BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

(1) The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

(2) On August 20, 2014, the Commission issued its Opinion and Order (Order) in this case, finding that DP&L met its burden of proof by demonstrating that it made prudent decisions regarding its fuel optimization program. In accordance with this finding, the Commission found that Optimizations 2012-A, 2012-B, 2012-C, 2012-D, 2012-H, and 2012-I should be allowed. However, the Commission found that Optimizations 2012-J and 2012-K should be disallowed for not meeting the requirements of proper optimization transactions.

(3) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On September 19, 2014, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. Subsequently, on September 29, 2014, DP&L filed a memorandum contra the application for rehearing.

(5) By Entry issued on October 15, 2014, the Commission found that sufficient reason was set forth by OCC in its application for rehearing to warrant further consideration of the matters specified in the application for rehearing.

Accordingly, the Commission granted rehearing for further consideration of the matters raised by OCC.

(6) In its first assignment of error, OCC argues that the Commission's Order is unlawful and unreasonable because it misinterpreted the stipulation in Case No. 11-5730-EL-FAC to preclude OCC from asserting that Optimizations 2012-A, 2012-H, and 2012-I fail to qualify as optimizations under DP&L's optimization program. See Order at 8; *In re The Dayton Power and Light Co.*, Case No. 11-5730-EL-FAC, Stipulation and Recommendation (Dec. 5, 2012) (*2011 Stipulation*) at 8-9. OCC asserts that its arguments regarding disallowing the optimizations are not related to alternative ratemaking structures, alternative contracting approaches, alternative hedging strategies, or obtaining a more favorable end result for customers. OCC argues that Optimizations 2012-A, 2012-H, and 2012-I should be disallowed because they either were not optimization transactions at all or were not properly conducted optimizations. OCC asserts that the Commission should stand by the Auditor's recommendation to disallow Optimization 2012-A because the transaction took place prior to the effective period of the Fuel Rider, and the Commission should disallow Optimizations 2012-H and 2012-I because the replacement purchase was not consistent with a proper optimization transaction.

DP&L opposes OCC's assignment of error and argues that the Commission correctly found that DP&L's treatment of optimization gains was consistent with the prior stipulations. DP&L asserts that OCC's arguments are that alternative ratemaking structures or contracting approaches should have been included in the Fuel Rider. However, DP&L points out that the *2011 Stipulation* precludes any party from arguing for alternative ratemaking structures or contracting approaches to achieve a better end result for customers. *2011 Stipulation* at 8-9. Further, DP&L argues that there were analogous optimizations in which transactions took place prior to 2010 that were reviewed as part of the 2010 audit and approved in the stipulation in that proceeding. See *In re The Dayton Power and Light Co.*, Case No. 09-1012-EL-FAC (*2010 Fuel Rider Case*), Stipulation and Recommendation (Oct. 6, 2011) (*2010 Stipulation*). Further, DP&L asserts that the economic value of these optimization transactions took place during the pendency of the Fuel Rider because the coal was not burned until 2012. Therefore, DP&L asserts that the optimizations should be allowed.

(7) The Commission finds that OCC's first assignment of error lacks merit. We note that we thoroughly addressed this issue in the Order and OCC has raised no new or novel arguments in its application for rehearing. We found in the Order that OCC's argument rests on the premise that alternative ratemaking structures or alternative contracting approaches could have been included in the Fuel Rider to exclude optimization transactions that took place before the Fuel Rider, even though the benefits of those transactions would be realized during the term of the Fuel Rider. However, the Fuel Rider and the stipulations contain no provisions to exclude optimization transactions that took place prior to the beginning of the term of the Fuel Rider that would be realized during the term of the Fuel Rider. See Order at 6, 8; *2011 Stipulation*.

We note that, at the time the Fuel Rider was established, DP&L already had an existing, ongoing fuel procurement operation in place. The Fuel Rider was then established in 2010 and, pursuant to the Fuel Rider, DP&L could engage in optimization transaction where DP&L would make coal sales at either a nominal gain or nominal loss and offset that gain or loss by purchasing replacement coal at a lower price. *In re The Dayton Power and Light Co.*, Case No. 09-1012-EL-FAC, Application (Oct. 30, 2009); (*2010 Fuel Rider Case*), Opinion and Order (Dec. 16, 2009). DP&L's Fuel Rider and optimization program would then be subject to an annual audit for each year that they are effective. After the audit for 2011, the parties agreed to the *2011 Stipulation*, which stated that with respect to optimizations, the signatory parties would not be permitted to challenge the optimizations based on general views that alternative ratemaking structures, alternative contracting approaches taken prior to April 29, 2011, or alternative hedging strategies could have resulted in a more favorable end result for customers. *2011 Stipulation* at 8-9.

We affirm our finding that, in this case, OCC is seeking alternative ratemaking structures or contracting approaches to achieve a more favorable end result for customers. Order at 8. OCC's arguments reflect a desire for the Fuel Rider to contain an alternative structure to exclude transactions that took place before 2010, even if the results of those transactions would not be economically realized until 2012. In the Order, we noted that neither the Fuel Rider, the *2010 Stipulation*, nor the *2011 Stipulation* declared that all of the coal in DP&L's possession on January 1, 2010, would be considered DP&L's existing position for optimization transactions during the term of the Fuel Rider. Additionally, the Fuel Rider and the stipulations failed to establish a timeframe for which replacement purchases must be made. We find that the *2011 Stipulation*, which was signed and agreed to by OCC, precludes parties from arguing that Optimizations 2012-A, 2012-H, and 2012-I should be disallowed because they violate alternative ratemaking structures or contracting approaches.

Further, even if OCC's argument were true that Optimization 2012-A is not an optimization because it took place before the Fuel Rider, potentially 100 percent of the optimization gains would then belong to DP&L. Before the Fuel Rider became effective, DP&L did not recover fuel costs from customers, so returns from transactions that decreased fuel costs on DP&L would potentially belong to DP&L. However, in this case, we find that Optimization 2012-A was a properly conducted optimization pursuant to the Fuel Rider, the *2010 Stipulation*, and the *2011 Stipulation*. Therefore, OCC's assignment of error is denied.

(8) As its second assignment of error, OCC argues that the Commission's Order was unlawful and unreasonable

because the Commission presumed that DP&L's actions were prudent and then shifted the burden of proof to OCC. OCC asserts that the Commission unlawfully concluded that DP&L's actions were prudent and did not require DP&L to meet its burden of proof, in violation of R.C. 4928.143(B)(2)(a). OCC asserts that R.C. 4928.143(B)(2)(a) squarely places the burden of proof on DP&L to prove that its costs were reasonably incurred, and that the Commission misapplied *Syracuse* to shift the burden to the parties to rebut a presumption of prudence on DP&L. *In re Syracuse Home Utils. Co.*, Case No. 86-12-GA-GCR, Opinion and Order (Dec. 30, 1986) at 10 (*Syracuse Order*). OCC then argues that the Supreme Court of Ohio has rejected the Commission's application of *Syracuse* and held that it is the utility that must prove a positive point: that its expenses were prudently incurred. *Duke Energy Ohio, Inc. v. Pub. Util. Comm.*, 131 Ohio St.3d 487, 2012 Ohio LEXIS 849, 967 N.E.2d 201, ¶8.

DP&L argues that the Commission should deny rehearing on OCC's assignment of error. DP&L asserts that the Order was clear that it left the burden of proof with DP&L and that DP&L met its burden. DP&L then notes that OCC chose not to sponsor a witness or present any direct evidence, thus, doing nothing to satisfy any sort of burden of producing evidence. DP&L agrees that OCC did not carry the burden of proof and, thus, did not need to sponsor a witness or present direct evidence, but asserts that OCC's failure to produce any evidence is in stark contrast to the substantial probative evidence presented by DP&L in support of its prudent decision-making. DP&L asserts that it maintained the burden of proof and met its burden in this case.

(9) The Commission finds that OCC's second assignment of error lacks merit. A prudent decision is one 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. Order at 6; *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). We indicated in the Order that DP&L bears the burden of proof in this proceeding, but that DP&L's management decisions would initially be presumed to be prudent. Order at 6; *Syracuse Order* at 10. However, after indicating that we would initially presume DP&L's management decisions to be prudent, we recognized that the presumption that a utility's decisions were prudent is rebuttable, and evidence produced by the parties may overcome the presumption. Order at 6; *Syracuse Order* at 10. In this case, the presumption of prudence was rebutted by the 2012 Audit Report and no presumption of prudence was applied to DP&L. Therefore, DP&L carried the burden of proof and was required to prove the positive: that its actions were what a reasonable person would have done in light of the circumstances known, or that reasonably should have been known, at the time the decision was made. *Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 967 N.E.2d 201, at ¶8.

We find that DP&L met its burden of proof by demonstrating that it acted prudently when it chose not to exercise an option contract in 2010, for coal delivery in 2012, because it reasonably believed the option contract was out-of-the-money. DP&L witness Crusey testified that "[w]hen DP&L made the decision to not exercise the option, [it] reviewed what the market prices were including the well-respected ICAP United report * * * After adjusting the price for Btus, that [market] price was equivalent to $52.07/ton. Thus, the market price was $1.43 lower than the option strike price in the contract" (DP&L Ex. 1 at 32-33, DJC-12). Further, DP&L witness Heller testified that DP&L compared the price of coal under the option ($53.50/ton at 11,800 Btu/lbs.) to the then-current forward price for ILB coal for 2012 delivery ($52.07 adjusted from 11,500 Btu/lb. to 11,800 Btu/lbs.) using the ICAP prices and it showed that the option contract was more expensive than the market price (DP&L Ex. 2 at 22). Accordingly, we find that DP&L met its burden of proof by demonstrating that it prudently chose not to exercise an option that it reasonably believed was out-of-the-money. Further, we find that DP&L demonstrated that any reasonable person could also have concluded that the option was out-of-the-money.

Additionally, we find that DP&L met its burden of proof by demonstrating that it acted prudently when it chose to purchase low-sulfur coal in 2010 for 2012 delivery. DP&L demonstrated that it reasonably believed that it would have an ongoing, permanent need for low-sulfur coal. DP&L witness Crusey testified that, in September 2010, a study was performed by the engineering firm of Black & Veatch that indicated numerous concerns with DP&L attempting to move to 100 percent high-sulfur coal. While the study recommended additional capital expenditures of approximately $9.5 million to allow conversion to 100 percent high-sulfur coal, it identified concerns and presented warnings about potential negative effects that would prevent DP&L from achieving a 100 percent high-sulfur coal burn (DP&L Ex. 1 at 14, DJC-6 at 17-19.) Further, in the Audit Report for 2010, the auditor noted that DP&L's estimates of high-sulfur coal use could be higher only if its capital expenditure efforts turned out to be successful, reflecting the concerns raised in the Black & Veatch report (Staff Ex. 3 at 3-29, n. 36.) Accordingly, we find that DP&L met its burden by demonstrating that its decisions were prudent.

(10) As its third assignment of error, OCC argues that the Commission's Order was unlawful or unreasonable because DP&L's purchase of low-sulfur coal in 2010 for delivery in 2012 resulted in an increase in fuel charges to customers. According to OCC, DP&L should have logically surmised that the percentage of high-sulfur coal burn in 2012 would be higher than the level forecasted in 2010 due to the capital expenditures DP&L was making to burn more high-sulfur coal. Because DP&L did not prepare to burn more high-sulfur coal in 2012, OCC asserts that DP&L actually increased fuel charges on customers.

DP&L asserts that it met its burden of proof by demonstrating that its decision in 2010 to purchase additional tons of low-sulfur coal for delivery in 2012 was prudent because DP&L reasonably believed that it would have an ongoing, permanent need for low-sulfur coal. Further, DP&L asserts that it presented evidence in the form of an engineering study from the firm of Black & Veatch that identified multiple concerns regarding its use of high-sulfur coal (DP&L Ex. 1 at 14, DJC-6 at 17-19.) Therefore, DP&L avers that it did not increase fuel charges on customers.

(11) The Commission finds that OCC's third assignment of error lacks merit. We find that DP&L met its burden of proof by demonstrating that it acted in a manner consistent with what a reasonable person would have done in light of conditions and circumstances that were known at the time or reasonably should have been known. In the Order, we determined that DP&L reasonably believed that it would have an ongoing, permanent need for low-sulfur coal (Order at 6-7.) As we indicated supra, DP&L witness Crusey testified that there were numerous concerns about DP&L's ability to move to 100 percent low-sulfur coal, and these concerns were reflected in both a report by the firm of Black & Veatch and the Audit Report for 2010 (DP&L Ex. 1 at 14, DJC-6 at 17-19; Staff Ex. 3 at 3-29, n. 36.) Thus, we find that DP&L met its burden of proof by demonstrating that its decision to purchase low-sulfur coal in 2010 for delivery in 2012 was prudent. Additionally, we note that OCC's assertion that DP&L's actions were improper because they resulted in an increase in costs to customers erodes the credibility of its previous argument that it is not trying to impose alternative ratemaking structures or contracting approaches to achieve a better end result for customers. As we have also indicated supra, attempting to impose alternative ratemaking structures or contracting approaches to achieve a better end result for customers would violate the terms of the *2011 stipulation*. Accordingly, OCC's assignment of error is denied.

It is, therefore,

ORDERED, That OCC's application for rehearing be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

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Entered in the Journal
MAR 1 1 2015

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Secretary