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 THE OHIO CONSUMERS' COUNSEL WITNESSES KENNETH ROSE AND DANIEL J. DUANN

The Dayton Power and Light Company moves the Commission for an order to strike portions of the testimony of The Ohio Consumers' Counsel witnesses Kenneth Rose and Daniel J. Duann. 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 THE OHIO CONSUMERS' COUNSEL WITNESSES KENNETH ROSE AND DANIEL J. DUANN

I. INTRODUCTION AND SUMMARY

On March 1, 2013, The Ohio Consumers' Counsel ("OCC") filed the direct testimony of its witnesses Kenneth Rose and Daniel J. Duann (collectively, the "Testimony"). The Testimony of OCC'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:

Witness	Page and Line Numbers
Kenneth Rose	page 9, lines 9-11, 14-19; page 11, lines 20-21; page 12, lines 1-4, 8-10, 15-19; page 13, lines 1-16; page 14, lines 14-15
Daniel J. Duann	page 8, lines 18-19; page 9, lines 1-12; page 31, lines 14-22; page 32, lines 1-5

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

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

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[1] There is no evidence that Messrs. Rose and Duann are lawyers, let alone legal experts.

[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 OCC witnesses Kenneth Rose and Daniel J. Duann.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company to Strike Testimony of The Ohio Consumers' Counsel witnesses Kenneth Rose and Daniel J. Duann has been served via electronic mail upon the following counsel of record, this 7th day of March, 2013:

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698447.1

*OCC EXHIBIT*_____

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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DIRECT TESTIMONY
OF
KENNETH ROSE, Ph.D.

On Behalf of
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March 1, 2013

Q1. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND EMPLOYER.

A1. My name is Kenneth Rose. I am an independent consultant. My business address is P.O. Box 12246, Columbus, Ohio 43212-0246. I have been retained by the Office of the Ohio Consumers' Counsel for purposes of this proceeding.

Q2. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A2. I received my B.S., M.A., and Ph.D. in economics from the University of Illinois at Chicago. I have been an independent consultant since 2002. Previously, I was a Senior Institute Economist at the National Regulatory Research Institute (NRRI) at The Ohio State University from 1989 to 2002 and was an economist in the Energy and Environmental Systems Division at Argonne National Laboratory from 1984 to 1989. I have also been a lecturer for the School of Public Policy and Management (1998 to 2002) and the John Glenn School of Public Affairs (2009 to 2011) at The Ohio State University. I have been a Senior Fellow with the Institute of Public Utilities at Michigan State University since 2002.

1 the Company was authorized to collect approximately $441 million from
2 customers in order to compensate it for the cost of its generating units that
3 exceeded market value. And now, DP&L is seeking to deny consumers the
4 benefit of a market price, at a time when consumers could greatly benefit from a
5 low market price.
6
7 ***Q16. IS THERE ANY AUTHORITY TO SUPPORT YOUR OPINION THAT***
8 ***DP&L'S TRANSITION PERIOD HAS BEEN LONG ENOUGH?***
9 ***A16.*** Yes. I understand that Ohio law prohibits the recovery of stranded costs or
10 transition costs beyond the "market development period." That time period
11 expired long ago.
12
13 ***Q17. PLEASE EXPLAIN.***
14 ***A17.*** My understanding, confirmed by my Counsel, is that Section 4928.38 of the
15 Revised Code, as adopted October 5, 1999, provides that an electric utility may
16 receive transition revenues from the starting date of competitive retail electric
17 service through the end of the market development period. Further, that section
18 of the Revised Code provides that once the utility's market development period
19 ends, it "shall be fully on its own in the competitive market."

will decrease; the risk that there will be increased competition in DP&L's service territory; and the risk associated with transitioning to a 100% competitive bid process.[12] These risks can be summed up singularly: DP&L faces the risk that its SSO rate is higher than the retail market price for electric service, and its customers will switch to competitive electric generation suppliers, offering service at lower market-based rates. Then, the Company will not be able to sell its generation into the wholesale market at a price that assures it of the revenues it receives at its SSO rate. DP&L has failed to demonstrate that any of the "financial integrity" issues stem from its transmission or distribution operations.

If DP&L's SSO rates exceed the retail price for electricity found in the market, this could result in DP&L being unable to recover (through SSO rates) its plant investment costs. However, DP&L was already compensated for stranded costs in its ETP proceeding and has been provided time to adjust to market conditions.

Q20. CAN THE COMPANY RECOVER ADDITIONAL GENERATION-RELATED TRANSITION COSTS AFTER THE MARKET DEVELOPMENT PERIOD IF THEY ARE NECESSARY TO ENSURE THE COMPANY'S FINANCIAL INTEGRITY?

A20. No. The law, per my understanding and advice of counsel, is very clear that "[w]ith the termination of that approved revenue source, the utility shall be fully

[12] Company Response to OCC INT-308.

on its own in the competitive market" and that the commission "shall not authorize the receipt of transition revenues or any equivalent revenues" after the termination of the market development period. And the market development period for DP&L ended on December 31, 2005.[13]

Q21. CAN A UTILITY INCLUDE AS PART OF ITS ELECTRIC SECURITY PLAN A SERVICE STABILITY RIDER?

A21. It is my understanding, based on advice of counsel, that a utility may only include a provision in its ESP that is specifically listed in R.C. 4928.143(B)(2). I do not believe DP&L's Service Stability Rider falls under any of those provisions.

Q22. CAN A UTILITY INCLUDE IN ITS ELECTRIC SECURITY PLAN A CHARGE "STABILIZING OR PROVIDING CERTAINTY REGARDING RETAIL ELECTRIC SERVICE?"

A22. No. Per my understanding and advice of counsel, the SSR is not a term, condition or charge that is, as stated in R.C. 4928.143(B)(2)(d) "relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals." I do not find that the SSR is

[13] See *In the Matter of the Application of the Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005).

1 any one of the permissible charges listed in subsection (B)(2)(d) of R.C.
2 4928.143.
3
4 Additionally, I do not believe that this provision of the Revised Code was
5 intended to allow for recovery of transition costs already collected from
6 customers through an electric transition plan. I conclude this because allowing
7 the SSR as a provision under an ESP would conflict with other provisions of the
8 law, including R.C. 4928.141.
9
10 Section 4928.141 clearly states that "[A] standard service offer under section
11 4928.142 or 4928.143 of the Revised Code shall exclude any previously
12 authorized allowances for transition costs, with such exclusion being effective on
13 and after the date that the allowance is scheduled to end under the utility's rate
14 plan." Otherwise, double recovery of such costs could occur. Duplicate cost
15 recovery is contrary to sound ratemaking principles and would undermine any
16 reasonable basis for establishing rates.
17

1 ***Q23. THE COMPANY REFERS TO THE PUCO'S DECISION ON AEP'S***
2 ***ELECTRIC SECURITY PLAN AS SUPPORT FOR ITS SERVICE***
3 ***STABILITY RIDER. IS IT FAIR TO RELY UPON THAT DECISION AS A***
4 ***BASIS FOR APPROVING DP&L'S SERVICE STABILITY RIDER?***
5 *A23.* No. That PUCO decision was largely based on AEP being a "Fixed Resource
6 Requirement" or FRR entity in PJM. Basically an FRR allows load-serving
7 entities (LSEs) in PJM to "self-supply" resources to meet their capacity
8 obligations by designating resources they own or purchase bilaterally. To my
9 knowledge, DP&L is not currently using, and has not filed to use, this option.
10
11 ***Q24. IS THE COMMISSION'S AUTHORIZATION OF A STABILITY-TYPE***
12 ***CHARGE IN THE AEP CASE A REASON TO AUTHORIZE A SERVICE***
13 ***STABILITY RIDER IN THIS CASE?***
14 *A24.* No. In fact, any such charge is completely contrary to the law and the goals of
15 creating a competitive market. Such a charge would subsidize DP&L's
16 generation service and compel all customers to continue to pay above-market
17 rates for such service.
18

OCC EXHIBIT _____

BEFORE

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(PUBLIC VERSION)

DIRECT TESTIMONY

OF

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March 1, 2013

TABLE OF CONTENTS

LIST OF ATTACHMENTS

1 **I. INTRODUCTION**

2

3 ***Q1. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND POSITION.***

4 ***A1.*** My name is Daniel J. Duann. My business address is 10 West Broad Street, Suite
5 1800, Columbus, Ohio, 43215-3485. I am a Principal Regulatory Analyst with
6 the Office of the Ohio Consumers' Counsel ("OCC").

7

8 ***Q2. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND***
9 ***PROFESSIONAL EXPERIENCE.***

10 ***A2.*** I received my Ph.D. degree in public policy analysis from the Wharton School,
11 University of Pennsylvania. I also have a M.S. degree in energy management and
12 policy from the University of Pennsylvania and a M.A. degree in economics from
13 the University of Kansas. I completed my undergraduate study in business
14 administration at the National Taiwan University, Taiwan, Republic of China. I
15 was conferred by the Society of Utility and Regulatory Financial Analysts as a
16 Certified Rate of Return Analyst in April 2011.

17

18 I was a Utility Examiner II in the Forecasting Section of the Ohio Division of
19 Energy, Ohio Department of Development, from 1983 to 1985. From 1985 to
20 1986, I was an Economist with the Center of Health Policy Research at the
21 American Medical Association in Chicago. In 1986, I joined the Illinois
22 Commerce Commission as a Senior Economist in its Policy Analysis and
23 Research Division. I was employed as a Senior Institute Economist at the

1 market participant (in this case, DP&L) in a competitive marketplace (the retail
2 electric service in DP&L's service territory).
3
4 Second, the SSR is being collected to support the financial integrity of a business
5 entity that is engaged in both a competitive market (retail generation) and a
6 regulated market (distribution) while any deteriorating financial integrity is solely
7 related to the competitive market. As proposed by DP&L, the SSR will be
8 collected from all distribution customers (shopping and SSO customers) but
9 solely for the purpose of ensuring the financial integrity of DP&L's generation
10 business, the competitive component of DP&L. Thus, the proposed SSR is
11 inconsistent with the regulatory principle as well as Ohio's electric service policy
12 of avoiding subsidies from the regulated operation of a utility to the non-regulated
13 operation of that utility.[9]
14
15 Third, the proposed SSR is inconsistent with the regulatory principle of not
16 insulating a regulated utility or a business entity that has both competitive
17 and regulated business segments from incurring losses due to the normal
18 operation of a business. This regulatory principle is best exemplified in a
19 case decided by the United States Supreme Court which states in part:
20

[9] See Ohio Revised Code 4928.02 (H).

> "By longstanding usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense… **But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings** …"[10] (emphasis added)

Based on this regulatory principle, DP&L, and DP&L alone, should be responsible for the profits and losses in providing a competitively-supplied service –the retail electric service or SSO service within its service territory. It is unjust and unreasonable to ask DP&L's customers to provide a guarantee for DP&L's profit from its generation business.

Fourth, the proposed SSR is inconsistent with the regulatory principle that any proposed rates to recover costs or to ensure financial integrity (such as the proposed SSR if DP&L's claim is accepted) should be based on "known and measurable" expenses, revenues, and investments. DP&L's request for the SSR and its claim of deteriorating financial integrity are not based on the data and methodology used in a traditional rate case. Rather, DP&L's request in this ESP proceeding is largely based on projected financial data presented in its Application that are not "known and measurable." As further discussed later in

[10] Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

Q35. ARE THE PROJECTED PRO-FORMA FINANCIAL STATEMENTS AND RETURNS ON EQUITY (OVER THE NEXT FIVE YEARS) AS PRESENTED BY DP&L RELEVANT TO THIS ELECTRIC SECURITY PLAN PROCEEDING?

A35. No. These long-term financial projections presented by DP&L are irrelevant and should not be considered at all by the Commission in this ESP proceeding.

Q36. WHY ARE THE PROJECTED PRO-FORMA FINANCIAL STATEMENTS AND RETURNS ON EQUITY (OVER THE NEXT FIVE YEARS) AS PRESENTED IN THE ESP APPLICATION IRRELEVANT TO THIS ELECTRIC SECURITY PLAN PROCEEDING?

A36. As discussed earlier in my testimony, this proposed ESP deals only with the rates and terms of retail electric generation service (the SSO service) within DP&L's service territory. It is my opinion as a regulatory economist that the Commission is not obligated or permitted by Ohio law and established regulatory principles to consider the financial integrity of DP&L in setting the rates and terms of an ESP. Based on my understanding of the ESP statutes and my participation in the recent ESP proceedings, the only relevant standard in setting the rates and terms of an ESP is that the Commission must find that "the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that otherwise apply under section 4928.142 of

1 the Revised Code." in approving an ESP.[49] There is no other standard, including
2 ensuring financial integrity, to be used in approving an ESP or any terms included
3 in an ESP. Consequently, the financial integrity of DP&L, as represented by the
4 long-term financial projections presented in the ESP Application, is irrelevant,
5 and should not be considered by the Commission in this proceeding.
6
7 ***Q37. HOW WOULD YOU CHARACTERIZE THE PROJECTED PRO-FORMA***
8 ***FINANCIAL STATEMENTS AND RETURNS ON EQUITY (OVER THE***
9 ***NEXT FIVE YEARS) AS PRESENTED IN THE ELECTRIC SECURITY***
10 ***PLAN APPLICATION?***
11 *A37.* Even if the Commission were to determine that the long-term financial
12 projections are appropriate to consider in an electric security plan proceeding,
13 DP&L's long-term financial projections of pro-forma financial statements and
14 return on equity should not be considered in this because they are unreliable and
15 speculative. Specifically, these long-term financial projections made by DP&L
16 are not audited, not available to the general public, not included in regulatory
17 filings or in presentations to financial analysts, and not comparable with available
18 information (if any) of long-term projected return on equity and other financial
19 information made by independent third-parties.

[49] Revised Code 4928.143 (C) (1). It should be noted this is a necessary condition in approving an ESP. An ESP cannot be approved if it fails this test. But the Commission does not have to approve any ESP that satisfies the test. The Commission can, and has modified and imposed additional terms and terms in approving an ESP.

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Summary: Motion of The Dayton Power and Light Company to Strike Testimony of The Ohio Consumers' Counsel Witnesses Kenneth Rose and Daniel J. Duann electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company