

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Motion to)	
Modify the June 18, 2008 Opinion and)	Case No. 12-1842-GA-EXM
Order in Case No. 07-1224-GA-EXM)	

**MOTION TO STRIKE PORTIONS OF
THE TESTIMONY OF BRUCE M. HAYES
BY THE OHIO GAS MARKETERS GROUP
AND THE RETAIL ENERGY SUPPLY ASSOCIATION**

Pursuant to Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Ohio Gas Marketers Group ("OGMG") and the Retail Energy Supply Association ("RESA") move to strike portions of the Direct Testimony of Bruce M. Hayes on behalf of the Ohio Consumers' Counsel ("OCC"). The reasons supporting the Motion to Strike Portions of Mr. Haynes' Testimony are contained in the accompanying Memorandum in Support. By making this Motion to Strike, OGMG and RESA do not waive their right to request additional Motions to Strike or raise other objections at the evidentiary hearing in this case.

Respectfully Submitted,



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**MEMORANDUM IN SUPPORT OF
THE MOTION TO STRIKE PORTIONS OF THE
TESTIMONY OF BRUCE M. HAYES**

A. INTRODUCTION

On June 15, 2012, East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) and the Ohio Gas Marketing Group (“OGMG”) filed a Joint Motion to Modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM in accordance with the terms contained in an stipulation signed by DEO, OGMG and the Office of the Consumers’ Counsel (“OCC”). The stipulation was attached to the Joint Motion. OCC filed its Motion to Intervene on August 30, 2012, which was subsequently granted. The Attorney Examiner set a procedural schedule requiring that intervener testimony be filed on or before October 4, 2012. OCC timely filed the Direct Testimony of Bruce M. Hayes on October 4, 2012. Mr. Hayes, in his testimony, neither supports nor opposes the Joint Application although OCC had signed the stipulation attached to the Joint Motion.

The OGMG and the Retail Energy Supply Association (“RESA”) hereby move to strike Attachment B-4 and Questions and Answers 38 through 40 on the grounds that Mr. Hayes seeks to bring into the record information that is inadmissible hearsay and prejudicial.

**B. ATTACHMENT B-4 AND QUESTIONS AND ANSWERS 38 THROUGH 40
SHOULD BE STRICKEN AS INADMISSIBLE HEARSAY**

OCC witness Hayes’ testimony contains four attachments. Attachment B-4 is a Report authored by Ken Costello, which is critical of a variety residential Choice programs in open-access states and the United Kingdom. Mr. Hayes seeks to both comment about the Report and bring the Report in toto into the record in the matter at bar. The Commission should strike Attachment B-4 in its entirety inasmuch as it is hearsay and does not fit into any of the hearsay

exceptions.

Ohio Rule of Evidence 802 reads as follows: “[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.” Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid. R. 801(C). Ohio Rule of Evidence 801(A) defines a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Additionally, Ohio Rule of Evidence 803 provides potential exceptions to the hearsay rule when the declarant is available, and Ohio Rule of Evidence 804 provides exceptions when the declarant is unavailable.

Attachment B-4 should be stricken inasmuch as it is hearsay and does not fit into any of the exceptions under Ohio Rules of Evidence 803 and 804. First, Attachment B-4 meets the definition of hearsay because it is the statement of Ken Costello and it is being offered to prove the truth of the matters asserted by Mr. Costello. The document is clearly a “statement” by Mr. Costello, not Mr. Hayes. Second, the purpose of Exhibit B-4 is to bring into evidence Mr. Costello’s view that residential Choice programs have not benefited residential customers.

Question and Answers 38 through 40 of Mr. Hayes’ testimony provides as follows:

***Q38. DO YOU HAVE ANY OTHER REASON FOR YOUR
RECOMMENDATION THAT THE PUCO SHOULD COLLECT
AND ANALYZE DATA REGARDING THE ELIMINATION OF
A COMPETITIVELY BID DEFAULT OPTION SUCH AS THE
SCO?***

***A38. Yes. The National Regulatory Research Institute (“NRRI”), an
independent research arm for state public utility commissions,***

published a paper by Ken Costello in July of 2011 titled, *Gas Choice: Do Residential Customers Benefit?* ("NRRI Report").

Q39. DOES THE NRRI REPORT OFFER ANY USEFUL INFORMATION FOR THE COMMISSION TO CONSIDER IN THIS CASE?

A39. Yes.

Q40. PLEASE EXPLAIN.

A40. Mr. Costello identifies the following attributes that a Choice market should possess in order for small customers (such as small commercial customers or residential customers) to benefit: (1) a sufficient number of sellers to have workable competition and no collusion, (2) well-informed customers, (3) transparent commodity prices, (4) customer responsiveness to price, (5) low transaction costs for customers to change suppliers, and (6) low entry barriers for new suppliers.

If there is an Exit for non-residential customers, the Commission should continuously monitor the Choice market to assure that the attributes identified by Mr. Costello exist in the Dominion market. Mr. Costello also provides highlights of the Choice markets in several U.S. states including Ohio and Georgia, and the United Kingdom. Mr. Costello also reviewed Choice Programs from the marketer perspective and from the customer perspective. Mr. Costello concludes his report with a section on what the regulators should do, and one of Mr. Costello's recommendations is for the regulator to conduct surveys of gas customers.

Mr. Hayes advocates that the Commission accept the arguments of Mr. Costello in order to make its decision in the matter at bar. Mr. Hayes, as an expert, can certainly express his own view as to what the Commission should do with regard to the issues in this proceeding, but he cannot offer Mr. Costello's report for the truth of its content to support his argument. Mr. Costello must be the witness so that he could be asked the basic questions of (1) how his views apply to commercial customers, (2) how the evidence used in the report on residential Choice programs applies to DEO's commercial Choice program as it exists now, and (3) how it would be changed by the Joint Application.

As noted above there are exceptions to the hearsay rule in Ohio Rules of Evidence 803 and 804, but none apply here. If OCC wants to put Mr. Costello's Report into evidence in this case, it must bring Mr. Costello to testify. To do otherwise would allow admission of inadmissible hearsay.

C. ATTACHMENT B-4 AND QUESTIONS AND ANSWERS 38 THROUGH 40 ARE PREJUDICIAL

As an additional argument, the Commission should strike Attachment B-4 and Questions and Answers 38 through 40 because admission of this evidence would violate Ohio Rule of Evidence 403. Under Evid. R. 403(A), the Commission must not admit evidence, even if is relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. The Costello report, even at first blush, is not relevant. The title of the report is "Gas Choice: Do Residential Customers Benefit? The Joint Application, and its accompanying stipulation, seek no change for the residential Choice customers. In fact, the Joint Application actual delays the ability of the Joint Applicants to even ask for a residential exit program for several years. Assuming for argument sake that there is some tangential relevance, the next question is whether it is prejudicial. Mr. Costello's views is clear; he finds Choice programs – all Choice programs in the US and the United Kingdom – offer small and often negative benefits for residential customers. The Costello report does not address commercial customers, nor does the Report state that residential and commercial choice programs are similar. Thus, what OCC seeks to introduce is a negative report regarding residential Choice even though, in this record, the Joint Applicants seek to clear a decision related only to DEO's commercial Choice program. It would be prejudicial to allow OCC to introduce evidence that is unrelated to the limited scope of the proceeding.

WHEREFORE, OGMG and RESA respectfully request that the Commission grant this Motion to Strike Portions of Mr. Haynes' Testimony for the reasons explained herein.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 15th day of October, 2012 by electronic mail upon the persons listed below.



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Summary: Motion Motion to Strike Portions of the Testimony of Bruce M. Hayes electronically filed by M HOWARD PETRICOFF on behalf of Ohio Gas Marketers Group and Retail Energy Supply Association