of the $22.3 million settlement is attributable to any of the individual storm years.

### 1. There is no evidence that imprudent costs and costs that are already being collected in base rates from customers were excluded from the settlement amount that DP&L seeks to charge its customers.

In support of the Stipulation, the PUCO Staff summarily argues that the Stipulation does not violate any important regulatory principle or practice.[29] But the PUCO Staff appears to ignore its own edict when it proceeded to acknowledge that "[p]ermitting recovery of prudently-incurred costs is a longstanding principle in the field of utility regulation, which the [PUCO] recently followed in AEP's storm cost recovery case."[30]

However, the PUCO Staff in accepting DP&L's argument that the costs were prudently incurred has ignored, without any explanation in its Brief, the status of adjustments identified in the Staff's Audit Report. The Staff's adjustments were intended to prevent double recovery or address the prudence of certain costs. The arguments pertaining to the adjustments in question are as follow:

- The Stipulation violates regulatory principles (including PUCO Orders) because the Signatory Parties did not establish that the three-year average of storm O&M costs are not included in the $22.3 million.[31] Absent the three-year adjustment—as the PUCO has recognized—DP&L's customers could pay twice for the same costs (once in base rates and once through the storm cost recovery mechanism). Such double recovery would be a violation regulatory principles and practice.

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[29] PUCO Staff Merit Brief at 5.

[30] PUCO Staff Merit Brief at 5 (citations to DP&L testimony omitted).

[31] OCC Merit Brief at 37-38 (July 24, 2014); see also, *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. 08-1332-EL-AAM, Finding and Order at 1(January 14, 2009). See also DP&L 2008 Storm Cost Deferral Application at 1 (December 26, 2008). See also *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 3 (December 19, 2012).

- The Stipulation violates regulatory principles because the Signatory Parties failed to establish that the $22.3 million excludes O&M costs associated with the non-major storms of 2008.[32] The PUCO specifically limited DP&L's 2008 storm costs deferral request to the costs associated with restoration efforts following the Hurricane Ike event.[33] Therefore, it would be a violation of regulatory principle and practice to disregard a PUCO Entry and allow DP&L to recover such non-Ike restoration costs from its customers.

- The Stipulation violates important regulatory principles because it allows DP&L to collect certain 2011 storm costs despite the Utility's failure to timely seek PUCO authority to defer those costs and the absence of such an authorization for deferral from PUCO.[34]

Certain PUCO Staff Audit Report adjustments were made to prevent double recovery because the costs were already in DP&L's base rates. Those adjustments were as follows:

- The removal of union straight time costs of $820,679 is a necessary adjustment to prevent double recovery of those costs from customers.[35]

- The PUCO Staff made an adjustment for management labor costs which are either straight time costs ($337,137) that are imbedded in base rates or costs that represent over-time incentive payments to management employees ($494,124), neither of which should be collected from customers.[36]

Certain PUCO Staff Audit Report adjustments were made to prevent collection of imprudent costs. Those adjustments were as follows:

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[32] Id. at 38-40.

[33] *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. 08-1332-EL-AAM, Finding and Order at 2 (January 14, 2009).

[34] Id. at 41-43.

[35] Id. at 25-26.

[36] Id. at 26-28.

- The PUCO Staff's Audit found other miscellaneous adjustments ($151,252) that should not be collected from customers.[37]

DP&L similarly failed to establish how the rates are just and reasonable. Instead, the Utility chose to warp OCC arguments without attempting to meet the burden of the three-prong test. Ultimately, that burden was not met. Thus, the PUCO should reject the Stipulation providing for DP&L to collect $22.3 million from customers for storm costs because it violates Ohio law and important regulatory principles and practices that all charges for utility service are just and reasonable.[38] The Signatory Parties, therefore, cannot meet their burden of proof to establish that the $22.3 Settlement is just and reasonable and is in accordance with prior PUCO orders. As such, the Stipulation must be rejected.

**2. DP&L's attempts to manipulate the three-year average calculation are disingenuous.**

DP&L first argues that the three-year average should not be applied to the request in this case because the Utility's base rates do not include any costs associated with major event storms (as defined by Ohio Adm. Code 4901:1-10-01(T)).[39] Contrary to DP&L's litigation position, however, the PUCO has rejected the Utility's argument that its current distribution rates do not include major storm costs. Specifically, the PUCO held "that allowing DP&L to recover the full amount could allow for DP&L to engage in double-recovery for the O&M expense, first from base distribution rates and second from this

[37] Id. at 28-30.

[38] R.C. 4905.22.

[39] DP&L Merit Brief at 7.

proceeding."[40] Therefore, based on the doctrine of collateral estoppel, DP&L is precluded from re-litigating this issue. The doctrine of collateral estoppel states:

> Collateral estoppel may be applied in a civil action to bar the relitigation of issues already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings.[41]

The doctrine of collateral estoppel applies to administrative decisions as well as to judicial decisions.[42] Accordingly, the PUCO should not revisit DP&L's arguments that its current rates lack recovery for major storm damage.

Alternatively, DP&L argues that if a three-year average methodology is employed, then the average should exclude years that include extraordinary storms.[43] DP&L specifically argues that:

> the Staff Report shows that the three-year average that Staff used to calculate the $2,893,949 figure included $6,094,093 in storm expenses from 2005. That amount is a clear outlier. Indeed, the [PUCO] has previously allowed DP&L to recover costs associated with an ice storm in 2005 * * *. [44]

This is peculiar because DP&L also admits that the level of storm restoration costs included in base distribution rates is unknown. DP&L's witness states:

> While the Stipulation in DP&L's 1991 rate case did not identify a specific level of storm cost recovery, there must have been some level of storm costs included in those base rates. As discussed

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[40] *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. 12-2881-EL-AAM, Entry on Rehearing at ¶7 (Feb. 13, 2013).

[41] *Tedesco v. Glenbeigh Hospital of Cleveland* (1989), 1989 Ohio App. LEXIS 899, 903.

[42] See, e.g., *Consumers' Counsel v. Pub. Util. Comm*. (1985), 16 Ohio St.3d 9. The Ohio Supreme Court recently supported the general application of collateral estoppel to Commission proceedings. *Migden-Ostrander v. Public Util. Comm.* (2004), 102 Ohio St.3d 451, 2004-Ohio-3924, ¶25.

[43] DP&L Merit Brief at 8 (July 24, 2014).

[44] DP&L Merit Brief at 12 (July 24, 2014).

> above, rates were established based on a 1991 test year, and there would have been storms that had occurred or were assumed to occur during the test year. **However, since that case was settled via a black box settlement, is it unclear what level of storm cost recovery would have been included in base distribution rates**.[45]

In fact, based on that 1999 unbundling of rates, it remains impossible to determine the level of major storm restoration costs are included in the base distribution rates that are in effect today.

Moreover, at no point has the PUCO qualified the three-year average to exclude major storms. This is because the purpose of the three-year average is to provide a surrogate for unknown costs that are undefined but assumed to be included in base rates to prevent the Utility from collecting the same costs twice.[46] DP&L cites to the AEP ESP case to support its argument,[47] but that case is fundamentally different from this proceeding. In the AEP ESP case, the PUCO set a baseline for a storm tracker into the future, exclusive of major storms.[48] In other words, the PUCO was determining the amount of non-major storms that AEP is likely to experience over the coming years. In this matter, however, the three-year average is used as a proxy for determining what amount is already in DP&L's base rates at the time the storms in question occurred. This is necessary because DP&L's last rate case was another "black box" settlement and that

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[45] DP&L Ex. No. 4 (Direct Testimony of Dona Seger-Lawson) at 3 (December 21, 2014). (Emphasis added).

[46] The three-year average adjustment is important in assuring that customers are not charged twice for the same costs, once in base rates and once in the mechanism for collecting storm costs. ***See*** *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. 12-2281-EL-AAM, Entry on Rehearing at 4 (February 13, 2013).

[47] DP&L Merit Brief at p. 11 (citing *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.

[48] *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, Opinion and Order at 68-69 (August 8, 2012).

amount is unknown.[49] It is quite possible that DP&L's base rates contain significant restoration costs, including major storms. Manipulating the three-year average calculation to exclude major storms would enable DP&L to receive double recovery of these storm restoration costs from its customers. Therefore, any effort by DP&L to manipulate and obfuscate the methodology that the PUCO has implemented -- the three-year average – (not an adjusted three-year average) should be rejected.

### 3. Not all 2008 major storm expenses should be collected from customers.

DP&L argues that all 2008 storm expenses should be recoverable;[50] thereby suggesting that both Hurricane Ike and non-Ike 2008 storm restoration costs less a three-year average should be recoverable.[51] Therefore, in its Application, DP&L asks for $3.6 million in storm restoration costs for eight storms.[52] DP&L witness Nickel's Supplemental Testimony, retroactively applied the 2.5 beta methodology for making a determination of major storms and reduced the non – Ike major storms in 2008 to three storms.[53] Likewise, that reduced the restoration costs that DP&L sought in its Application from $3.6 million to $2.3 million.[54]

Regardless of what calculation is used, the PUCO did not grant DP&L the authority to defer costs related to the non-Ike storms in 2008. This point is also supported by a finding by the PUCO Staff in its Audit Report.[55] Despite DP&L's request

[49] See supra, DP&L Ex. No. 4 (Direct Testimony of Dona Seger-Lawson) at 3.

[50] DP&L Merit Brief at 13 (July 24, 2014).

[51] Tr. Vol. I at 105 (Campbell) (June 3, 2014).

[52] Tr. Vol. I at 25 (Nickel) (June 3, 2014).

[53] Tr. Vol. I at 25 (Nickel) (June 3, 2014).

[54] Tr. Vol. I at 25 (Nickel) (June 3, 2014).

[55] Audit Report at 6 (January 3, 2014).

for authority to defer other 2008 storms, the Utility was only authorized to defer the restoration costs associated with the outages resulting from Hurricane Ike specifically.[56] Therefore, the lack of probability of future recovery should have precluded DP&L from deferring any 2008 storm restoration costs other than Ike-related storm restoration costs. These are costs that customers should not pay. And there is no evidence that these costs are not included in the Stipulation.

#### 4. OCC's Mutual Assistance Adjustment should be adopted by the PUCO to prevent the double-recovery of costs from DP&L's customers.

OCC argued on brief that to prevent a double recovery for DP&L, OCC witness Yankel proposed an adjustment for mutual assistance costs billed by DP&L in 2011 and 2012 to other utilities that are also included in DP&L's base rates. Based on the supporting documentation for the invoiced amounts, Mr. Yankel recommended a $614,099 adjustment to DP&L's collection of major storm restoration costs to prevent the double-recovery of costs from mutual assistance invoices, and costs that are also included in DP&L's base rates.[57] DP&L opposed this adjustment because it was alleged that the Utility incurs incremental labor expense when it provides mutual assistance.[58] However, DP&L could not quantify the amount of incremental labor expenses that allegedly incurred when it participated in mutual assistance endeavors.[59] Furthermore, OCC's proposed adjustment of $614,099 was an attempt to reasonably identify the potential double-recovery of the total $1,472,183 billed for mutual assistance activities in 2011 and

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[56] *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 at paragraph 4 (January 14, 2009).

[57] OCC Initial Brief at 30-34 (July 24, 2014).

[58] DP&L Merit Brief at 16 (July 24, 2014).

[59] Tr. Vol. I at 60-61 (Nickel) (June 3, 2014).

2012. In other words, OCC witness Yankel identified the net amount that DP&L received from mutual assistance. The Utility failed to carry its burden of showing that this unjust and unreasonable amount was excluded from the $22.3 million Settlement.

**5. The Management Labor Adjustment should be adopted by the PUCO to protect customers from double-recovery, and to recognize that the Utility and its shareholders benefit from the storm team incentive payments.**

The PUCO Staff made an adjustment for management labor, which included an adjustment for straight-time management labor cost ($337,137), and an adjustment for overtime paid to management employees as part of the DP&L Storm Incentive Program ($494,124).[60] DP&L only takes exception to the labor costs associated with the storm team incentive plan, because the payments are contractually obligated.

As OCC argued on brief, the DP&L Storm Team Incentive Program is intended to improve storm restoration efficiency.[61] Storm restoration efficiency results in a significant benefit for both customers and for DP&L's management and its shareholders.[62] Nevertheless, DP&L proposes that all charges associated with the storm team incentive compensation program be charged to customers.[63] Given that the Utility also benefits by getting customers back in service sooner, it is unreasonable to expect consumers to pay management over-time to improve storm restoration efficiency for which DP&L and its shareholders receive a financial benefit. Furthermore, in the recent storm costs case of Duke Energy Ohio, Inc., the PUCO disallowed a significant portion of supplemental compensation for salaried employees on the ground that overtime for

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[60] DP&L Ex. No. 2, Supplemental Testimony of Bryce Nickel at 5 (January 17, 2014).

[61] OCC Merit Brief at 26-28 (July 24, 2014).

[62] Tr. Vol. I at 32 (Nickel) (June 3, 2014).

[63] Tr. Vol. I at 31 (Nickel) (June 3, 2014).

salaried employees was not a general practice and was within the company's discretion. Therefore, it was determined an inappropriate expense for recovery. [64] Clearly, these expenses, whether contractually obligated or not, are unreasonable and should not be paid by customers.

#### 6. Utility earnings are a legitimate basis for denying the collection of storm expenses from customers.

DP&L argues that a utility's historic earnings cannot serve as a basis for the denial of the recovery of prudently-incurred expenses.[65] However, in this case, DP&L is seeking recovery of costs incurred in prior periods that were deferred instead of being charged against past revenues (thus causing past returns to increase) in order to charge these storm restoration costs later. OCC does not seek a change in the rates charged by DP&L for 2008, and 2011. Instead, OCC seeks to prevent DP&L from increasing its rates in 2014 and beyond for past major storm-related costs when DP&L has already fully collected these costs in 2008 and 2011 as evidenced by the very high return on equities ("ROEs") earned by DP&L in those years.[66]

DP&L has experienced such high earnings that expensing its major storm restoration costs in 2008 and 2011 would not have reduced the Utility's ROE below its authorized return. While DP&L's ESP Stipulation provided an exception to its distribution rate freeze for storm cost recovery, that stipulation implicitly required that

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[64] 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 at 23 (January 11, 2011).

[65] DP&L Merit Brief at 18-20 (July 24, 2014).

[66] OCC Exhibit 24 (Direct Testimony of Duann, January 30, 2014) at 15-16 and 19-20.

the costs be prudent and reasonable.[67] On cross-examination from the bench, Dr. Duann explained that concept:

> Q. Okay. And the "and reasonable" was the part I was going to get to. Did you apply your earnings test to whether or not the recovery is reasonable? Can you explain for the Bench why you think that's implicit in this language too?
>
> A. Because I think when -- it is my understanding as a regulatory economist and has been involved in public utility regulation for over 20 years, I think it is -- I believe it is in the public interest and it is in the -- a fundamental principle of utility regulation that the utility can only recover prudent and reasonable costs, yeah.[68]

Therefore, it would be unjust and unreasonable to charge DP&L's customers for 2008 and 2011 major storm restoration costs in light of the sustained level of significant earnings during the periods DP&L experienced the major storm activity.

DP&L's argument that its 2008 and 2011 ROEs are irrelevant in this proceeding because there was no precedent cited by OCC is flawed and should be rejected.[69] As discussed By Dr. Duann on cross-examination, the PUCO has an obligation to the public and to DP&L's customers to set just and reasonable rates. As such, it is not necessary for a specific instance or statute to expressly disallow certain expenses as a result of past earnings.[70] The PUCO always has the obligation and the authority, granted by the General Assembly, to set just and reasonable rates for utility services.[71]

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[67] Tr. Vol. III (Duann) at 537 (June 5, 2014).

[68] Tr. Vol. III (Duann) at 537 (June 5, 2014).

[69] DP&L Merit Brief at 19.

[70] Tr. Vol. III (Duann) at 501-502.

[71] Id.

The cases that DP&L proceeds to cite are not only inapposite, but many are nearly one-hundred-years old and only two are binding on the PUCO.[72] Moreover, they all explore the return on equity or rate of return on current and/or future capital expenditures.[73] In this matter, however, DP&L is seeking to charge customers for operating and maintenance ("O&M") costs not capital. More importantly, DP&L is seeking O&M costs, which were assessed in the past (not present or future). The Utility's past rate of return and return on equity for 2008 and 2011 are certainly relevant to determining whether DP&L may charge customers for past costs incurred during those respective years. In fact, the cases cited by DP&L indicate as much – "[a utility is entitled to] a reasonable return on the value of the property used **at the time that it is being used for public service**."[74] The O&M costs at issue in this case were used to restore customer service in 2008 and 2011, a time where DP&L's earnings consistently exceeded the Utility's authorized returns. Allowing DP&L to collect major storm restoration costs from 2008 and 2011 would result in unjust and unreasonable rates, which does not benefit customers and is not in the public interest. Therefore, the PUCO should reject the Stipulation.

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[72] DP&L Merit Brief at 19.

[73] *See*, *Cincinnati v. Public Utilities Com.*, 113 Ohio St. 259, 148 N.E. 817 (1925); *Marietta v. Public Utilities Com.*, 148 Ohio St. 173, 74 N.E.2d 74 (1947); *Edison Light & Power Co. v. Driscoll*, 25 F. Supp. 192 (E.D. Pa 1938); *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Com.*, 292 F. 139 (E.D. Mich. 1923); *Chicago R. Co. v. Illinois Commerce Com.*, 277 F. 970 (E.D. Ill. 1922); *Mississippi Public Service Com. v. Home Tel. Co.*, 236 Miss. 444 (Miss. 1959).

[74] *City of Marietta*, 148 Ohio St. at 184-85 (emphasis added).

### 7. DP&L's arguments on investor reliance and cost of capital are unsupported and flawed.

DP&L's position that a utility can defer expenses only if the expenses are probable for recovery in a future period is relevant only from the financial reporting aspect.[75] The so-called "investor reliance" has no bearing on what the PUCO can and should do in this proceeding. In numerous decisions, the PUCO was very clear that under the regulatory framework in Ohio, DP&L can defer any expense only when it receives an authorization from the PUCO for a change in its accounting methods. Otherwise, there is no reason for DP&L (or other utilities) to file applications with the PUCO for authority to defer major storm-related expenses in 2008, 2011 (very late), and 2012.

Regardless of how the PUCO ruled on applications for deferral authority in the past, it invariably emphasized that its authorization to defer certain expenses is not equivalent to the authorization to collect the deferred expenses.[76] Specifically in the Finding and Order for the 2008 DP&L Deferral authorization, the PUCO stated:[77]

> The determination of the reasonableness of the deferred amounts and the recovery thereof, if any, will be examined and addressed in a future proceeding before the Commission. As the Supreme Court has previously held, *deferrals* do not constitute ratemaking. *See Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305.

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[75] DP&L Merit Brief at 21.

[76] *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. 12-2281EL-AAM,Application at paragraph 9, (August 10, 2012); *see also*, OCC Exhibit 24 (Direct Testimony of Duann, January 30, 2014) at 21-22.

[77] *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. 08-1332-EL-AAM, Finding and Order at paragraph 6 (January 14, 2009); *see also*, OCC Exhibit 24 (Direct Testimony of Duann, January 30, 2014) at 22.

The investors and other third parties can and should make their own decisions on the probable recovery of deferred expenses by DP&L based on their understanding of the PUCO decision authorizing deferrals and other information.[78] They are paid to do that and they are held accountable for their own assessment regarding the probable recovery of the deferred expenses in a future period. But it is unreasonable and bad public policy to restrict the PUCO's ability to set just and reasonable rates by giving any consideration to "investor reliance."

As enumerated in state electric service policies, the electric customers in the state of Ohio are entitled to adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.[79] This is the primary responsibility of the PUCO. Allowing "investor reliance," to control ratemaking, especially when such reliance is not justified, would limit the PUCO's ability to carry out its statutory obligations.

### 8. DP&L's argument that OCC's proposed adjustments in reducing the major storm-related costs would lead to a higher cost of capital is also unsubstantiated and should be rejected.

First of all, DP&L has provided no study, no analysis, or estimation on any increase in its cost of capital in this proceeding. The citations provided in DP&L's Brief are merely conjecture made by its own witness that admittedly has no investing expertise.[80] The cost of capital of a regulated utility is affected by many factors. The regulatory framework is just one of them. There is also no evidence provided by DP&L

[78] OCC Exhibit 24 (Direct Testimony of Duann, January 30, 2014) at 23-24.

[79] Ohio Revised Code 4928.02 (A).

[80] DP&L Merit Brief at 21-22; see also, DP&L Ex. No. 8 (Testimony in Response to Staff Audit Report Michael Barrett) at 1-2 (January 17, 2014); OCC Ex. No. 14 Barrett Deposition at 8 (January 30, 2014).

that a state regulatory commission that sets just and reasonable rates by disallowing imprudent or unreasonable expenses will necessarily be perceived negatively by the capital market or the investors. More importantly, as discussed by Dr. Duann during his cross-examination, a lower cost of capital, if not implemented through other regulatory policies, will not be necessarily be beneficial to the customers.[81] The PUCO can and should consider the effects of its decision on the cost of capital of a regulated utility. But such a consideration should be balanced against the beneficial effects of ensuring that DP&L's customers are not charged for unjust and unreasonable expenses.

**9. DP&L's position that it does not need a PUCO order approving a deferral and there is no deadline to seek a deferral is flawed, unprecedented, and bad public policy that will create rate instability and uncertainty and could be harmful to Ohio's economic development and job creation.**

DP&L supports the Stipulation by arguing that there is no requirement to seek deferral of storm costs prior to seeking collection of those costs.[82] DP&L also argues that there is no deadline by which to file an application for authority to defer certain costs.[83] However, both of these propositions violate regulatory principles and could have very harmful effects on the Utility's customers as well as the economy, negating any alleged public interest served by the proposed Stipulation.

**a. Deferring expenses before receipt of approval for the deferral violates important regulatory principles and is not in the public interest.**

The PUCO is the primary state agency statutorily charged with regulating intrastate electric services provided by DP&L. Under the relevant statutes, the PUCO has

[81] Tr. Vol. III (Duann) at 517-518.

[82] DP&L Merit Brief at 23.

[83] DP&L Merit Brief at 23-24.

broad authority in setting the service terms and rates of utility services, including retail electric services, in the state of Ohio.[84] There is no question that PUCO has the full authority in approving, modifying, or rejecting the application for deferral of expenses and the application for the collection of deferred expenses.[85] Allowing a utility to haphazardly make independent decisions regarding deferral obfuscates the PUCO's statutorily prescribed jurisdiction. Thus, it is inappropriate for a utility to defer expenses without receipt of PUCO deferral authority and does so at its own peril. Moreover, OCC finds it particularly curious that DP&L filed three separate applications requesting PUCO approval to defer storm expenses incurred in 2008, 2011, and 2012 despite arguing that such authority is not necessary.

**b. Failing to timely seek PUCO approval for authority to defer costs violates important regulatory principles and is not in the public interest.**

DP&L's argument that a deferral request may be filed at any time will set a very bad example for utility regulation in Ohio[86] creating significant uncertainty and instability in the Utility's rates.[87] Specifically, if such a proposition were accepted, the rates for service could increase substantially and quickly because-under the position advanced by DP&L—a utility could discover and record previously undisclosed expenses as deferrals and seek collection of those deferred expenses. These unforeseen and unpredicted upward changes in the Utility's prices will make planning more difficult and discourage industrial and commercial customers from moving to or expanding in the state of Ohio. This rate instability will also make the monthly budgeting of income and

[84] Revised Code Chapter 4905.

[85] R.C. 4905.13.

[86] Tr. Vol. III (Duann) at 524.

[87] Id.

expenses for residential customers more difficult. It is also unfair to ask current utility customers to pay for undisclosed expenses associated with providing service in the past. The implications of this unprecedented position could be enormous and the PUCO should consider them carefully before approving the Stipulation that necessarily includes the 2011 storm costs for which DP&L did not timely seek deferral authority.

#### 10. OCC did not sign Stipulations that authorize DP&L to recover its storm expenses from customers.

DP&L argues that OCC signed a series of Stipulations that authorized DP&L to recover its storm expenses for the 2008, 2011, and 2012 storms,[88] but DP&L has over-stated the language of the Stipulations. OCC agrees that under the Stipulations, DP&L can **apply** to recover costs of storm damage.[89] However, applying to recover does not equate to automatic recovery. DP&L has applied for recovery and OCC is well within its rights, under the stipulations, to intervene and challenge the level of recovery that should be authorized.[90]

Therefore, OCC restates below the recommendations to the PUCO for the appropriate level of authorized recovery of 2008, 2011 and 2012 storm costs that were contained in OCC's Merit Brief:

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[88] DP&L Merit Brief at 20.

[89] Id. (Emphasis added).

[90] Tr. Vol. II at 376 (Seger-Lawson) (June 4, 2014).

## V. OCC RECCOMENDATIONS TO THE PUCO

### A. DP&L Should Be Allowed To Collect No More Than $1.26 Million For Major Storm Restoration Costs From Customers.

DP&L should not be permitted to collect any storm costs for years 2008 and 2011 because of (1) the level of DP&L's earnings in those years, and (2) the PUCO did not—and should not—authorize DP&L to defer any storm costs in 2011 and non-major storms in 2008. The PUCO should not approve a settlement that authorizes DP&L to collect any storm restoration costs for those two years.[91] And because the Stipulation is a "black box" the Signatory Parties failed to carry their burden of establishing that the Settlement excludes these costs, which violates PUCO precedent and don't benefit customers.

Additionally, it is unreasonable and unjust for DP&L to be permitted to collect eighteen (18) times the amount of money recommended in the PUCO Staff's Audit Report.[92] Based on the PUCO Staff's Audit Report, comments, and analysis, and OCC's testimony, comments, and analysis, DP&L's customers should pay no more than $1.26 million ($1,259,942) for the storm restoration events requested in DP&L's Application.[93]

### B. In The Alternative, DP&L Should Be Allowed To Collect No More Than $11.3 Million For 2008, 2011, And 2012 Major Storm Restoration Costs From Customers.

As illustrated above, the Stipulation should be rejected. But if the PUCO permits DP&L to collect storm costs for years 2008 and 2011 -- which OCC strongly opposes --

[91] OCC Ex. No. 23 (Testimony of Daniel Duann, Ph.D. In Opposition to the Stipulation) at 6 (May 23, 2014).

[92] Id. ("As I discussed earlier, in its Audit Report, the PUCO Staff recommended that customers pay DP&L a total of $1 million ($1,010,600) plus associated carrying costs of approximately $249,342 for DP&L's storm restoration efforts.").

[93] OCC Ex. No. 23 (Testimony of Daniel Duann, Ph.D. In Opposition to the Stipulation) at 6 (May 23, 2014). (Emphasis added).

then DP&L should only be permitted to collect prudently incurred costs. In that regard, customers should pay no more than $11.3 million as shown below:

| | | | |
|---|---|---|---|
| 1 | DP&L Originally Filed O&M Cost | $29,695,078 | |
| | **Less Adjustments:** | | |
| 2 | 2008 Three Year Average | $ 554,503 | |
| 3 | 2008 Non-Major Storms | $ 3,574,934 | |
| 4 | 2011 Total Major Storm O&M Costs | $10,035,297 | |
| 5 | 2012 Three-Year Average | $ 3,482,366 | |
| 6 | Sub Total Adjustments | $ 7,611,803 | (2+3+4+5) |
| 7 | Appropriate O&M Starting Point | $12,047,979 | (1-6) |
| 8 | Carrying Charge % (historic + recovery period) | 24.67%[94] | |
| 9 | Carrying Charge $ (historic + recovery period) | $ 2,972,236[95] | |
| 10 | Adjusted O&M plus Carrying Charge (historic + recovery period) | $15,020,215 | (7+9) |
| 11 | **Less Carrying Charges during recovery period:** | $ 1,265,875[96] | |
| | **Less Other Staff Adjustments:** | | |
| 12 | Union Straight Time Labor Adjustment: | $ 820,679 | |
| 13 | Management Labor Adjustment: | $ 831,361 | |
| 14 | Out of Period Labor Adjustment: | $ 84,926 | |
| 15 | Specific Invoice Adjustments: | $ 66,326 | |
| **16** | **Less OCC Mutual Assistance Adjustment:** | $ 614,099 | |

[94] OCC Ex. No. 16 (Testimony of Anthony Yankel In Opposition to the Stipulation) at 5 (May 23, 2014). The carrying charge percentage of 24.67% is based on DP&L's proposed total O&M expenses of $29,695,078 and associated carrying charges of $7,356,576.

[95] $12,047,979 x .2467 = $2,972,236.

[96] The carrying charge during the recovery period is based on the percentage (42.59%) of forecasted carrying cost of $3,120,239 (see page 1 of 1 $PC-3 of DP&L's Application) out of total carrying cost of $7,326,576. This estimated carrying charge during the recovery period should be disallowed, and it is calculated as following: $2,972,236 * 0.4259 = $1,265,875.

| | | | |
|---|---|---|---|
| 17 | Subtotal Carrying Charge, Staff and OCC Adjustments: | $ 3,683,266 | (11+12+13+14+15+16) |
| 18 | **Recommended Adjusted Collection from Customers:** | $11,336,948<br>========= | (10-17) |

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

*/s/ Larry S. Sauer*
Melissa R. Yost, Counsel of Record
Deputy Consumers' Counsel
Larry S. Sauer
Michael J. Schuler
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-1291 (Telephone-Yost)
(614) 466-1312 (Telephone-Sauer)
(614) 466-9547 (Telephone-Schuler)
yost@occ.ohio.gov
sauer@occ.ohio.gov
schuler@occ.ohio.gov

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief* by the Office of the Ohio Consumers' Counsel has been served upon those persons listed below via electronic mail this 8th day of August 2014.

*/s/ Larry S. Sauer*
Larry S. Sauer
Assistant Consumers' Counsel

## SERVICE LIST

Ryan O'Rourke
Attorney General's Office
Public Utilities Commission of Ohio
180 East Broad St., 6th Fl.
Columbus, Ohio 43215
Ryan.orourke@puc.state.oh.us

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Charles J. Faruki
Jeffrey S. Sharkey
Faruki Ireland & Cox PLL
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
cfaruki@ficlaw.com
jsharkey@ficlaw.com

AEs: Bryce.mckenney@puc.state.oh.us
Gregory.price@puc.state.oh.us