

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Dayton Power and Light Company for)
Approval of Tariff Changes Associated) Case No. 05-1090-EL-ATA
With a Request to Implement a Storm Cost)
Recovery Rider.)

ENTRY ON REHEARING

The Commission finds:

- (1) The Dayton Power and Light Company (DP&L) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On August 31, 2000, in Case No. 99-1687-EL-AIR, et al., the Commission approved a stipulation (the ETP Stipulation) in DP&L's electric transition plan proceeding. *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Transition Plan Pursuant to Section 4928.3, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al. Opinion and Order (August 31, 2000). The ETP Stipulation provided, *inter alia*, that DP&L's distribution rates be frozen through December 31, 2006. The ETP Stipulation, however, provided that such distribution rates could be adjusted to reflect, among other costs, relief from storm damage expenses. The ETP Stipulation provided that such adjustments be made by an application under Section 4909.18, Revised Code.

On September 3, 2003, in Case No. 02-2779-EL-ATA et al., the Commission approved a stipulation (the RSP Stipulation) which extended DP&L's market development period to December 31, 2005 and provided for a rate stabilization period from January 1, 2006 through December 31, 2008. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (September 2, 2003). In addition, the RSP Stipulation provided, *inter alia*, that DP&L's distribution rates are to remain frozen through December 31, 2008, subject to the adjustments permitted in the ETP Stipulation, including storm damage expenses. Further, the

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RSP Stipulation provided that the allowed adjustments to the distribution rates be made by the filing of an ATA application.

- (3) On September 2, 2005, DP&L filed an application in this proceeding for approval of changes to DP&L's tariffs to implement a new rider to recover storm costs incurred during December 2004 and January 2005. On September 30, 2005, DP&L filed a supplement to its application to correct rates which were not accurately reflected in the proposed Storm Cost Recovery Rider filed on September 2, 2005. On October 20, 2005, DP&L filed a second supplement to its application to reflect the inclusion of three years of depreciation expense and return on rate base rather than one year as reflected in DP&L's original application. Finally, DP&L filed a third supplement to its application on February 22, 2006, to incorporate an incremental cost approach to quantifying extraordinary storm damage expenses. DP&L proposed to recover \$8,601,815.
 - (4) On July 12, 2006, the Commission issued its Finding and Order in this case. In the Finding and Order, the Commission granted DP&L's application to implement a new rider to recover storm costs incurred during December 2004 and January 2005. In addition, the Commission denied motions to intervene filed by OCC and Industrial Energy Users-Ohio.
 - (5) On August 11, 2006, OCC filed an application for rehearing, pursuant to Section 4903.10, Revised Code, alleging that the Finding and Order in this case was unreasonable and unlawful on the following grounds:
 - (a) The Commission erred when it granted DP&L increased rates to collect storm-related costs without adhering to Ohio's rate-making statutes and due process.
 - (b) The Commission abused its discretion when it interpreted prior stipulations in a manner that violates Ohio law.
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- (c) The Commission erred by treating DP&L's application as a filing for a new service and not setting this matter for hearing.
 - (d) The Commission erred when it failed to state specific findings of fact, supported by the record, and failed to state the reasons upon which the conclusions in the Commission's Finding and Order were based, or otherwise failed to comply with Section 4903.09, Revised Code.
 - (e) The Commission erred when it denied OCC's motion to intervene.
- (6) On August 21, 2006, DP&L filed a memorandum contra OCC's application for rehearing.
- (7) In its first assignment of error, OCC argues that the Commission erred when it granted DP&L increased rates to collect storm-related costs without adhering to Ohio's rate-making statutes and due process. Further, in its second assignment of error, OCC argues that the Commission abused its discretion when it interpreted prior stipulations in a manner that violates Ohio law.

In its memorandum contra, DP&L argues that OCC signed the RSP Stipulation, advocated its approval and received the benefit of the rate freeze; therefore, DP&L argues, OCC should be estopped from challenging the RSP Stipulation. Further, DP&L notes that OCC, in its application for rehearing, does not address the fact that the RSP Stipulation expressly provides that the adjustments to the distribution rate freeze should be made through the filing of an "ATA" application. Finally, DP&L argues that the Commission and the Ohio Supreme Court have already ruled that the RSP Stipulation does not violate the law, citing the Commission's approval of the RSP Stipulation in *Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., and the Court's decision to uphold approval of the RSP Stipulation in *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, (2004) 104 Ohio St. 3d 530.

The Commission fully considered these issues in our Finding and Order, issued on July 12, 2006, where we held that the ETP Stipulation and the RSP Stipulation provided for the recovery of storm damage expenses through an application for tariff approval, pursuant to Section 4909.18, Revised Code. In the Finding and Order, at 3-4, we addressed the language of the ETP Stipulation and the RSP Stipulation, noting that:

The ETP stipulation implemented a distribution rate freeze through December 31, 2006. However, the ETP Stipulation provided that, after December 31, 2003, distribution rates could be adjusted to obtain relief from storm damage expenses by an application under Section 4909.18, Revised Code (ETP Stipulation at 3-4). Further, in the RSP Stipulation, the parties agreed to extend the distribution rate freeze through December 31, 2008, subject to the same adjustments provided for in the ETP Stipulation and clarified that the agreed adjustments to the rate freeze should be made through "the filing of an 'ATA' application" rather than through an application for an increase in rates (RSP Stipulation at 12).

Further, we specifically addressed whether the application should have been filed as an application for an increase in rates or as an application for tariff approval, holding that:

OCC's argument that DP&L is required by the Stipulations to comply with the procedural requirements for an application for an increase in rates is inconsistent with the language of the Stipulations, which make it clear that adjustments to the rate freeze may be made by the filing of an application for tariff approval (i.e., an "ATA" proceeding) rather than an application for an increase in rates (i.e., an "AIR" proceeding). It certainly was not intended that the adjustments permitted under the Stipulations would be reviewed in proceedings used for applications for an increase in rates under Chapter 4909, Revised Code.

The OCC was a signatory party to both the ETP Stipulation and the RSP Stipulation. We approved the Stipulations, including the distribution rate freeze, subject to adjustments to recover storm damage expenses, only after a full evidentiary hearing. With respect to the RSP Stipulation, which specified that adjustments to the distribution rate freeze should be made through the filing of an "ATA" application, OCC claimed that the RSP Stipulation, as a package, benefited ratepayers and the public interest. *Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, et al., Post Hearing Merit Brief of the Ohio Consumers' Counsel (filed July 3, 2003) at 12. Moreover, OCC represented to the Commission that the RSP Stipulation did not violate any important regulatory principle. *Id.* at 17-18. If OCC believed that the adjustments to the distribution rate freeze for recovery of storm damage expenses could be made only by an application for an increase in rates rather than through an application for tariff approval, OCC could have and should have raised that issue with the Commission at the time the RSP Stipulation was submitted to the Commission for approval.

Rehearing on this assignment of error should be denied.

- (8) OCC states in its third assignment of error that the Commission erred by treating DP&L's application as a filing for a new service and not setting this matter for hearing. OCC does not cite a specific finding by the Commission that the application is for a new service but argues instead that DP&L had submitted its application for filing as a new service and that the Commission appeared to accept DP&L's position.

In its memorandum contra, DP&L argues that the rider approved by the Finding and Order will be a new rate and that the rate-increase procedures in Section 4909.18, Revised Code, do not apply. DP&L contends that the Supreme Court has established that the Commission can approve a new rate for an old service without implementation of the rate increase procedures contained in Section 4909.18, Revised Code. See, *Cleveland v. Public Utilities Comm'n* (1981), 67 Ohio St. 2d 446, 424 N.E. 2d 561. See also, *Dominion Retail, Inc., v. The Dayton Power and Light Company*, Case No. 03-2405-EL-CSS, Entry on Rehearing (March 23, 2005) at 5 (holding that an ATA filing was an appropriate mechanism to implement a new rate, and that no rate increase application under Section 4909.18, Revised

Code, was required, since the new rate was authorized by DP&L's ETP Stipulation).

However, OCC is mistaken in its belief that the Commission approved the application as a filing for a new service. In the Finding and Order, the Commission explicitly found that the application was filed pursuant to Section 4909.18, Revised Code, and our orders in Case No. 99-1687-EL-AIR, et al., and Case No. 02-2779-EL-ATA, et al. Although DP&L argues that the filing was an application for a new service, it was unnecessary to address this question, and we did not do so. Rehearing on this assignment of error should be denied.

- (9) OCC alleges in its fourth assignment of error that the Commission erred when it failed to state specific findings of fact, supported by the record, and failed to state the reasons upon which the conclusions in the Commission's Finding and Order were based, or otherwise failed to comply with Section 4903.09, Revised Code.

DP&L argues, in its memorandum contra, that OCC's claim is meritless. DP&L notes that the Supreme Court has held that:

The purpose of [Section 4903.09, Revised Code] is to inform interested parties of the reasons for the commission's action and to provide this court with an adequate record in order to determine whether the decision is lawful and reasonable . . . All that is required is that the commission set forth some factual basis and reasoning based thereon in reaching its conclusion.

Migden-Ostrander v. Public Utilities Comm'n (2004), 102 Ohio St. 3d 451, 455.

In the Finding and Order, the Commission found, based upon a review of the application and the pleadings of the parties seeking intervention, that the calculation of the rider was consistent with our orders in Case No. 99-1687-EL-AIR, et al., and Case No. 02-2779-EL-ATA, et al., and that the application did not appear to be unjust or unreasonable, in accordance with Section 4909.18, Revised Code. Further, the Commission, exercising its discretion, determined that a hearing in this

proceeding was not necessary. The Commission notes that the arguments raised by OCC in its pleadings were legal arguments which were thoroughly addressed by the Commission in the Finding and Order. Rehearing on this assignment of error should be denied.

- (10) In its fifth assignment of error, OCC argues that the Commission erred in failing to grant OCC's motion to intervene because OCC met the criteria for intervention set forth at Section 4903.221, Revised Code, and Rules 4901-1-11(A)(2) and 4901-11(B), Ohio Administrative Code.

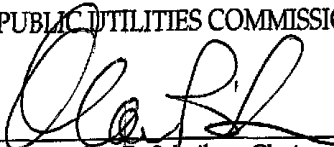
The Commission fully considered this issue in its Finding and Order. OCC has not raised any new arguments in its application for rehearing. Where the Commission does not exercise its discretion to hold a hearing, there is no right to intervene. *Ohio Domestic Violence Network v. Pub. Util. Comm'n* (1994), 70 Ohio St. 3d 311, 315, 638 N.E. 2d 1012, 1017. Moreover, it was not necessary to grant intervention to OCC in order to consider its pleadings in our determination in this application. Rehearing on this assignment of error should be denied.

It is, therefore,


ORDERED, That the application for rehearing filed by the Ohio Consumers' Counsel be denied. It is, further,

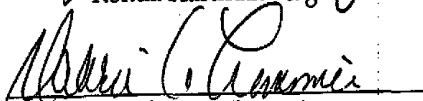
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Judith A. Jones

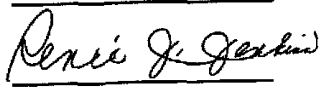

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GAP:ct

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AUG 30 2006


Renee J. Jenkins
Secretary