BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider.	)))	Case No. 12-2881-EL-FAC

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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BY
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For 500,000 residential consumers of The Dayton Power and Light Company ("DP&L" or "Utility") to receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing. In an Opinion and Order issued by the Public Utilities Commission of Ohio ("PUCO") on August 20, 2014 ("August 20 Order"), DP&L's position was adopted that results in an over-collection of more than $4.7 million dollars from Standard Service Offer ("SSO") customers for 2012 fuel costs. The PUCO Staff, the Auditors hired by the PUCO and the Consumers' Counsel all recommended that DP&L's customers be protected from paying for these inappropriate costs related to fuel. The prudency of DP&L's coal procurement decisions is at issue in this case and is significant because the Utility's Standard Service Offer customers pay the costs of fuel (including coal) through DP&L's Fuel Rider. This Application for Rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

Rehearing is sought of the August 20 Order that is unreasonable and unlawful based on the following Assignments of Error:

A. The August 20 Order Is In Error Because It Misinterpreted The Settlement In Case No. 11-5730-EL-FAC to Preclude OCC From Asserting that DP&L's Optimizations 2012-A, H, And I Fail to Qualify as optimizations under DP&L's earlier application in Case No. 09-1012-EL-FAC.

B. The PUCO Erred In Unreasonably And Unlawfully Presuming That DP&L Met Its Burden Of Proof With Respect To The Prudency Of DP&L's Decision Not To Exercise A 2010 Option To Purchase High-Sulfur Coal That Was 'In-The-Money,' And Then By Shifting The Burden Of Proof In The Proceeding To The Challenging Parties Such As OCC.

   1. The August 20 Order is in error because the PUCO misapplied *In re Syracuse*.

   2. Even if the burden shifting paradigm from *Syracuse* is applicable, the test is misapplied in the August 20 Order.

   3. The adoption of DP&L's positions in the August 20 Order were in error because DP&L did not meet its burden of proof.

C. The August 20 Order Finding DP&L To Be Prudent In Purchasing Low-Sulfur Coal In 2010 For Delivery In 2012 Was In Error Because DP&L's Purchase Resulted in Increased Fuel Charges to Its Standard Service Offer Customers.

The basis of this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its August 20 Order.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

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In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider.	)))	Case No. 12-2881-EL-FAC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ohio law protects customers from paying fuel costs that DP&L fails to show were "prudently incurred."[1] DP&L bears the burden of proving that the fuel costs it collected from customers for 2012 were prudently incurred and reasonable.[2] The Auditors retained for this proceeding (Energy Ventures Analysis, Inc. and Larkin and Associates, collectively "Auditors") identified a number of issues with the Utility's Fuel Rider for 2012 and the amounts DP&L's SSO customers were ultimately charged. [3] In this regard, the Auditors recommend a total disallowance of $4.8 million[4] from the Utility's Fuel Rider for 2012 fuel charges paid by DP&L's SSO customers. The Auditors specifically supported a number of adjustments to DP&L's Fuel Rider that either partially adjusted or

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[1] R.C. 4928.143(B)(2)(a).

[2] See *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No 09-872-EL-FAC, et al., 2012 Ohio PUC LEXIS 344 at *12, where the PUCO acknowledges that the purpose of an Fuel Adjustment Clause ("FAC") Audit is to "ensure and verify the FAC costs and expenses as well as to review the prudency of the Companies' transactions."

[3] 2012 Audit Report at 1-16.

[4] Management Disallowance 1 was for $3.4 million dollars (see Case No. 12-2881-EL-FAC, Transcript Volume II at 329 (Smith)) and Management Disallowance No. 2 totaled $1.4 million dollars (see Case No. 12-2881-EL-FAC,Transcript Volume II at 299-300 (Smith)) for a total of $4.8 million.

totally removed several of DP&L's optimization transactions for 2012.[5] The Auditors also recommended a disallowance based on the Utility's imprudent management decisions.

In its August 20 Order, the PUCO agreed with the arguments raised by OCC and the PUCO Staff with respect to two of DP&L's claimed optimizations and disallowed Optimizations 2012-J and 2012-K.[6] The PUCO concluded that these transactions did not meet the definition for optimizations.[7] However, the PUCO found that OCC and the PUCO Staff were precluded from challenging Optimizations A, H, and I by arguing that alternative ratemaking structures could have resulted in a more favorable end-result for customers. The PUCO held that OCC (and the PUCO Staff) could not challenge these transactions because the 2011 DP&L Fuel Stipulation (Case No. 11-5730-EL-FAC) precludes arguments based on the general view that alternative rate-making structures should have been included in the Fuel Rider.[8] But the PUCO misapplied certain provisions of the 2011 Stipulation to support its decision to allow charge customers for Optimizations A, H, and I. These transactions do not meet the definition of an optimization as defined in DP&L's Application for a Fuel Rider.

In addition to allowing Optimizations A, H, and I, the PUCO found, despite the Auditors' recommendation for disallowance, that DP&L's decision not to exercise the 2010 option to purchase high-sulfur coal in October 2010 for delivery in 2012 was

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[5] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC, Audit Report at 6-87 (June 14, 2013) (hereinafter, "2012 Audit Report") . Optimizations are transactions where the Utility improves upon an existing coal position by selling the coal and replacing it with a lower priced coal.

[6] August 20 Order at 9.

[7] *Id.* at 8-9.

[8] *Id.* at 9.

prudent based upon the circumstances known to DP&L at the time.[9] The PUCO first presumed DP&L's actions were prudent, and then determined that OCC and the PUCO Staff did not present adequate evidence to overcome the presumption.[10] But OCC was not required to prove that DP&L was imprudent. The Utility, not the challenger, bears the burden of showing that its fuel costs that are charged to customers are prudent.[11] DP&L did not meet this burden.

Finally, the PUCO found that DP&L's decision to purchase low-sulfur coal in 2010 for delivery in 2012 was prudent. This decision by the Utility resulted in Optimizations 2012-B, 2012-C, 2012-D. Again, in its August 20 Order, the PUCO presumed that DP&L's management decision was prudent "based upon what DP&L knew, or reasonably should have known, at the time of its decision."[12] But the record shows otherwise.[13]

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC is an intervenor in this proceeding, and participated in the hearing in this case.

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[9] *Id.*

[10] August 20 Order at 6-7.

[11] *In Re Duke Energy Ohio, Inc.*. 131 Ohio St.3d 487, 2012 Ohio LEXIS 849, 967 N.E.2d 201, ¶8.

[12] August 20 Order at 7.

[13] Under R.C. 4903.09, the PUCO must base its decision on the facts in the record.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard to modify or abrogate the Order is met here.

III. ARGUMENT

A. The August 20 Order Is In Error Because It Misinterpreted The Settlement In Case No. 11-5730-EL-FAC to Preclude OCC From Asserting that DP&L's Optimizations 2012-A, H, And I Fail to Qualify as optimizations under DP&L's earlier application in Case No. 09-1012-EL-FAC.

1. Optimization 2012-A

The Auditors concluded that one of DP&L's optimizations (Optimization 2012-A) did not qualify as an optimization because the entire transaction took place prior to the effective period of the Fuel Rider.[14] DP&L claimed this optimization based on a 2009

[14] 2012 Audit Report at 4-4. DP&L witness Cooper agreed on cross-examination that the entire optimization transaction in question took place prior to DP&L's Fuel Rider going into effect. See Case No. 12-2881-EL-FAC, Transcript Volume II at 240 (Cooper) (January 28, 2014).

sale of low-sulfur coal for 2012 delivery and a corresponding 2009 purchase of low-sulfur coal at a slightly lower price, also for 2012 delivery.[15] The transaction sale date was December 30, 2009, but DP&L's Application for a Fuel Rider was not approved by the PUCO until December 16, 2009, with the effective date of the new tariffs not earlier than January 1, 2010.[16] As the sale and purchase for Optimization 2012-A occurred in 2009 - before the existence of DP&L's Fuel Rider - only the replacement purchase was in place during the effective period of the Fuel Rider (not the initial purchase/position). The fact that DP&L sold the original coal and purchased the replacement coal prior to January 1, 2010 is undisputed.[17]

OCC and the PUCO Staff supported the Auditors' recommendation and argued that Optimization 2012-A should be returned to SSO customers.[18] It is unreasonable[19] to charge SSO customers for an optimization gain that took place prior to DP&L's optimization program being approved.

In its August 20 Order, the PUCO found that the PUCO Staff and OCC "did not preserve the ability to challenge Optimization 2012-A."[20] To this end, the PUCO concluded that although the parties explicitly reserved the right to challenge the calculations of any optimization of contracts for coal deliveries in 2012, the parties were not permitted to challenge optimizations based on general views that alternative ratemaking structures, alternative contracting approaches taken prior to April 29, 2011, or

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[15] 2012 Audit Report at 4-4.

[16] See Case No. 09-1012-El-FAC, Opinion and Order (November 9, 2011).

[17] 2012 Audit Report Exhibit 6-51 at 6-87.

[18] See OCC's Initial and Reply Briefs.

[19] R.C. 4928.02 mandates that the PUCO should ensure that the cost of electric service for DP&L's customers should be reasonable.

[20] August 20 Order at 8.

alternative hedging strategies, could have resulted in a more favorable end-result for customers.[21] The PUCO found that the arguments raised by the Staff and OCC regarding Optimization 2012-A rest on the premise that alternative ratemaking structures could have been included in the Fuel Rider to exclude optimizations that took place before DP&L's Fuel Rider went into effect.[22] But the PUCO misinterprets and misapplies the 2011 Fuel Stipulation.

The 2011 Stipulation does provide that parties would not be permitted to challenge 2012 optimizations based on certain arguments (i.e. that alternative ratemaking structures, alternative contracting approaches, or alternative hedging strategies, could have resulted in a more favorable end-result for customers). The Stipulation provision does not apply here. OCC does not argue that alternative ratemaking structures or alternative hedging strategies could have resulted in a more favorable end result for customers. Instead, OCC is arguing that Optimization 2012-A is not eligible to qualify as an optimization based on how DP&L itself defined an optimization in its first Fuel Rider Application. Thus, contrary to the PUCO's opinion, the Stipulation provision does not preclude OCC's (and the PUCO Staff's) arguments.

OCC's argument does not apply a new structure, strategy, theory, or rule. Instead, OCC's argument is that DP&L should not be permitted to charge SSO customers for an optimization gain when that transaction took place prior to DP&L's Fuel Rider going into effect. As DP&L agreed in the 2011 Fuel Rider Stipulation, an optimization occurs when

[21] *Id.*

[22] *Id.*

there is an improvement on a then existing coal position.[23] Therefore, no optimization of an existing position took place (as the existing position was the replacement coal purchased on December 30).[24] The existing position as of the Fuel Rider date was the optimized position. Thus, Optimization 2012-A cannot satisfy the Stipulation definition of an optimization transaction. There is no provision in the 2011 DP&L Fuel Stipulation that precludes OCC from making the argument that Optimization 2012-A does not qualify as an optimization.

The optimization calculation for Optimization 2012-A cannot be completed because the sale and purchase of coal took place prior to the establishment of DP&L's Fuel Rider. This leaves only the replacement purchase taking place during the effective period of the Fuel Rider. There was no improvement on a then existing coal position, and thus no optimization. As Optimization 2012-A took place before the existence of DP&L's Fuel Rider, Optimization 2012-A should be disallowed and refunded for the benefit of SSO customers.

2. Optimizations 2012-H and I

The concept of optimizations was presented by DP&L as a win for DP&L and a win for its customers. In this regard, DP&L stated (in its application) that no optimization transaction would occur unless it saved the customers money.[25] However, with respect to Optimizations 2012-H and I, DP&L had coal under contract that was sold

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[23] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 11-5730-EL-FAC, Stipulation and Recommendation at 9 (December 5, 2012). The "then-existing position" means the costs of the coal portfolio as of the time a sale from such coal portfolio is made.

[24] 2012 Audit Report at 4-4.

[25] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 09-1012-El-UNC, Application, at 7 (October 30, 2009).

and replaced with multiple purchases, months, or even a year later. Thus it is virtually impossible to tie the dealings together as an optimization transaction.

In its Application to establish a Fuel Rider, DP&L described an optimization transaction as one where "there is a sale of coal or power and a replacement purchase."[26] Later in the Application, when describing how an optimization would occur, the Utility stated "DP&L would consider selling the original coal and replacing it with the alternative supply."[27] And the Utility claimed that optimizations would occur when DP&L "makes coal sales at either a nominal gain or nominal loss that will be offset by a replacement purchase at a lower price. No optimization transaction will take place unless the net effect of the transaction results in a net decrease of costs to the retail ratepayer."[28]

When coal is sold and replaced with multiple purchases over several months or even up to a year (as was the case with Optimizations 2012-H and I), it is evident that the initial coal was sold without having a replacement coal lined up. This does not coincide with the Utility's stated explanation of an optimization transaction. Consistent with the Auditors' recommendations in this case, OCC (and PUCO Staff) argued that DP&L manufactured Optimizations 2012-H and I by linking several transactions together. This increased costs to the retail customers. This artifice is contrary to the concept DP&L presented in both its Application for a Fuel Rider and Electric Security Plan Application that the PUCO approved. It is unreasonable to charge customers for transactions that are not true "optimizations"–where no transaction will take place unless the net effect of the transaction is a decrease in cost to retail ratepayers.

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[26] *Id.* at 4.

[27] *Id.* at 7.

[28] *Id.*

The PUCO determined in its August 20 Order that "it would be inappropriate to disallow gains from Optimizations 2012-H and 2012-I for similar reasons as Optimization 2012-A; the argument for disallowance is based upon a general view that disallowance would result in a more favorable end result for customers and that alternative rate-making structures should have been included in the Fuel Rider."[29] But this conclusion also misconstrues and misapplies the 2011 Fuel Rider Stipulation.

OCC is not arguing that alternative rate-making structures should have been included in the Fuel Rider. Instead, OCC is arguing that Optimizations 2012-H and I do not qualify as optimizations per the requirements the Utility developed in its Application for a Fuel Rider. This is because these transactions: (1) added costs for -SSO customers, and (2) the sale of the low-sulfur coal does not correlate with the purchase of the replacement coal. OCC's argument is founded upon the definition of an optimization transaction, as presented by DP&L in its Application for a Fuel Rider. Nothing in the 2011 Fuel Stipulation negates the definition of optimizations the Utility developed in its Application for a Fuel Rider. Customers should not be charged for Optimizations H and I.

B. The PUCO Erred In Unreasonably And Unlawfully Presuming That DP&L Met Its Burden Of Proof With Respect To The Prudency Of DP&L's Decision Not To Exercise A 2010 Option To Purchase High-Sulfur Coal That Was 'In-The-Money,' And Then By Shifting The Burden Of Proof In The Proceeding To The Challenging Parties Such As OCC.

The Auditors concluded that DP&L acted imprudently when it failed to exercise an "in-the-money"[30] option to purchase high-sulfur in October 2010 for delivery in

[29] August 20 Order at 9.

[30] The terms "in-the-money" and "out-of-the-money" mean the market alternative is cheaper or more expensive, Case No. 12-2881-EL-FAC, Transcript Volume II at 355 (Medine) (January 28, 2014).

2012.[31] In this regard, the Auditors determined that if a utility has an option that is "in-the-money" it would be imprudent for that utility to fail to exercise the option. OCC and PUCO Staff supported the Auditors' argument.

DP&L failed to present any analysis conducted in 2010 that explained what the Utility did to determine whether the option was "in-the-money." The only documentation DP&L produced to support its decision was direct testimony by witnesses Crusey and Heller. And neither witnesses discussed any steps DP&L took in 2010 (at the time the decision was made) to determine whether the high-sulfur coal option for delivery in 2012 was in-the-money.

Despite the fact that DP&L presented no analysis of what it did at the time to determine whether the option was in-the-money, the PUCO found that DP&L's choice not to exercise the 2010 option contract to purchase high-sulfur coal was prudent.[32] In the August 20 Order, the PUCO not only initially presumed DP&L's decision was prudent, but also found that the Staff or OCC must overcome the presumption of prudence.[33] Despite the fact that the Auditors, OCC and PUCO Staff all presented evidence calling into question the prudency of the Utility's decision not to exercise the 2010 option, the PUCO concluded DP&L was prudent without the Utility actually meeting its burden of proof. This finding is contrary to R.C. 4928.143(B)(2(a) which squarely places the burden on the utility to prove that such costs are reasonably incurred. The onus is not on the challenging parties to show that DP&L's costs were imprudently incurred. The PUCO cannot rewrite the statue. It must apply the law as written.

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[31]2012 Audit Report at 4-12.

[32] August 20 Order at 6.

[33] *Id.*

1. The August 20 Order is in error because the PUCO misapplied *In re Syracuse*..

The PUCO relied on *In re Syracuse Home Utils. Co., Pub. Util. Comm.*[34] as authority for its standard on prudence.[35] In *Syracuse*, the PUCO adopted the guidelines reported in the National Regulatory Research Institute ("NRRI") paper, "The Prudent Investment Test in the 1980s."[36] The first of these guidelines called for utility decisions to be viewed with a presumption of prudence.[37] The test upon which the PUCO relies in finding a presumption of prudence for utility decisions was created for a completely different situation. The paper (that the PUCO relied upon in its *Syracuse* decision) is entitled "The Prudent Investment Test in the 1980s." It was designed to be applied to utility investment decisions, namely, investments in large power plants.[38]

The facts before the PUCO are not analogous. At issue in this proceeding is whether the fuel costs DP&L incurred were prudently incurred. The *Syracuse* burden-shifting paradigm that the PUCO applied to this case is misplaced because there is a law that establishes the burden of proof here. That law is R.C. 4928.143(B)(2)(a). Under it the Utility must show that the cost of fuel used to generate electricity supplied under the standard service offer is prudently incurred.

Further, in *Syracuse*, the PUCO distinguished the burden of proof from the burden of producing evidence.[39] However, the burden of proof requires that the utility produce

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[34] No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at 21 (Dec. 30, 1986).

[35] August 20 Order at 6.

[36] *Id.* [citing "The Prudent Investment Test in the 1980s," NRRI-85-16, (April, 1985)].

[37] *Id*. at 22.

[38] "The Prudent Investment Test in the 1980s," NRRI-85-16, at 62 (April, 1985).

[39] *In the Matter of the Regulation of Purchased Gas Adjustment Clause Contained within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters*, No. 86-12-GA-GCR, 1986 Ohio PUC LEXIS 1, at 22.

evidence to support its position. Regardless of how the PUCO words the burden, it remains with the Utility. By requiring another party to produce evidence rebutting any alleged presumption of prudence, the PUCO is asking the challenger to prove a negative. This approach was rejected by the Supreme Court of Ohio in *In Re Duke Energy Ohio, Inc*.[40] In that case Duke Energy sought reimbursement for roughly $30.7 million in costs associated with damages caused by Hurricane Ike.[41] The PUCO limited Duke's recovery to only $14.1 million (based in part on OCC's evidence). Duke then appealed the decision to the Supreme Court of Ohio ("Supreme Court") and argued that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent."[42] The Supreme Court held that argument by Duke's was "irrelevant because those parties did not bear the burden of proof."[43] The Supreme Court explained that it is the Utility that has to "prove a positive point: that its expenses had been prudently incurred *** [t]he commission did not have to find the negative: that the expenses were imprudent."[44] As a result, the Supreme Court upheld the PUCO's decision to disallow much of the $30 million that Duke sought to recover from customers for storm damage, flatly rejecting any presumption of prudence.[45]

R.C. 4928.143(B)(2)(a) requires that the costs of fuel and purchased power must be shown by a utility to be "prudently incurred." It is therefore not the duty of challenging parties to first prove otherwise.

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[40] *In Re Duke Energy Ohio, Inc*. 131 Ohio St.3d 487, 2012 Ohio LEXIS 849, 967 N.E.2d 201, ¶8.

[41] *Id.* at ¶4.

[42] *Id.* at ¶9.

[43] *Id.*

[44] Id. at ¶8.

[45] *Id.* at ¶6.

2. Even if the burden shifting paradigm from *Syracuse* is applicable, the test is misapplied in the August 20 Order.

According to PUCO case law, challengers must produce evidence to rebut the presumption. In *Syracuse*, the PUCO decided that a party must do more than disagree in order to rebut the presumption that utility decisions are prudent.[46] Conclusory statements and unsubstantiated inferences were not enough to shift the burden of producing evidence back to the Utility.[47] Yet, precedent does not require a high standard of proof to invalidate the presumption of prudence. Challengers do not have to prove that the Utility's decisions were imprudent.[48] PUCO precedent only requires challengers to "go forward with some concrete evidence supporting their position."[49] Parties merely have "to provide enough evidence of potential imprudence to rebut the presumption."[50] These cases establish a low standard of proof to rebut the presumption. This standard was met by the Auditors, OCC, and the PUCO Staff.

The Auditors, OCC, and the PUCO Staff all raised arguments (and presented evidence) with respect to DP&L's decision not to exercise the 2010 option. To this end, the Auditors concluded that DP&L acted imprudently when it failed to exercise an "in-the-money" option to purchase high-sulfur coal in October 2010 for delivery in

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[46] *Syracuse* at 22-23.

[47] *Id.*

[48] *In the Matter of the Regulation of the Electric Fuel Component*, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, at 65 (July 16, 1987).

[49] *In the Matter of the Investigation into Perry*, Pub. Util. Comm. No. 85-521-EL-COI, 1988 Ohio PUC LEXIS 1269, at 21 (Jan. 12, 1988).

[50] In the Matter of the Regulation of the Electric Fuel Component, Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, at 65 (July 16, 1987). (Emphasis added).

2012.[51] The Auditors determined that if a utility has an option that is “in-the-money”[52] it would be imprudent for that utility to fail to exercise the option.[53] The Auditors also found that DP&L’s decision to purchase one million tons of low-sulfur coal in the last four months of 2010 was imprudent because the low sulfur coal would not have been needed if the high-sulfur coal option would have been exercised.[54] These were not conclusory statements made by the Auditors. In this regard, the Audit Report explains in detail why DP&L’s failure to exercise the option cost customers money and was imprudent.[55]

In addition, OCC (and the PUCO Staff) argued, and demonstrated, that the Utility conducted no analysis in 2010 that supports its position (now) that the option was out-of-the-money. OCC pointed out that DP&L’s after-the-fact analysis was lacking as the Utility failed to consider adjustments for sulfur dioxide, transportation costs, and operation costs of the scrubbers when making its decision not to exercise the option. This lack of analysis is significant and relevant. As one of the Auditors explained, “the value of the sulfur to the company is actually based upon the variable operating costs of the scrubber as a function of the sulfur content.”[56] This Auditor went on to point out that the variable operating cost due to a half pound difference in SO_2 is not irrelevant. “It’s something that one would evaluate in a prudent position.”[57]

[51] 2012 Audit Report at 4-12.

[52] The terms “in-the-money” and “out-of-the-money” mean the market alternative is cheaper or more expensive, Case No. 12-2881-EL-FAC, Transcript Volume II at 355 (Medine) (January 28, 2014).

[53] 2012 Audit Report at 4-12.

[54] 2012 Audit Report at 1-9.

[55] *Id.*

[56] Transcript Volume II (Medine) at 357.

[57] Transcript Volume II (Medine) at 358.

A low standard of proof to rebut the presumption of prudence provides the Utility and the PUCO with information about each party's concerns with the case. The parties must rebut the presumption by providing some evidence, and the Utility can then provide proof as to why its decisions were reasonable.[58]

In this case, the PUCO presumed that DP&L's decision that a 2010 option was 'not in-the-money' was prudent. The PUCO then found that the Auditors, OCC, and the PUCO Staff did not successfully rebut that presumption. But the evidence presented in this case and the Auditors' own conclusions that DP&L did not act prudently should have been enough to rebut the presumption of prudence, especially given the low threshold. Indeed, the PUCO very recently held that an Auditor's report alone was "sufficient evidence to overcome the presumption that [a utility's] management decisions were prudent."[59] And the Supreme Court of Ohio has held that "[a] presumption is not to have the effect of shifting the burden of proof onto the opposite party, but merely imposes a burden of going forward with evidence to meet the presumption."[60] The PUCO's decision effectively places the burden of proof on the challenging parties. This is wrong.

The PUCO's decision fails to acknowledge that DP&L made the decision not to exercise the contract without evaluating all of the costs associated with the option contract. Instead, the PUCO states that it was "not persuaded that these adjustments would have overcome the price difference to put the option in-the-money."[61] The point

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[58] *In the Matter of the Regulation of the Electric Fuel Component,* Pub. Util. Comm. No. 86-05-EL-EFC, 1987 Ohio PUC LEXIS 69, at 65 (July 16, 1987).

[59] *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 11-5201-EL-RDR, Opinion and Order at 21 (August 7, 2013).

[60] *Evans v. National Life & Acci. Ins. Co.*, 22 Ohio St. 3d 87, 90 (Ohio 1986).

[61] August 20 Order at 6.

that is missed in this finding is that DP&L failed to even consider these factors in its analysis. And DP&L failed to demonstrate that these factors would not have overcome the price difference to put the option in-the-money. The PUCO's August 20 Order unreasonably puts the onus on the challengers to conduct the analysis DP&L should have completed in 2010 when it made the decision not to exercise the option.

The challengers do not bear the burden to prove imprudence. The Utility bears the burden to prove its decisions were prudent. And even if the PUCO shifts the burden to the challengers, the threshold of proof that challengers face is low. Challengers must only provide enough evidence of potential imprudence to rebut the presumption. Thus, the Auditors, OCC, and PUCO Staff provided enough evidence to establish potential imprudence, as even the PUCO acknowledged that DP&L's analysis did not include certain factors.[62] The burden then remains with the Utility to provide evidence as to why its decisions were prudent. DP&L did not meet this burden.

3. The adoption of DP&L's positions in the August 20 Order were in error because DP&L did not meet its burden of proof.

R.C. 4928.143(B)(2)(a), provides that the PUCO may authorize an electric utility to collect from customers the utility's prudently incurred cost of fuel. In addition, one of the policy provisions of R.C. 4928.02 is that the PUCO must ensure that reasonably priced retail electric service is available to customers in Ohio.[63]

The burden of proof in this case is set-forth in R.C. 4928.143(C)(1). That law provides that the burden of proof in an Electric Security Plan proceeding ("ESP") shall be

[62] August 20 Order at 6.

[63] R.C. 4928.02.

on the utility. Because this Fuel Adjustment Clause proceeding originated from the Utility's ESP case, the burden of proof remains with DP&L.

The PUCO's rules are consistent with law. In this regard, the Ohio Adm. Code mandates that:

> Each electric utility for which the commission has approved an electric security plan (ESP) which includes automatic adjustments under division (B)(2)(a) of section 4928.143 of the Revised Code shall file for such adjustments in accordance with the provisions of this rule. [64]
>
> ***
>
> (C) On an annual basis, the prudence of the costs incurred and recovered through quarterly adjustments shall be reviewed in a separate proceeding outside of the automatic recovery provision of the electric utility's ESP. **The electric utility shall demonstrate that the costs were prudently incurred** as required under division (B)(2)(a) of section 4928.143 of the Revised Code and, if a significant change in costs has incurred, include an analysis comparing the electric utility's resource and/or environmental compliance strategy with supply and demand-side alternatives. The process and timeframes for that separate proceeding shall be set by order of the commission, the legal director, deputy legal director, or attorney examiner.[65] (Emphasis added).

Thus, it is clear that Ohio law and the PUCO's rules mandate that the burden of proof for automatically recoverable costs, like fuel costs, is on the Utility. And only those costs that are proven by the Utility to be prudently incurred and reasonable may be collected from customers.

The PUCO has previously held that the lack of adequate documentation regarding a decision undergoing a prudence review raises serious doubts about a decision's

[64] Ohio Adm. Code 4901:1-35-09(A).

[65] Ohio Adm. Code 4901:1-35-09(C).

prudence.[66] In this proceeding, the only documentation DP&L produced to support its 2010 decision were the direct testimonies of Mr. Crusey and Mr. Heller. But there was no testimony as to any steps DP&L took in 2010 to determine whether the high-sulfur coal option for delivery in 2012 was in-the-money. Neither Witnesses offered documents discussing the analysis or any supplier response to a Request for Proposal soliciting market offers. Nor did DP&L witness Crusey offer any documents related to any analysis of the contract option available to DP&L versus the then market price of high-sulfur coal.[67] The only evidence witness Crusey offered to support DP&L's decision not to exercise the option in the contract was an after the fact "analysis" Mr. Crusey conducted for the purpose of his testimony in this case.[68] And this analysis was severely lacking.

As noted above, DP&L did not take into account adjustments for SO_2 or transportation costs. The PUCO was not persuaded that these adjustments would have put the option in-the-money[69] despite the fact that the Auditor testified that both of these factors can influence the price of coal.[70] Specifically, Auditor Emily Medine testified that "when you are looking at two coals with different Btu contents, you absolutely must take into account transportation costs."[71] Thus, it is logical to surmise that a prudent analysis should have taken these factors into account. The PUCO could only conclude in

[66] See, e.g., *In the Matter of the Regulation of the Elec. Fuel Component Contained Within the Rate Schedules of the Cleveland Elec. Illum. Co. & Related Matters*, Pub. Util. Comm. No. 91-108-EL-EFC, 1992 WL 127211260 (Feb. 20, 1992) ("adequate documentation" is required in order to review the prudence of a utility's business decisions).

[67] OCC Initial Brief at 13-14.

[68] *Id*. at 31. DP&L Exhibit 1.

[69] August 20 Order at 6.

[70] Case No. 12-2881-EL-FAC, Transcript Vol. II at 344-3445 and 347 (Medine) (January 28, 2014).

[71] *Id*. at 347.

its August 20 Order that adjusting for transportation costs "may" not have made any difference at all.[72] But the Auditor's testimony (and the Audit Report) conclude that transportation costs influence the price of coal and must be taken into account.[73] It is not the burden of the challenging parties to complete the analysis DP&L should have completed in 2010. DP&L, not the challenging parties, had the burden of demonstrating that it (1) took these factors into account in its analysis and (2) that the option was still not in-the-money (even when considering these factors). It did neither.

The PUCO found that DP&L's decision was prudent "based upon the circumstances known to DP&L at the time."[74] But DP&L failed to establish what it considered in 2010 to determine the option was out-of-the-money. Specifically, Mr. Crusey contends that at the end of October, when DP&L made the decision not to exercise the option for the high-sulfur coal, DP&L reviewed the market prices for coal, and concluded that the option was "not in-the-money."[75] But Mr. Crusey offered no record of any analysis DP&L actually conducted in 2010 to support his contention. The only evidence witness Crusey offered to support DP&L's decision not to exercise the option in the contract was an "analysis" Mr. Crusey conducted for the purpose of his testimony in this case.[76] DP&L could not have met its burden by simply looking at the market prices for coal and conducting no analysis. The PUCO should have found that that DP&L did not meet this burden because it failed to demonstrate that it completed any analysis to determine whether or not the option was in-the-money.

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[72] August 20 Order at 6.

[73] Case No. 12-2881-EL-FAC, Transcript Vol. II at 344-3445 and 347 (Medine) (January 28, 2014).

[74] August 20 Order at 6.

[75] Testimony of David Crusey at 32-33, DP&L Exhibit 1.

[76] *Id*. at 31. DP&L Exhibit 1.

C. The August 20 Order Finding DP&L To Be Prudent In Purchasing Low-Sulfur Coal In 2010 For Delivery In 2012 Was In Error Because DP&L's Purchase Resulted in Increased Fuel Charges to Its Standard Service Offer Customers.

The PUCO found that DP&L's decision to purchase low-sulfur coal in 2010 for delivery in 2012 was prudent.[77] The PUCO determined that DP&L demonstrated that it could not have reasonably known that it would be capable of burning as much high-sulfur coal in 2012 as it was ultimately able to burn.[78] But the record shows otherwise.

For example, OCC demonstrated that in the last four months of 2010, DP&L chose to contract for almost twice the percentage of its low-sulfur coal needs (85 percent) as its high-sulfur coal needs (44 percent), even though from 2008 through 2012 the Utility was spending upwards of $65 million on capital projects in order to continually increase the amount of lower-priced high-sulfur coal it could burn.[79] Because of the large capital expenditures dedicated to increasing high-sulfur coal usage at the generating facilities, it is logical to surmise that the percentage of high-sulfur coal burn would have increased in 2012 beyond the conservative levels forecasted in 2010.

And the PUCO Staff explained that the evidence showed that DP&L was not seriously pursuing high-sulfur coal.[80] DP&L did not solicit bids to determine the market price for high-sulfur coal, which is the standard procedure in the industry.[81] And DP&L did not contract with any other suppliers at that time to fill its open high-sulfur coal

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[77] August 20 Order at 6.

[78] *Id*. at 7.

[79] DP&L Initial Brief at 18.

[80] Staff Initial Brief at 6.

[81] *Id*.

position to hedge target levels.[82] Evidence showed that DP&L had a financial incentive to maximize the purchase of low-sulfur coal. Without purchasing low-sulfur coal that DP&L could later resell and replace with a high-sulfur coal for the generating plants to eventually burn, there would have been virtually no optimization gains for 2012.[83]

Despite this evidence, the PUCO determined that DP&L could not have reasonably known that it would be capable of burning as much high-sulfur coal in 2012 as it was ultimately able to burn. The record shows otherwise. DP&L's imprudent decision disadvantaged customers because it purchased (and ultimately charged customers for) more expensive low-sulfur coal in 2010, instead of exercising the high-sulfur option contract in 2010. The evidence presented in this case supports the Auditors' recommendation for disallowance. Rehearing on this issue is appropriate.

IV. CONCLUSION

This proceeding is significant for DP&L's customers, as customers are charged for DP&L's fuel costs. The law requires that customers should only be charged those costs that are prudently incurred. The PUCO's August 20 Order will result in $4.7 million dollars of charges to DP&L's SSO customers that are unjust and unreasonable. Accordingly, rehearing is appropriate to protect customers from paying these unwarranted charges.

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[82] Staff Initial Brief at 7.

[83] Transcript Volume I at 83.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 19th day of September 2014.

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