

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	: : : : :	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	: : : : :	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	: : : : :	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	: : : : :	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	: : : : :	Case No. 12-672-EL-RDR

**MOTION OF THE DAYTON POWER AND LIGHT COMPANY TO
STRIKE TESTIMONY OF FIRST ENERGY SOLUTIONS CORP. WITNESS
JONATHAN A. LESSER**

The Dayton Power and Light Company moves the Commission for an order to strike portions of the testimony of First Energy Solutions Corp. witness Jonathan A. Lesser. The Commission should issue the requested order because the testimony at issue contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION OF THE DAYTON POWER AND LIGHT
COMPANY TO STRIKE TESTIMONY OF FIRST ENERGY SOLUTIONS CORP.
WITNESS JONATHAN A. LESSER**

I. INTRODUCTION AND SUMMARY

On March 1, 2013, First Energy Solutions Corp. ("FES") filed the direct testimony of its witness Jonathan A. Lesser (the "Testimony"). The Testimony of FES's witnesses contains numerous statements that are not based on personal knowledge, that do not set forth facts that would be admissible in evidence, and that are conclusions of law (not statements of fact).

Specifically, the Commission should issue an order to strike the following portions of the Testimony:

<u>Witness</u>	<u>Page and Line Numbers</u>
Jonathan A. Lesser	page 53, lines 12-21; page 54, lines 23-24; page 55, lines 2-13; page 58, lines 12, 21-23

**II. PORTIONS OF THE TESTIMONY CONTAINING STATEMENTS ON
SUBSTANTIVE LAW ARE IMPROPER AND SHOULD BE STRICKEN**

FES has attempted to instruct the Attorney Examiners on the law to be applied to the ESP Application filed by The Dayton Power and Light Company ("DP&L"). The inadmissible portions of the Testimony identified above are wholly improper under decades of well-settled precedent, and must be stricken from the evidentiary record. By opining on substantive law, FES in effect seeks to offer expert testimony on the law.

Legal testimony as to the law is inadmissible, particularly where (as here)¹ the witnesses are not legal experts. Camp St. Marys Ass'n of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes, 176 Ohio App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶40 (3d Dist.) (rejecting testimony because witness "was not qualified as a legal expert, and his opinions concerning superiority, influence, and fiduciary duties are legal conclusions rather than statements of fact"); Niermeyer v. Cook's Termite & Pest Control, Inc., 10th Dist. No. 05AP-21, 2006-Ohio-640, ¶34 (affirming trial court's granting motion to strike testimony because "it stated only legal conclusions, and failed to outline any facts supporting such conclusions"); Molecular Tech. Corp. v. Valentine, 925 F.2d 910, 919 (6th Cir. 1991) ("it is impermissible for a trial judge to delegate his duty to determine the law of a case to an expert") (citations omitted); Smith v. United States, No. 3:95cv445, 2012 U.S. Dist. LEXIS 58623, at *53 (S.D. Ohio Apr. 26, 2012) ("It is axiomatic that a court must determine the law which is applicable in a particular suit. In other words, the applicable law is not a matter about which the parties present evidence.").²

This prohibition of testimony concerning substantive law has been applied to both lay and expert witnesses. United States v. Kingston, 971 F.2d 481, 486 (10th Cir. 1992) ("[L]ay witnesses and even expert witnesses are not permitted to give opinions as to what the law is.").

Here, FES has attempted to define the substantive law for DP&L's ESP Application. The portions of the Testimony outlined above are improper because FES has

¹ There is no evidence that Mr. Lesser is a lawyer, let alone a legal expert.

² Ohio courts may look to federal case law as persuasive authority in interpreting an Ohio rule. Industrial Risk Insurers v. Lorenz Equip. Co., 69 Ohio St. 3d 576, 579, 635 N.E.2d 14, 17 (1994). Thus, the Commission should consider the federal cases cited in this memorandum as persuasive authority.

crossed the line between witness and legal advocate. Indeed, the Testimony is further flawed because significant portions of it are written in the form of a legal brief, with citation to Ohio law and Commission precedent. G.F. Co. v. Pan Ocean Shipping Co., Ltd., 23 F.3d 1498, 1507 (9th Cir. 1994) (striking witnesses' testimony because "[e]ach is written in the form of a legal document, complete with subdivisions for discussion of the issues, the law, and the conclusions"); In re McKesson HBOC, Inc. Secs. Litig., 126 F. Supp. 2d 1239, 1246-47 (N.D. Cal. 2000) (granting motion to strike when expert testimony was written in form of legal brief because "[t]hese declarations offer few facts or any admissible expert opinions, instead proffering various and sundry conclusions of law.").

III. CONCLUSION

Based on these severe defects in the Testimony, the Commission should issue an order to strike portions of the Testimony of FES witness Jonathan A. Lesser.

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**BEFORE THE
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer)))	Case No. 12-426-EL-SSO
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**DIRECT TESTIMONY
OF
JONATHAN A. LESSER
ON BEHALF OF
FIRSTENERGY SOLUTIONS CORP.**

March 1, 2013

PUBLIC VERSION

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1 **I. INTRODUCTION, PURPOSE, AND SUMMARY OF CONCLUSIONS**

2 **Q. PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS.**

3 A. My name is Jonathan A. Lesser. I am the President of Continental Economics,
4 Inc., an economic consulting firm that provides litigation, valuation, and strategic
5 services to law firms, industry, and government agencies. My business address is 6 Real
6 Place, Sandia Park, NM 87047.

7 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL QUALIFICATIONS,**
8 **EMPLOYMENT EXPERIENCE, AND EDUCATIONAL BACKGROUND.**

9 A. I am an economist with substantial experience in market analysis in the energy
10 industry. I have almost 30 years of experience in the energy industry working with
11 utilities, consumer groups, competitive power producers and marketers, and government
12 regulators. I have provided expert testimony before numerous state utility commissions,
13 as well as before the Federal Energy Regulatory Commission (“FERC”), state legislative
14 committees, and international venues.

15 Before founding Continental Economics, I was a Partner in the Energy Practice
16 with the consulting firm Bates White, LLC. Prior to that, I was the Director of Regulated
17 Planning for the Vermont Department of Public Service. Previously, I was employed as a
18 Senior Managing Economist at Navigant Consulting. Prior to that, I was the Manager,
19 Economic Analysis, for Green Mountain Power Corporation. I also spent seven years as
20 an Energy Policy Specialist with the Washington State Energy Office, and I worked for
21 Idaho Power Corporation and the Pacific Northwest Utilities Conference Committee (an
22 electric industry trade group), where I specialized in electric load and price forecasting.

1 **Q. SHOULD DP&L BE ALLOWED TO RECOVER THE COSTS OF THE YANKEE**
2 **SOLAR FACILITY BECAUSE THE PUCO ACCEPTED THE 2010 LTFR**
3 **STIPULATION, WHICH STATED THERE WAS A “NEED” FOR THE SOLAR**
4 **FACILITY?**

5 A. No. The evidence provided by DP&L to justify the “need” for Yankee Solar
6 consisted solely of Attachment 1 to the Stipulation. That attachment failed to address
7 DP&L’s SREC requirement based on its net SSO loads and failed to account for other
8 SREC supplies. In other words, to justify the “need” for Yankee Solar, Attachment 1
9 compares DP&L’s total SREC requirement, based on the company’s entire connected
10 load against the SRECs provided by Yankee Solar. By showing that DP&L’s total (in-
11 state and out-of-state) SREC requirement is greater than the SRECs provided by Yankee
12 Solar, DP&L supposedly “proves” the “need” for the Yankee Solar facility. This sort of

13 “proof” cannot provide a legitimate regulatory basis for allowing DP&L to claim a
14 “need” for Yankee Solar under R.C. § 4928.143(B)(2)(c) and, therefore, justify a
15 nonbypassable AER-N, even as a placeholder.

16 The most that can be shown from the Stipulation and the PUCO’s April 19, 2011
17 Order is that DP&L needed additional solar generation facilities to meet the increasing
18 benchmarks in R.C. § 4928.64(B)(2). The determination of “need” under R.C. §
19 4928.143(B)(2)(c) requires a demonstration that “generation needs cannot be met through
20 the competitive market.”⁶³ No such demonstration was made by DP&L in Case No. 10-
21 505-EL-FOR.

⁶³ AEP Order in Case No. 11-346-EL-SSO, p. 39 (Dec. 14, 2011).

1 **D. Approving a Nonbypassable AER-N, or Even a “Placeholder” AER-N, Will**
2 **Damage Retail Competition and Harm the Ohio Economy**

3 **Q. WHY WOULD IMPOSING A NONBYPASSABLE SURCHARGE FOR YANKEE**
4 **SOLAR BE ANTICOMPETITIVE?**

5 A. Imposing a nonbypassable surcharge to pay for Yankee Solar would be
6 anticompetitive because CRES providers are also required to comply with the renewable
7 energy requirements set forth in R.C. 4928.64(B)(2). Therefore, if a nonbypassable
8 surcharge is imposed on DP&L customers, then customers who purchase their electricity
9 from CRES providers would be forced to pay twice for renewable energy. They would
10 be forced to pay for the Yankee Solar project costs and the costs of SRECs purchased by
11 their CRES provider. Forcing CRES customers to pay twice for in-state solar RECs,
12 while DP&L’s ESP customers only pay a diluted price for Yankee Solar, harms those
13 customers who have elected to shop and places CRES suppliers at an obvious
14 competitive disadvantage, thus foreclosing competition. It would impose a barrier to
15 entry in the form of an “entrance fee” for CRES suppliers to compete in the market,
16 penalize existing CRES customers for shopping, and act as a disincentive to existing ESP
17 customers choosing CRES providers. That is clearly anticompetitive.

18 **Q. WOULD IMPOSING A NONBYPASSABLE SURCHARGE FOR YANKEE**
19 **SOLAR BE CONTRARY TO ESTABLISHED STATE POLICY TO DEVELOP**
20 **COMPETITIVE RETAIL ELECTRIC MARKETS?**

21 A. Yes. Imposing a nonbypassable surcharge for Yankee Solar would penalize
22 customers who wish to purchase electricity from CRES providers and, thus, would inhibit
23 retail electric competition. That would be contrary to the plain language of R.C.
24 4928.02(A)-(D), and (H).

1 CRES providers already produce or procure all requisite energy, capacity and
2 renewables to serve their retail customers. Forcing all DP&L customers, including those
3 who purchase electricity from CRES providers, to pay for Yankee Solar would be
4 discriminatory and contrary to the language of R.C. 4928.02(A). It would restrict “the
5 availability of unbundled and comparable retail electric service that provides consumers
6 with the supplier, price, terms, conditions, and quality options they elect to meet their
7 respective needs,” contrary to the language of R.C. 4928.02(B). It would reduce the
8 diversity of electric suppliers, contrary to the language of R.C. 4928.02(C). It would
9 discourage market access, contrary to the language of R.C. 4928.02(D). And, by forcing
10 CRES customers to pay twice for in-state solar RECs, once through the nonbypassable
11 surcharge and again for the in-state solar RECs purchased or developed by their CRES
12 provider, it would restrict effective competition in the provision of retail electric service,
13 contrary to the language of R.C. 4928.02(H).

14 **Q. DP&L IS ONLY PROPOSING A “PLACEHOLDER” AER-N AT THIS TIME.**
15 **HOW CAN SUCH A “PLACEHOLDER” AER-N BE ANTICOMPETITIVE?**

16 A. A “placeholder” sends a signal to retail markets and customers. In essence, a
17 placeholder is a “warning signal” to both CRES providers and customers, which will
18 increase market uncertainty and affect the choices made by both customers and suppliers.
19 Specifically, a placeholder AER-N means there is a positive probability that DP&L will
20 be allowed to recover the costs of the Yankee Solar facility, which will force CRES
21 customers to pay for both the costs of Yankee Solar and their CRES provider’s own
22 SREC requirements. As such, retail competition will be discouraged because SSO
23 customers will be less likely to want to switch to a CRES provider. The reason is simple:

1 recovery associated with the Fuel Rider, PJM Reliability Pricing Model (“RPM”) Rider,
2 Transmission Cost Recovery Rider - Bypassable (“TCRR-B”), Alternative Energy Rider
3 (“AER”), and the Competitive Bidding True-Up (“CBT”) Rider; and 4) any remaining
4 deferral balance or credit after the Fuel, RPM, and TCRR-B are eliminated as of June 1,
5 2016.

6 **Q. ON WHAT BASIS DOES DP&L JUSTIFY RECOVERY OF COSTS**
7 **ASSOCIATED WITH THE CBP ON A NONBYPASSABLE BASIS?**

8 A. According to DP&L witness Rabb,⁶⁴ the company justifies collection of the costs
9 associated with the CBP based on the language of R.C. § 4928.142(C)(3).

10 **Q. DOES THE LANGUAGE OF R.C. § 4928.142(C)(3) DISCUSS RECOVERY OF CBP**
11 **CHARGES ON A NONBYPASSABLE BASIS?**

12 A. No, quite to the contrary. R.C. § 4928.142(C)(3) states:

13 All costs incurred by the electric distribution utility as a result of or related
14 to the competitive bidding process or to procuring generation service to
15 provide the standard service offer, including the costs of energy and
16 capacity and the costs of all other products and services procured as a
17 result of the competitive bidding process, shall be timely recovered
18 through the standard service offer price, and, for that purpose, the
19 commission shall approve a reconciliation mechanism, other recovery
20 mechanism, or a combination of such mechanisms for the utility.

21 This provision applies to MROs, and it makes no reference whatsoever to collection of
22 CBP costs on a nonbypassable basis. Instead, CBP costs are to be recovered through the
23 bypassable SSO price.

⁶⁴ *Application of the Dayton Power and Light Company for Approval of an Electric Service Plan*,
Second Revised Direct testimony of Emily Rabb, December 12, 2012 (“Rabb Direct”), p. 9, lines 3-9. I
understand that DP&L witness Seger-Lawson has adopted Ms. Rabb’s testimony in its entirety.

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Summary: Motion Motion of the Dayton Power and Light Company to Strike Testimony of First Energy Solutions Corp. Witness Jonathan A. Lesser electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company