BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs.	))))	Case No. 12-3062-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case No. 12-3266-EL-AAM

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Faruki, Ireland, & Cox, PLL, by Jeffrey S. Sharkey, 500 Courthouse Plaza, S.W., 10 Ludlow Street, Dayton, Ohio 45402, as well as Judi L. Sobecki and Joseph Strines, 1065 Woodman Drive, Dayton, Ohio 45432, on behalf of The Dayton Power and Light Company.

Mike DeWine, Ohio Attorney General, by Ryan O'Rourke, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Bruce J. Weston, Ohio Consumers' Counsel, by Melissa Yost, Larry Sauer, and Michael Schuler, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility consumers of The Dayton Power and Light Company.

Taft, Stettinius & Hollister LLP, by Zachary D. Kravitz and Celia Kilgard, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of The Kroger Company.

OPINION:

I. History of the Proceeding

The Dayton Power and Light Company (DP&L or the Company) is a public utility and electric light company as defined in R.C. 4905.02 and 4905.03(A)(3), and is an electric distribution utility as defined in R.C. 4928.01(A)(11) and, as such, is subject to the jurisdiction of this Commission.

On June 24, 2009, the Commission modified and approved an application filed by DP&L for a standard service offer (SSO) in the form of an electric security plan (ESP). The ESP, as approved, froze DP&L's distribution base rates through December 31, 2012, subject to DP&L's right to seek the cost of storm damage. *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al. (*ESP I Case*), Opinion and Order (June 24, 2009) at 5-6, 13.

On March 30, 2012, DP&L filed a subsequent application to establish an SSO. However, by the end of 2012, the Commission had not yet authorized DP&L to establish a subsequent SSO. Accordingly, by Entry issued on December 19, 2012, the Commission found that the provisions, terms, and conditions of *ESP I* should continue until a subsequent SSO was authorized. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Entry (December 19, 2012) at 3-4.

On December 21, 2012, DP&L filed its application in this case requesting authority to recover certain storm-related service restoration costs. Through its application, DP&L sought authority to recover storm operation and maintenance (O&M) expenses for all major event storms in 2011 and 2012, as well as certain 2008 storm O&M expenses. The application also sought recovery of the related capital revenue requirements for Hurricane Ike in 2008 and major storms in 2011 and 2012. Additionally, DP&L requested authority to implement a storm cost recovery rider to recover all costs associated with major storms going forward and to defer O&M costs until they are recovered through the rider.

By Entries issued on May 2 and May 23, 2013, the attorney examiner established a comment and reply comment period in this case. Comments were filed by Staff, the Ohio Consumers' Counsel (OCC), and the Kroger Company (Kroger). Reply comments were filed by DP&L, OCC, and Kroger.

By Entry issued on October 23, 2013, the Commission found after reviewing the comments and reply comments that the application may be unjust or unreasonable.

Accordingly, the Commission directed that a hearing be scheduled in this matter pursuant to R.C. 4909.18. Further, the Commission found that this is not the appropriate proceeding for the Commission to authorize DP&L to establish a charge to recover capital expenses related to storm restoration. The Commission determined that recovery of capital costs for storm damage and restoration should be considered in a distribution rate case.

By Entry issued on October 23, 2013, the attorney examiner established a procedural schedule setting this matter for hearing. Subsequently, on December 18, 2013, the attorney examiner granted a motion to continue the procedural schedule. Thereafter, the attorney examiner granted additional motions to continue this matter on February 6, March 7, April 15, and May 9, 2014.

On January 3, 2014, Staff filed a detailed audit of DP&L's storm expenses (Audit Report) in this case. The Audit Report includes a detailed review of the costs proposed for recovery by DP&L in this case (OCC Ex. 1).

On May 1, 2014, a joint stipulation and recommendation (stipulation) was filed by DP&L, Staff, and Kroger (Jt. Ex. 1). DP&L filed the testimony of Dona Seger-Lawson in support of the stipulation (DP&L Ex. 7). On May 23, 2014, OCC filed the testimony of Daniel Duann and Anthony Yankel in opposition to the stipulation (OCC Ex. 23; OCC Ex. 15). Additionally, on May 27, 2014, OCC filed the testimony of David Effron in opposition to the stipulation (OCC Ex. 20). Subsequently, on May 30, 2014, DP&L filed the rebuttal testimony of Greg Campbell (DP&L Ex. 4).

The evidentiary hearing was held in this matter on June 3, 2014, and concluded on June 5, 2014. Following the conclusion of the evidentiary hearing, DP&L, Staff, and OCC filed initial briefs on July 24, 2014. Reply briefs were filed by DP&L and OCC on August 8, 2014.

II. Discussion

A. Summary of the Application

In its application, DP&L requested authority to recover storm O&M expenses for all major event storms in 2011 and 2012, as well as certain 2008 storm O&M expenses. Additionally, the application requested recovery of the related capital revenue requirements for Hurricane Ike in 2008, as well as major storms in 2011 and 2012. DP&L then sought authority to implement a Storm Cost Recovery Rider that would permit DP&L to recover all costs associated with major storms going forward and requested accounting authority to defer O&M costs until they are recovered through the rider. Further, DP&L requested that the Commission grant it accounting authority pursuant to R.C. 4905.13 to defer the 2011 major event storm O&M costs with carrying costs equal to DP&L's cost of debt.

DP&L explained in its application that on September 14, 2008, Hurricane Ike swept through DP&L's service territory, causing extensive damage to DP&L's distribution system facilities. According to DP&L, sustained winds in excess of 80 miles per hour remained in areas for several hours, causing large trees and debris to come into contact with distribution power lines and equipment. Of DP&L's approximate 515,000 customers at the time, DP&L indicated that over 300,000 were without power at the height of the storm. DP&L deployed over 1,700 individuals to restore service. In total, DP&L asserted that 860 distribution poles, 1,291 cutouts, and 336 transformers were damaged. Additionally, DP&L indicated that approximately 25 miles of conductor were damaged and required repair or replacement. Subsequently, on December 26, 2008, DP&L filed an application in Case No. 08-1332-EL-AAM for approval of accounting authority to defer as a regulatory asset the portion of its O&M expenses associated with restoring electric service in the aftermath of Hurricane Ike. The Commission authorized DP&L's deferral application on January 14, 2009. *In re The Dayton Power and Light Co.*, Case No. 08-1332-EL-AAM, (*Ike Deferral*), Finding and Order (Jan. 14, 2009) at 2.

Further, DP&L explained that it experienced five storms in 2011 that exceeded the threshold for designation as major event storms. The first storms occurred in February of 2011, when a major winter storm hit DP&L's service territory. This major storm caused ice accumulations of nearly one inch, which were followed by sustained high winds with gusts up to 44 miles per hour. DP&L deployed more than 1,500 individuals to restore service. DP&L indicated that over 156,000 customers lost power, and DP&L replaced 174 poles, 393 cutouts, and 43,519 feet of conductor. Further, DP&L asserted that it experienced four other major event storms in 2011, which left more than 370,000 customers without power.

Additionally, DP&L's application explained that on June 29, 2012, DP&L experienced unusually high winds resulting from a derecho. This storm contained sustained winds in excess of 58 miles per hour. DP&L asserted that over 185,000 customers were impacted by the derecho. Additionally, a second round of storms moved through DP&L's service territory affecting an additional 40,000 customers. DP&L stated that it replaced 281 poles, 627 cutouts, and 43,774 feet of conductor. Further, on August 10, 2012, as amended on October 19, 2012, DP&L filed an application in Case No. 12-2281-EL-AAM for approval of accounting authority to defer

O&M expenses associated with restoring electric service in the aftermath of the derecho. The Commission authorized DP&L's deferral application on December 19, 2012. *In re The Dayton Power and Light Co.*, Case No. 12-2281-EL-AAM, (*Derecho Deferral*), Finding and Order (Dec. 19, 2012) at 2.

DP&L also requested recovery of the return on rate base, depreciation expense, and taxes on capital expenditures associated with Hurricane Ike, 2011 major event storms, and the 2012 derecho. DP&L asserted in its application that recovery of return on rate base, depreciation expense, and taxes on capital expenditures related to these major event storms would be reasonable because of the significant damage and repair required to restore DP&L's distribution system.[1]

Further, DP&L asserted that to calculate its proposed storm cost recovery rider, DP&L would recover the revenue requirement for the historical period January 2008 through February 2012 over a three-year period. For the initial storm cost recovery rider rate, DP&L would calculate an annual revenue requirement for the most recent 12 month period, plus one-third of the historical revenue requirement. This revenue requirement would also include the projected carrying costs for the current year. DP&L proposed that on a going forward basis, it would apply a carrying charge equal to its cost of debt to any over or under recovered amount. DP&L would then file a true-up rider every December for rates effective March 1st of the following year.

Finally, DP&L asserted that the rate design for the storm cost recovery rider should be based on DP&L's most recent annual distribution revenues exclusive of the customer charge revenues. DP&L indicated that it would take its most recent 12 months of distribution revenue by tariff class and subtract the customer charge revenues for each class. The resulting revenues would then be used to allocate the annual storm revenue requirement across customer class. This would assign each tariff class responsibility for a share of the storm restoration costs in proportion to its share of the base distribution system costs. Finally, each tariff class would be assigned a rate based on that tariff class's billing determinants.

B. Summary of the Stipulation

As stated previously, a stipulation signed by DP&L, Staff, and Kroger was filed on May 1, 2014. However, OCC was not a signatory party to the stipulation. The

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1 By Entry issued on October 23, 2013, the Commission found that recovery of capital costs for storm damage and restoration is an issue that is more appropriate for a distribution rate case. The Commission found that recovery of capital costs should not be considered in this proceeding.

stipulation was intended by the signatory parties to resolve all of the outstanding issues in this proceeding (Jt. Ex. 1 at 1). The stipulation includes, inter alia, the following provisions:

(1) DP&L's recovery for storms in 2008, 2011, and 2012, as identified in DP&L's application, shall be $22.3 million;

(2) DP&L shall recover the $22.3 million amount over one year, after approval of the stipulation by the Commission, and shall accrue no additional carrying costs during recovery;

(3) DP&L shall not recover its capital expenditures associated with the 2008, 2011, and 2012 storms in this case. Nothing prohibits DP&L from seeking recovery of those capital expenditures in a future distribution rate case; and

(4) DP&L will allocate storm recovery costs to residential, non-residential, and private outdoor lighting tariff classes consistent with base distribution revenues from the most recent calendar year. A residential storm rate will be calculated by dividing the storm recovery amount by the historical number of residential customers, times 12 monthly bills to obtain a dollar per customer per bill. A non-residential storm rate will be calculated by dividing the storm recovery amount by the historical number of non-residential customers, times 12 monthly bills to obtain a non-residential dollar per customer per bill. A private outdoor lighting rate will be calculated by dividing the storm recovery amount by the historical number of lamps to obtain a dollar per lamp per month rate. Attachment A to the stipulation contains the rates DP&L will assess beginning the first billing cycle of the first calendar month following Commission approval of the stipulation.

Further, the stipulating parties agree that the stipulation satisfies the three-part test traditionally used by the Commission to consider stipulations. Specifically, the stipulating parties agree that:

(5) The stipulation is a product of lengthy, serious, arms-length bargaining among capable, knowledgeable parties representing diverse interests;

(6) The stipulation does not violate any important regulatory principle or practice; and

(7) The stipulation, as a whole, benefits customers and the public interest, and represents a just and reasonable resolution of all of the issues in this proceeding.

(Jt. Ex. 1 at 1-4.)

C. Consideration of the Stipulation

Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *W. Reserve Tel. Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993); *Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR (Jan. 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities.

Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

The signatory parties agree that the stipulation in this case is a just and reasonable resolution of the issues raised in this proceeding and is the product of lengthy, serious bargaining among knowledgeable and capable parties, representing a wide range of interests (Jt. Ex. 1 at 1; DP&L Ex. 7 at 6-7). DP&L argues that whether a stipulation represents diverse interests is not one of the parts of the three-part test used by the Commission to determine the reasonableness of a stipulation. DP&L asserts that Staff, Kroger, and DP&L are each capable, knowledgeable parties. DP&L witness Dona Seger-Lawson testified that the signatory parties regularly participate in rate proceedings before the Commission, are knowledgeable in regulatory matters, and were represented by experienced, competent counsel. Additionally, Ms. Seger-Lawson testified that all of the parties were invited to participate in settlement discussions and participated in multiple meetings to discuss resolution of the case. (DP&L Ex. 7 at 6-7.) Additionally, DP&L avers that Staff balances the interests of the utility and its customers, and in this case Staff was aware of the arguments advanced by OCC. DP&L argues that the fact that Staff signed the stipulation demonstrates that residential customers were protected.

Staff asserts that settlement discussions were marked by an arms-length negotiation process. Further, Staff avers that all parties were represented by able counsel and skilled technical advisors, and had ample opportunities to participate in the settlement process. Further, Staff argues that OCC's decision not to sign the stipulation does not make it unreasonable.

OCC argues that the stipulation does not represent diverse interests because OCC is the only party in this case that represents residential consumers. OCC witness Anthony J. Yankel testified that residential customers are the largest group of customers impacted by this case, and that residential customers will absorb the majority of any associated revenue requirement. (OCC Ex. 16 at 10.) OCC argues that a stipulation that does not reflect the interests of residential customers is not diverse, especially where the residential customers will absorb the lion's share of the agreed-to amount of $22.3 million for storm restoration expenditures.

Commission Conclusion

The Commission finds that the stipulation is the product of serious bargaining among capable, knowledgeable parties. All of the parties, including OCC, attended multiple meetings to discuss settlement proposals. Further, the parties in this case routinely participate in rate matters before the Commission, are capable and knowledgeable with respect to regulatory matters, and are represented by experienced counsel. Additionally, the signatory parties represent a wide variety of diverse interests. Although OCC did not ultimately sign the stipulation, the interests of residential customers were considered and adequately represented.

Additionally, the Commission notes that we have repeatedly determined that we will not require any single party, including OCC, to agree to a stipulation, in order to meet the first part of the three-part test. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014) at 10; *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 26, citing *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005) at 18, Entry on Rehearing (Mar. 23, 2005) at 7-8. Further, there is no evidence in the record that any class of customers was excluded from the settlement negotiations. *See Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996). Therefore, upon review of the record, the Commission finds that the first prong of the Commission's three-part test for reasonableness has been met.

2. Does the settlement, as a package, benefit ratepayers and the public interest?

The signatory parties submit that, as a package, the stipulation benefits ratepayers and is in the public interest (Jt. Ex. 1 at 1). DP&L argues that the stipulation serves the public interest because it permits DP&L to recover over $12 million less than the amount of the expenses that it sought to recover in this case. DP&L witness Seger-Lawson testified that the signatory parties, for settlement purposes, agreed upon a level of cost recovery that is within the range of amounts that was supported in the record, and was more than $12 million less than the amount that DP&L sought for O&M expenses in this case. Ms. Seger-Lawson testified that the stipulation benefits the public interest by allowing DP&L to recover its prudently-incurred storm expenses, thereby providing a reasonable expectation to the Company going forward that it will be permitted to recover prudently-incurred costs associated with its efforts to restore customers to service as safely, quickly, and efficiently as possible after future storms. (DP&L Ex. 7 at 7.) Additionally, DP&L asserts that it agreed to forego recovery in this case of capital expenditures to respond to the storms at issue.

Staff argues that the stipulation benefits ratepayers and the public interest because the $22.3 million stipulation is significantly less than DP&L's initially requested amount of over $64 million, or DP&L's subsequent request of approximately $37 million. Staff then notes that the Audit Report recommends that DP&L should be permitted to recover $23,407,216. However, the stipulation includes recovery of just $22.3 million, which is less than DP&L's request and the Audit Report's recommended recovery amount. Further, the stipulation prohibits DP&L from accruing carrying charges on this amount during recovery, which further mitigates bill impacts. (Jt. Ex. 1 at 2.)

OCC first argues that the stipulation does not benefit customers or the public interest because it authorizes DP&L to charge its customers 18 times the amount recommended in the Audit Report. OCC witness Dr. Daniel Duann testified that the Audit Report recommends that customers pay DP&L a total of approximately $1 million, plus associated carrying costs of $249,342 for DP&L's storm restoration efforts (OCC Ex. 23 at 6). OCC witness Yankel also testified that DP&L customers should pay no more than $1 million, plus carrying costs, for the 2008, 2011, and 2012 storm restoration expenses. (OCC Ex. 16 at 11). OCC argues that the significant difference between the $22.3 million contained in the stipulation and the approximately $1 million recommended by the Audit Report demonstrates that the stipulation does not serve the public interest. OCC asserts that even if the Commission allows DP&L to collect the total amount described in DP&L's application, minus the Audit Report's adjustments plus associated historical carrying costs, DP&L would still collect no more than $20 million, which is less than the stipulated amount. OCC argues that the stipulation does not benefit the public interest because it will require ratepayers to pay over $21.3 million more than they should be required to pay. (OCC Ex. 23 at 6-7; OCC Ex. 16 at 11-12; OCC Ex. 1.)

Next, OCC asserts that the stipulation harms customers because it may authorize double-recovery of storm restoration costs. OCC notes that DP&L's current distribution rates were established in 1999, using the rates developed in DP&L's 1991 rate case. *See In re The Dayton Power and Light Co.*, Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000); *See also In re The Dayton Power and Light Co.*, Case No. 91-414-EL-AIR, Opinion and Order (Jan. 22, 1992). OCC asserts that the stipulation does not benefit the public interest because it may authorize DP&L to recover storm costs that are already being recovered from customers in DP&L's base distribution rates. Further, OCC argues that the stipulation may permit double-recovery because it does not explicitly state that it deducted the three-year average of major storm restoration costs. OCC notes that the Commission has ordered DP&L to deduct the three-year average of major storm restoration costs. *See Derecho Deferral*, Finding and Order (Dec. 19, 2012) at 3. OCC argues that authorizing a stipulation that permits DP&L to collect double-recovery for storm restoration costs from customers does not serve the public interest.

OCC then asserts that there are numerous additional adjustments that are not explicitly stated in the stipulation, which must be made for the stipulation to serve the public interest. These adjustments include the removal of 2008 non-Ike storm restoration costs, the removal of union straight-time labor costs, the removal of management labor costs, the removal of other miscellaneous costs, and an adjustment for mutual assistance. OCC notes that each of these adjustments was identified in the Audit Report and by OCC witness Yankel (OCC Ex. 1 at 3-8; OCC Ex. 15 at 17-20). OCC witness Duann testified that customers do not receive any benefit from paying DP&L more money than it should collect for restoring electric service after a storm event (OCC Ex. 23 at 5).

Finally, OCC argues that DP&L's historic earnings and returns on equity (ROE) were sufficient to cover the costs of storm restoration efforts without imposing additional costs on customers. OCC argues that DP&L should not be permitted to collect storm costs for years 2008 and 2011 because of DP&L's earnings in those years. OCC witness Dr. Duann used DP&L's Annual Report, as well as its FERC Form 1, to calculate the respective annual ROEs of each of the electric distribution utilities (EDUs) in Ohio during this period. He testified that DP&L had a 20.04 percent ROE in 2008, which was the highest ROE among Ohio's seven major electric utilities. Dr. Duann further testified that even if DP&L had fully expensed the storm costs, its ROE would have been over 18 percent. (OCC Ex. 23 at 6-15). OCC argues that DP&L's high ROE in 2008 indicates that DP&L's revenues from the rates it collected from its customers more than covered all of the O&M costs that it incurred. Since DP&L earned more than enough revenues to cover its O&M costs, OCC asserts that there is no financial need for DP&L to collect any deferred 2008 storm-related O&M expenses from its customers.

DP&L refutes OCC's adjustments, including the manner in which they were calculated. DP&L argues that major storm expenses for 2008 should be recoverable, that the three-year average calculated by OCC witness Yankel for 2008 storms includes unusual and non-recurring storms, that the three-year average calculated by OCC witness Yankel for 2012 includes unusual and non-recurring storms, that mutual assistance should not be excluded from recovery, and that management and labor costs should be recoverable. (DP&L Ex. 7 at 8; Joint Ex. at 2.)

Further, DP&L argues that its returns on equity for 2008 and 2011 are irrelevant to this proceeding. DP&L asserts that utility earnings cannot be a basis for denying recovery of expenses. *See City of Cincinnati v. Pub. Util. Comm.*, 113 Ohio St. 259, 281-82, 148 N.E. 817 (1925); *City of Marietta v. Pub. Utils. Comm.*, 148 Ohio St. 173, 184-85, 74 N.E.2d 74 (1947). DP&L notes that even OCC's witnesses admitted that they were not aware of any precedent supporting their contention that DP&L should be denied recovery of its prudently incurred expenses due to historic earnings (Tr. at 312, 501-503). Additionally, DP&L avers that OCC signed stipulations authorizing DP&L to recover its storm expenses for the 2008, 2011, and 2012 storms (DP&L Ex. 9 at 3; DP&L Ex. 10; DP&L Ex. 12). *ESP I Case*, Opinion and Order (June 24, 2009) at 5-6, 13. Further, DP&L argues that investors rely upon the Commission's precedent of permitting recovery of prudently-incurred storm expenses, and it would be unfair to investors to deny DP&L recovery of its storm expenses based upon DP&L's historic earnings. Not only would this be unfair to investors, but DP&L avers that it would also lead to a higher cost of capital on a forward looking basis. Finally, DP&L argues that its delay in seeking a deferral of 2011 storms is irrelevant because there is no requirement to seek a Commission Order approving a deferral, there is no deadline to seek a deferral, customers were not harmed by DP&L's delay in seeking deferral authority, and carrying costs were saved by customers due to DP&L's delay.

Commission Conclusion

Upon consideration of the parties' arguments, the Commission finds that the evidence of record demonstrates that, as a package, the stipulation benefits ratepayers and the public interest. The stipulation benefits ratepayers and the public interest because it permits DP&L to recover its prudently incurred storm damage expenses in an amount which is less than the amount that DP&L had requested and less than the amount that was recommended in the Staff Audit Report pursuant to a detailed audit of DP&L's storm expenses. Further, the stipulation provides for no recovery of capital expenditures and no additional carrying costs during the period of recovery (Jt. Ex. 1 at 2).

The Commission notes that each party to this proceeding, including OCC, signed a stipulation in the *ESP I Case*, which froze distribution rates but authorized DP&L to seek recovery of storm damage expenses. *ESP I Case*, Stipulation and Recommendation (Feb. 24, 2009) (*ESP 1 Stipulation*); *ESP I Case*, Opinion and Order (June 24, 2009) at 4, 5-6. In light of the *ESP 1 Stipulation*, we reject OCC's argument that we should consider DP&L's historic earnings in this matter. The Commission has long held that a utility's earnings cannot be a basis for denying recovery of prudently incurred expenses. *See City of Cincinnati v. Pub. Util. Comm.*, 113 Ohio St. 259, 281-82, 148 N.E. 817 (1925); *City of Marietta v. Pub. Utils. Comm.*, 148 Ohio St. 173, 184-85, 74 N.E.2d 74 (1947). Therefore, if OCC believed that DP&L earnings should impact DP&L's recovery of storm damage expenses, OCC should have negotiated consideration of that factor as part of the *ESP 1 Stipulation* rather than belatedly raising the issue in this proceeding.

With respect to whether the storm damage expenses were, in fact, prudently incurred, the Supreme Court of Ohio has held that a prudent decision by an electric distribution utility is a decision "which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made." *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993). Additionally, the Commission has previously found that "[p]rudence should be determined in a retrospective, factual inquiry." *In re Syracuse Home Utils. Co.*, Case No. 86-12-GA-GCR, Opinion and Order (Dec. 30, 1986), at 10. Further, we note that DP&L bears the burden of proof in this proceeding. *In re Duke*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶ 8. Nonetheless, although the Companies ultimately bear the burden of proof in this proceeding, the Commission should presume that the Company's management decisions were prudent. We emphasize, however, that, as discussed in *Syracuse*, the presumption that a utility's decisions were prudent is rebuttable, and evidence produced by Staff or intervenors may overcome that presumption. *Syracuse*, Opinion and Order (Dec. 30, 1986) at 10.

The Audit Report indicates that Staff conducted a detailed review of transactions related to company labor, outside contractors, material requisitions, internal expense reports, and more. The Audit Report further indicates that Staff used a statistical sampling method to determine an appropriate sample size, and achieved a 95 percent confidence level with a margin of error of four percent. Additionally, the Audit Report notes that Staff conducted a review of every invoice reflecting an amount greater than $50,000. The Audit Report concludes that, if the Commission determines that DP&L should be permitted to recover its expenses, then DP&L should be permitted to recover $23,407,216. (OCC Ex. 1 at 3.)

The Commission finds that the Audit Report, which recommended a reduction in the recovery of storm damages from the $37 million requested amount, plus carrying costs, to approximately $23.4 million, provides sufficient evidence to overcome the presumption that the Company's management decisions were prudent pursuant to *Syracuse*. However, the stipulation recommends that DP&L be authorized to recover incremental major storm costs of only $22.3 million, with no additional carrying costs during the recovery. The Commission finds that the $22.3 million recommended by the stipulation is amply supported by the record of this case and that the Company has met its burden of proof for the recovery of storm damage expenses.

The Commission notes that the $22.3 million recovery for storm damages expenses proposed by the stipulation is entitled to be given substantial weight by the Commission. *Indus. Energy Consumers,* 68 Ohio St.3d at 563. Further, the recovery is fully supported by the evidence in the proceeding. The recommended recovery in the stipulation is fully supported by the Audit Report because the Audit Report contained numerous proposed disallowances but recommended a greater amount for recovery, $23.4 million, than the stipulated amount, $22.3 million (OCC Ex. 1 at 4). Moreover, at the hearing, DP&L's witness Nickel testified that the storms for which DP&L sought recovery of storm damage expenses were three of the four worst storms in Company history and detailed the extensive damage to the Company's distribution system resulting from each storm (Co. Ex. 1 at 2-11, 15).

Moreover, although OCC witness Yankel contended that the Audit Report overstated the amount of prudently incurred storm damage expenses, claiming that the actual amount should be $20,048,167 (OCC Ex. 16 at 11-12), the Commission notes that DP&L witness Nickel also disputed the Audit Report, alleging that the Audit Report actually understated the amount of prudently incurred storm damage expenses (Co. Ex. 2). The Commission finds that the stipulated recovery of $22.3 million represents a reasonable compromise between the conflicting positions and testimony, particularly in light of the fact that the stipulated amount is actually less than what the Audit Report recommended.

The Commission also notes that OCC relies heavily on Staff Comments filed on June 17, 2013, which is referenced in the Audit Report (OCC Ex. 1 at 3). OCC's reliance on the Staff Comments is misplaced. In the Comments, Staff contended that DP&L should not recover storm damage expenses for the 2008 and 2011 storms. Although this may have been the initial position of Staff in this proceeding, Staff abandoned that position when it signed the stipulation in this proceeding recommending recovery of $22.3 million in storm damage expenses. Moreover, nothing in the Staff Comments disputes the actual finding in the Audit Report that DP&L prudently incurred $23.4 million in storm damage expenses for the 2008, 2011 and 2012 storms (OCC Ex. 1 at 4).

Further, we find that OCC's argument that the stipulation authorizes DP&L to engage in double-recovery for storm expenses lacks merit. As OCC notes, DP&L's current distribution rates were established in 1999, using the rates developed in DP&L's 1991 rate case. *See In re The Dayton Power and Light Co.*, Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000); *See also In re The Dayton Power and Light Co.*, Case No. 91-414-EL-AIR, Opinion and Order (Jan. 22, 1992). However, DP&L's 1991 rate case was fully stipulated, and OCC was a signatory party to that stipulation. OCC has not provided any evidence in support it's assertion that storm costs are being recovered in DP&L's base distribution rates.

Finally, the Commission is not persuaded by the testimony of OCC witness Yankel that the stipulation is deficient because it failed to deduct the three-year average of major storm restoration costs (OCC Ex. 15 at 26-30). The purpose of reducing recovery by the three-year average of major storm restoration costs is to ensure that the storm damage expenses are not ordinary expenses which the utility routinely incurs but represent extraordinary expenses. The Commission has not established a methodology for DP&L to reduce storm damage cost recovery by the three-year average of major storm restoration costs; in fact, the proper methodology is highly disputed by the parties (Tr. III at 491-492). Thus, we find that, in the absence of an established methodology ordered by the Commission or agreed to by the parties, the compromise in the amount of cost recovery embedded in the stipulation is sufficient to ensure that DP&L the major storm damage costs for which recovery is authorized are, in fact, extraordinary expenses not normally incurred by the utility. This is supported by the undisputed fact that the three storms in question represent three of the worst four storms in Company history as measured by the number of customers impacted and by cost (Co. Ex. 1 at 4, 11). Accordingly, the Commission finds that the stipulation, as a package, benefits ratepayers and the public interest, pursuant to the second prong of the test for consideration of stipulations.

3. <u>Does the settlement package violate any important regulatory principle or practice?</u>

Finally, the signatory parties agree that the stipulation violates no regulatory principle or practice. DP&L witness Seger-Lawson testified that the stipulation promotes and is consistent with regulatory principles and practices in Ohio, while advancing the state policy set forth in R.C. 4928.02. Ms. Seger-Lawson testified that the stipulation will provide recovery to DP&L for its actual expenditures and will maintain an appropriate expectation for DP&L to respond to storms in the future. (Jt. Ex. 1 at 1-4; DP&L Ex. 7 at 7-8.) Staff argues that the stipulation does not violate any important regulatory principle or practice. Staff asserts that the stipulation is consistent with the Commission's longstanding principle of permitting recovery of prudently-incurred costs. Further, Staff asserts that the stipulation supports the important regulatory practice of providing a reasonable expectation of recovery for storm costs in the future and provides an incentive for DP&L to expeditiously return service to customers after a storm event.

OCC argues that Ohio law and regulatory principles direct that DP&L can collect only just, reasonable, and prudent major storm costs from customers. OCC asserts that the stipulation permits DP&L to collect storm costs that are not just, reasonable, or prudent, therefore OCC believes that the stipulation violates important regulatory principles and practices. OCC's argument that the storm costs are not just, reasonable, or prudent is two-fold: DP&L delayed in requesting deferral authority for storm costs and the stipulation is unduly vague.

First, OCC argues that DP&L should not be permitted to collect storm restoration costs for storms that the Commission did not authorize DP&L to defer. OCC witness Dr. Duann testified that DP&L included in its application numerous non-major storm costs incurred in 2008 that the Commission never authorized DP&L to defer. (OCC Ex. 23 at 16-21.) Further, OCC argues that DP&L waited almost an entire calendar year before filing an application seeking authority to defer its 2011 storm costs. OCC argues that timely seeking deferral authority is a well-established regulatory practice. OCC asserts that Commission precedent demonstrates that prudency requires that a request for cost deferral must be timely filed. *See In Re Ohio-American Water Co.*, Case No. 03-2390-WS-AIR, at al., Staff Report (Sept. 30, 2004) at 20; *See also In re Ohio Edison*, Case No. 04-1931-EL-AAM, Finding and Order (May 18, 2005) at 6. Therefore, OCC argues that since the stipulation includes recovery for expenses that were not deferred pursuant to a timely request for deferral, the stipulation violates important regulatory principles and practices.

Second, OCC argues that the stipulation is too vague for the signatory parties to meet their burden of proof that the settlement does not violate any additionally important regulatory principles or practices. OCC witness Yankel testified that the stipulation does not provide a break-down of the 2008, 2011, and 2012 storm-related O&M costs that make up the $22.3 million that the stipulation permits DP&L to recover from customers (OCC Ex. 15 at 13-15; Tr. Vol. II at 197). OCC notes that the stipulation in this case is a black box settlement, which means that it only provides the total dollar amount agreed to and not the components that comprise the arrived at dollar amount. While OCC witness Yankel conceded that there is nothing wrong or unlawful about a black box settlement, OCC argues that DP&L must still demonstrate that the agreement does not violate any Commission Orders or regulatory principles (OCC Ex. 15 at 13).

OCC asserts that due to the stipulation's nature as a black box settlement, the stipulation lacks sufficient information regarding what has been settled and whether it violates any important regulatory principles. For example, OCC argues that when DP&L sought authority to defer major storm restoration costs in 2008, it included numerous smaller storms in its application. However, the Commission only granted

DP&L authority to defer restoration costs associated with Hurricane Ike. *Ike Deferral*, Finding and Order (Jan. 14, 2009) at 2. OCC avers that the stipulation is too vague to determine if those smaller storm restoration costs that DP&L was not permitted to defer are included in the amount to be collected from customers. OCC asserts that if the smaller 2008 storms are included in the amount to be recovered, which DP&L did not have authority to defer, then the stipulation directly violates a Commission Order. Similarly, OCC argues that if 2011 major storms are included in the amount to be recovered, then the stipulation violates important regulatory principles because DP&L has not received Commission approval to defer those 2011 major-storm costs. Finally, OCC argues that the Commission ordered DP&L to defer 2008 major-storm costs minus the three-year average. Without a break-down of the O&M costs being recovered, the stipulation does not indicate whether it adjusted the 2008 major-storm costs minus the three-year average. Accordingly, OCC argues that the stipulation violates important regulatory principles because it does not provide a break-down of the 2008, 2011, and 2012 storm-related O&M costs to determine if storm costs that are not proper for recovery are being recovered. (OCC Ex. 16 at 14-21, AJY-2.)

DP&L argues that the stipulation does not violate any important regulatory practice or principle. In response to OCC's first argument, DP&L argues that its delay in seeking a deferral of storm costs is irrelevant. DP&L avers that there is no requirement in Ohio law, Commission rules, or Commission precedent requiring that a utility seek Commission approval for a deferral. Further, DP&L asserts that there is no deadline for a utility to seek Commission approval for a deferral and customers were not harmed by DP&L's delay in seeking a deferral of its storm expenses. On the contrary, DP&L argues that customers likely benefitted by DP&L's delay because no carrying costs accrued.

Further, DP&L asserts that the stipulation is not vague because it states that it includes recovery for 2008, 2011, and 2012 storm costs, that it does not include carrying costs, and that it does not include DP&L's capital expenditures. Additionally, DP&L argues that the more important issue for the Commission is whether the $22.3 million is reasonable, which is the very purpose of the Commission's three-part test. DP&L argues that the $22.3 million recovery is reasonable because DP&L should have been permitted to recover at least $30.8 million.

Commission Conclusion

The Commission finds that the stipulation does not violate any important regulatory principle or practice. The Commission agrees that DP&L should have sought authority from the Commission under R.C. 4905.13 prior to, or at least soon after, deferring the 2011 storm damage expenses. However, we find that, under the facts and circumstances presented in the record of this case, the proper remedy for the failure to seek authority from the Commission would be to deny recovery of carrying costs related to the deferred expenses rather than to deny recovery of the storm damage expenses. The record at hearing demonstrates that no carrying costs have been booked for the 2011 storm damage expenses, and the stipulation in this case does, in fact, preclude the accrual of future carrying costs related to the storm damage expense (Tr. Vol. II at 187; OCC Ex. 1 at 3).

Further, we note that DP&L's failure to request deferral authority to recover the storm restoration costs at a later date does not make the incurring of the costs unjust, unreasonable, or imprudent. The Audit Report establishes that DP&L prudently incurred costs to restore service after storm events in 2008, 2011, and 2012. The Audit Report indicates that recovery for those prudently-incurred costs should be approximately $23 million. The stipulation provides for recovery of an amount which is less than the prudently incurred expenses detailed in the Audit Report, consistent with the regulatory principle of permitting a utility to recover its prudently-incurred costs. We note that DP&L's authorized ESP at the time maintained DP&L's right to seek recovery for the cost of storm damage. *ESP I Case*, Opinion and Order (June 24, 2009) at 4-6. Therefore, we find that the fact that DP&L did not seek authority from the Commission prior to booking the deferrals does not mean that the stipulation violates any important regulatory principles and practices.

Additionally, we find no merit to OCC's argument that the stipulation violates important regulatory principles because it is too vague. We note that OCC witness Yankel conceded that there is nothing wrong or unlawful about a black box settlement (OCC Ex. 16 at 13). In this case, the stipulation authorizes DP&L to recover $22.3 million for DP&L's storm costs in 2008, 2011, and 2012. Additionally, the stipulation directs that DP&L shall not recover its capital expenditures associated with the 2008, 2011, and 2012 storms, and prohibits DP&L from accruing any additional carrying costs during recovery. We find that the $22.3 million that the stipulation authorizes DP&L to recover is reasonable and is not inconsistent with Ohio law, Commission rules, or any prior Commission precedent. Accordingly, we find that the stipulation satisfies the third part of the Commission's three-part test for the consideration of stipulations.

Accordingly, the Commission finds that the stipulation should be adopted and approved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) DP&L is a public utility as defined in R.C. 4905.02 and an electric utility as defined in R.C. 4928.01(A)(11), and, as such, is subject to the jurisdiction of this Commission.

(2) On December 21, 2012, DP&L filed an application to recover certain storm restoration costs.

(3) On January 14, 2013, Kroger filed a motion to intervene. Subsequently, on January 18, 2013, OCC filed a motion to intervene. The motions to intervene by Kroger and OCC are hereby granted.

(4) On December 6, 2013, a stipulation was filed by DP&L, Staff, and Kroger, which was intended to resolve all of the issues in this case.

(5) The hearing on this matter was called on June 3, 2014. The hearing concluded on June 5, 2014.

(6) The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

ORDERED, That the Stipulation of the signatory parties be adopted and approved. It is, further,

ORDERED, That DP&L take all necessary steps to carry out the terms of the Stipulation and this Opinion and Order. It is, further,

ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further, ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

GAP/BAM/sc

Entered in the Journal

DEC 17 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary