

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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
)	
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 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
)	
)	

**MEMORANDUM CONTRA TO
MOTION OF THE DAYTON POWER AND LIGHT COMPANY
TO STRIKE TESTIMONY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

On March 1, 2013, the Office of the Ohio Consumers' Counsel ("OCC") filed the direct testimonies of Dr. Kenneth Rose and Dr. Daniel J. Duann. On March 7, 2013, the Dayton Power & Light Company ("DP&L" or "Company") filed a Motion to Strike ("DP&L Motion to Strike") portions of the testimony of OCC witnesses Dr. Rose and Dr. Duann on the asserted basis that the testimony opines on the "substantive law" to be applied to the electric security plan ("ESP") Application filed by DP&L, which DP&L

contends is “wholly improper under decades of well-settled precedent.” DP&L Motion to Strike, p. 2.

With respect to the testimony of OCC witnesses Dr. Rose² and Dr. Duann, which DP&L proposes to strike, such testimony addresses the following policy issues:

1. The permissible length of transition to a competitive market (Dr. Rose);
2. Whether generation-related transition costs can be recovered after such transition – market development – period (Dr. Rose);
3. Whether DP&L’s proposed Service Stability Rider is a permissible charge in an Electric Security Plan (Dr. Rose);
4. Whether it is appropriate to insulate or subsidize a utility’s competitive business activities with profits from its regulated activities (Dr. Duann); and
5. Whether DP&L’s projected financial performance is appropriately considered in setting the rates and terms of an electric security plan (Dr. Duann).

These issues lie at the core of the Public Utilities Commission of Ohio’s (“Commission” or “PUCO”) evaluation of DP&L’s proposal in this case. In considering these issues, it is appropriate for the Commission to consider the regulatory policy and practice concerns offered by Dr. Duann and Dr. Rose. It is DP&L that has put these issues in front of the Commission. DP&L’s attempt now to limit a party’s right to

² OCC notes that OCC witness Dr. Rose was a participant in discussions leading up to the adoption of Senate Bill 3 and, therefore, has additional insight into regulatory objectives associated with the introduction of competition into the electricity generation market in Ohio and the recovery of transition costs. Notably, in AEP’s ESP proceeding in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, AEP witness Mr. Baker, who had specific experience with discussions leading up to Senate Bill 221, was permitted to address his insights into that legislation over a Motion to Strike on the basis of hearsay. Transcript, pp. 255-258. (Vol. XIV 12/11/2008) (Attorney Examiner Bojko).

address proposals in its application is inappropriate and should be denied, as explained in detail below.

II. SUMMARY OF ISSUES AND OCC POSITION

As discussed below, DP&L's Motion to Strike should be denied for a number of reasons. First, DP&L fails to recognize that regulatory policy is typically construed in the context of a statutory and regulatory framework that leaves room for regulators to exercise some discretion to accommodate an array of regulatory objectives. Second, DP&L fails to recognize the different standards typically applied to opinions offered in regulatory proceedings regarding the legal and regulatory construct under which the Commission must make its decisions. Finally, DP&L also mischaracterizes the legal precedent it presents.

Expert testimony from non-attorney policy witnesses regarding the regulatory objectives and the flexibility the Commission has to meet the objectives has been a mainstay in regulatory proceedings. Expert witnesses often address complex economic issues albeit through an existing statutory and regulatory framework. In this case specifically, DP&L witnesses have offered extensive testimony regarding DP&L's Electric Security Plan and its alleged consistency with the statutory framework implemented by the General Assembly. In fact, the Company's testimony is replete with

citations to statutes and regulations.³ OCC witnesses, and other parties' witnesses as well, have appropriately responded by critiquing that testimony by offering their own viewpoint. There is no sound basis for DP&L's Motion to Strike and, indeed, much of DP&L's testimony and application would have to be stricken if the same standard they argue for was applied against them. The Commission should deny DP&L's Motion to Strike.

III. ARGUMENT

A. DP&L Mischaracterizes The Case Precedent To Support Its Position Regarding The Permissible Scope Of Expert Testimony Bearing Upon Legal Issues.

In support of its position that expert witnesses may not offer testimony opining on substantive law, DP&L relies on several state and federal court decisions – but no PUCO precedent. But even the cases cited by DP&L, discussed more specifically below, have little applicability to PUCO regulatory proceedings.

In PUCO proceedings, such as the instant electric security plan proceeding, expert witnesses regularly offer opinions whether a particular regulatory proposal is consistent with the underlying statutory and regulatory framework. Expert witnesses (in regulatory proceedings) must comment on the language of statutes and regulations, regulatory

³ See, for example, Testimony of Claire Hale, pp. 5-6, quoting/citing R.C. 4928.05(A)(2) and R.C. 4928.143(B)(2)(g), pp. 2, 7, and 17 citing Ohio Adm. Code 4901:1-36-03; Testimony of Dona Seger Lawson, p. 4, citing R.C. 4928.143 and Ohio Adm. Code 4901:1-35-03(C)(9)(b), Ohio Adm. Code 4901:1-36-03 and Ohio Adm. Code 4901:1-36-04(B), p. 5, Ohio Adm. Code 4901:1-36-03 and Ohio Adm. Code 4901:1-36-04(B); Herrington Testimony, pp. 4-7, citing R.C. 4928.143(C)(1) and quoting R.C. 4928.02(A), (B), (H), (L) and (N); Jackson Testimony, p. 6, citing Ohio Adm. Code 4901:1-35-03; Malinak Testimony, pp. 4, 7, 12 and 15 quoting and citing R.C. 4928.143 (C)(1) and (D); Rabb Testimony, p. 9, citing R.C. 4928.142(C)(3); Parke Testimony, p. 3, citing R.C. 4828.64(C)(3); p. 15, citing Ohio Adm. Code 4901-7-01. Many of these and other DP&L witnesses also cite to various decisions of the PUCO on issues surrounding these and other statutory and regulatory provisions, emphasizing their consistency with Commission rules and orders (see, for example, Rice Testimony at p. 2 that DP&L's Third Amended Corporate Separation Plan is "is consistent with the Commission's Rules and prior orders.").

proposals, and economic data and other pertinent information, in addressing whether a regulatory proposal is consistent with statutory and regulatory objectives. Referencing and putting those statutory and regulatory objectives into context is necessary to effectively communicate an expert's opinion.

For example, Company witnesses assert that the Company's proposed ESP, including its rate blending plan, six new rider rates, and competitive enhancements are consistent with the provisions of the law, regulations, and prior orders of the Commission.⁴ In response, OCC witnesses, including Dr. Rose and Dr. Duann, appropriately critique these proposals with the applicable laws and regulations.

In addition, a review of the cases cited by DP&L shows the inapplicability of the case law cited by DP&L. First, both state cases cited by DP&L concern affidavits submitted in opposition to motions for summary judgment which, contrary to a specific requirement in the Ohio Rules of Civil Procedure, lacked statements of material fact. Specifically, in *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 (3d Dist. 2008), that Court upheld a trial court determination that the Plaintiff had failed to put forth material facts in opposition to a motion for summary judgment. There, a lay person had made legal conclusions on "superiority, influence, and fiduciary duties" but asserted no material facts to support such claim. Similarly, in *Niermeyer v. Cook's Termite & Pest Control, Inc.*, 10th Dist. No. 05AP-21, 2006-Ohio-640, 2006 Ohio App. LEXIS 579 (Ct. Appeals; 10th Dist. 2006), the court found that an affidavit from an

⁴ See specific references to witness testimony in footnote 3 above.

expert witness was conclusory with respect to the standard of care for termite inspections and lacked facts to support the claims in it.

The federal cases cited by DP&L are similarly unavailing. The case of *Molecular Tech Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir. 1991), concerned whether an expert witness, as opposed to the trial judge, should be permitted to advise the jury as to the law. In this case in contrast, there is no jury, and the need to exclude testimony to avoid confusing the jury is not an issue. The Commission has the expertise and can give appropriate weight to testimony and evidence in this case. It can make all factual and legal determinations and in fact, it must. If an expert witness, in opining on regulatory policy, gives an opinion as to what the law says, the Commission is in a position to determine whether it is consistent or not with statutory and regulatory provisions. And it can accord that testimony the proper weight.

Similarly, in *Smith v. United States*, 3:95cv445, 2012 U.S. Dist. Lexis 58623, at *53 (S.D. Ohio 2012), the District Court for the Southern District of Ohio, declined to admit a federal regulation as an exhibit, since the Court must advise the jury as to the applicable law. Again, this authority is not controlling here because there is no jury. The Commission makes both factual and legal determinations.

In contrast, the issues addressed by OCC witnesses in this case concern the Company's claims for the Service Stability Rider ("SSR"), including whether there is a valid basis under the law for the Company's claims. The Company itself has asserted the validity of its claims under the law through non-legal witnesses.⁵ OCC's response is, in part, included in the testimony of witnesses Dr. Rose and Dr. Duann, who take issue with

⁵ See specific references to witness testimony in footnote 3 above.

DP&L's witnesses' claim that an SSR is justified under the law. In challenging the validity of the Company's witnesses' claims, OCC witnesses Dr. Rose and Dr. Duann appropriately address the Company's claims.

Expert testimony commenting on legal and regulatory provisions has generally been allowed by this Commission and other regulatory commissions,⁶ recognizing that, to the extent such testimony is "legal" in nature, the Commission will make an appropriate determination as to the weight to be accorded such testimony. This has especially been the case in recent Commission history where utilities have filed for approval of electric security plans and the provisions of S.B. 221 are at issue. For example, in regard to *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO *et al.*, 2011 Ohio PUC LEXIS 1084, p. 18 (PUC Ohio 2011), a non-attorney expert was permitted to testify on behalf of AEP as to three statutory bases contained in S.B. 221 in support of the Companies' claim for recovery of environmental carrying costs. In that case, the Attorney Examiners and the

⁶ Many regulatory commissions have addressed this issue and have found, with few exceptions, that regulatory policy testimony bearing upon statutory and regulatory provisions, are appropriate. *See, for example Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: Bay State Gas Company, M.D.T.E. Nos. 38 through 62, D.T.E. 06-77, 2006 Mass. PUC LEXIS 26, pp. 4-5 (Mass. Dept. of Telcom & Energy 2006) (In denying a motion to strike a legal opinion, Department stated "As a rule, the Department admits all testimony of experts and evaluates a witness's qualifications as we weigh the evidence of the proceeding"); In In the matter of the application of MICHIGAN CONSOLIDATED GAS COMPANY for approval of a price change determined pursuant to price amendments to gas purchase contracts with certain Michigan producers, Case No. U-8918, 1989 Mich. PSC LEXIS 38 (Mich PSC 1989) (stating that a witness commenting on the utility's contracts with producers "did not provide a legal opinion regarding the contracts; rather, he provided expert opinion evidence regarding gas rate regulatory matters." That Commission further stated that the "Staff witnesses presented are experts in the gas regulatory field, well-qualified to provide opinion evidence regarding FERC policy, pipeline PGA matters, and the day-to-day implementation of the Commission's regulatory powers under Act 9."); In the Matter of Union Electric Company d/b/a Ameren UE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area, Case No. ER-2007-0002; Tariff No. YE-2007-0007, 2007 Mo. PSC LEXIS 545 (Mo. PSC 2007) (stating that "if the Commission were to now strike Downs' expert legal opinion, it would also need to strike the legal opinion testimony that other parties offered" and that it is "confident in the belief that the Commission will be able to sort out factual testimony, expert testimony, and legal opinion testimony to reach an appropriate decision").*

Commission recognized that the witness was not offering a “legal opinion.” The testimony was allowed as policy testimony.

Similarly, in the first phase of AEP Ohio’s second electric security plan proceeding, Case No. 11-346-EL-SSO, the Commission ratified the Attorney Examiner’s rulings⁷ at the evidentiary hearing confirming that non-attorneys could testify on provisions in S.B. 221 based on advice of counsel. AEP Ohio’s Witness Mr. Hamrock, was allowed to present rebuttal testimony, based on advice of counsel, that certain statutory provisions of S.B. 221 supported its proposed distribution investment rider.⁸ Such testimony was permitted over the objection of OCC.⁹ Specifically, the Commission found OCC’s arguments “that the testimony of a non-attorney witness who admits his legal understanding is based on the advice of counsel”—to be without merit. While recognizing that non-attorneys are not qualified to offer a legal opinion, the Commission found that the testimony should not be struck but would be accorded its proper weight.¹⁰

Similarly, in regard to *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO *et al.*, 2008 Ohio PUC LEXIS 762, pp. 80-81 (PUC Ohio 2008), the Commission found as follows with

⁷ See Tr. XII at 1990 (denying OCC’s motion to strike); Tr. VIII at 1533-1543 (ruling denying AEP motion to strike testimony of IEU witness Murray that was based on advice of counsel).

⁸ Mr. Hamrock testified that “first and foremost, I have been advised by counsel that the Commission is not limited by R.C. 4928.143(B)*(2)(h) for approval of an item like the Distribution Investment Rider. For example, I am advised that R.C. 4928.143(B)(2)(d) also allows for Commission approval of carrying costs. As advised by counsel R.C. 4928.143(B)(2)(h) does include provisions related to distribution infrastructure and the examination of reliability of the distribution system, alignment of the utility’s and customer expectations and the dedication of sufficient resources to reliability.” Hamrock Rebuttal at 12-13 (Oct. 21, 2011).

⁹ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 11-346-EL-SSO *et al.*, 2011 Ohio PUC LEXIS 1325 at ¶26-30 (Dec. 14, 2011).

¹⁰ *Id.* at p. 12.

respect to many parties' Motions to Strike testimony of an Industrial Energy Users witness regarding a stipulation in a Duke Energy proceeding:

Mr. Murray testified as to the specific issues under consideration. To the extent that he presented factual evidence or expert opinion testimony, we will consider his testimony in our analysis. However, we note that multiple parties moved to strike portions of Mr. Murray's testimony on the ground that he is not an attorney and the testimony appeared to be a legal argument. Although the attorney examiners denied the motions to strike, they cautioned that the Commission would recognize that the witness is not an attorney in evaluating the weight to be given to his testimony.

In a 2004 case, *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters*, Case Nos. 04-221-GA-GCR *et al.*, 2006 Ohio PUC LEXIS 817, pp. 2-3, 7-8 (PUC Ohio 2006), Columbia Gas claimed that the testimony filed by OCC witnesses contained legal conclusions and that such testimony should be stricken. There, the Commission upheld the ruling of the Attorney Examiner that OCC's witnesses in "providing their expert opinion regarding the costs and credits to be included in the gas cost recovery rates charged to residential customers," were not making legal arguments and denied the Motion to Strike. Again, the Commission essentially found that expert witnesses may comment about policy, including the recovery of costs and charges and the design of rates, without such testimony being considered "legal" testimony. To the extent that such testimony bears upon legal issues, the Commission has consistently found that such testimony goes to the weight of the evidence, not its admissibility.

Accordingly, the Commission should deny DP&L's Motion to Strike. The summary judgment cases cited by the Company are specific to the Ohio Rule of Civil Procedure applicable to summary judgments and have limited applicability to a non-jury

setting, where the adjudicator of the case is an experienced body. Moreover, both the PUCO and the Supreme Court of Ohio have consistently recognized that Commission hearings are not strictly bound by the Ohio Rules of Evidence.¹¹

B. DP&L Fails To Recognize The Different Standards Typically Applied To Opinions Offered In Regulatory Proceedings Regarding The Legal And Regulatory Construct Under Which The Commission Must Make Its Decisions.

As the case precedent discussed above makes clear, in regulatory proceedings such as this one, where regulatory policy is intricately tied to statutory and regulatory provisions, it is both normal and appropriate for non-legal policy experts to offer opinions regarding the consistency of rate setting proposals with statutory and regulatory provisions. Even though DP&L has itself offered extensive testimony from non-attorneys regarding interpretation and application of provisions of Senate Bill 3 and Senate Bill 221 (see footnote 3 above), DP&L attempts to convince the Commission that OCC witnesses Dr. Rose and Dr. Duann should not be given this same latitude. The Company's position is inconsistent and contrary to the goal of setting sound regulatory policy, as well as contrary to Commission precedent. DP&L's position should be rejected.

A review of R.C. 4928.143, adopted by Senate Bill 221, reveals the numerous issues that are the subject of discretionary decision making and, therefore, call for expert witnesses to comment upon appropriate regulatory policy. These include, in just the first subsection of R.C. 4928.143(B), the following discretionary issues:

1. The design of "provisions relating to the supply and pricing of electric generation service." R.C. 4928.143(B)(1).

¹¹ *Ohio Bell Telephone Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50; *Greater Cleveland Welfare Rights Org. Inc. v. Pub. Util. Comm.*, (1982), 2 Ohio St. 3d 62, 68; *In the Matter of the Complaint of Pro Se Commercial Properties*, Case No. 07-1306-EL-SSO, Entry on Rehearing at 9 (Nov. 5, 2008).

2. The term of the electric security plan. R.C. 4928.143(B)(1).
3. Provisions of the “plan to permit the commission to test the plan pursuant to division (E).” R.C. 4928.143(B)(1).
4. “Transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized” under division (E).

R.C. 4928.143(B)(2) then includes subsections (a) through (i), describing numerous other provisions that the “plan may provide for or include, without limitation,” again demonstrating the substantial judgment that must be exercised by the PUCO in reaching its determinations under the burden of proof section (R.C. 4828.143(C)) of the electric security plan statutory provision. At the same time, the Commission must construe the electric security plan statutory provision consistently with other provisions of the law, including provisions of the law that previously allowed for recovery of costs associated with the transition to competition – in order to avoid duplicative cost recovery to the utility.

These are some of the complex regulatory policy issues that are addressed by DP&L and OCC witnesses, including OCC witnesses Dr. Rose and Dr. Duann. Areas of complex regulatory policy issues are also addressed by other parties’ witnesses. Where determinations of appropriate regulatory policy must be made in the context of numerous discretionary determinations and a complex rate-setting regime in this case, it is necessary for expert non-attorney policy witnesses to address the statutory and regulatory framework. And in doing so they may opine on the appropriateness of the regulatory objectives to be achieved by any particular regulatory proposal.

C. Expert Testimony On Sound Regulatory Policy And Practice Is Appropriate For The Commission's Determination As To Whether An Electric Security Plan Should Be Approved.

R.C. 4928.143(C) precludes the Commission from adopting an electric security plan unless the plan meets the aggregate results test, *i.e.* that it is more favorable than a Market Rate Offer under R.C. 4928.142. Beyond that determination, the Commission must consider whether a utility's proposals for an electric security plan are consistent with sound regulatory policy, including other statutory and regulatory provisions. In this context, the opinions of regulatory policy witnesses such as Dr. Rose and Dr. Duann, and other intervenor witnesses in this proceeding, are helpful to the Commission in addressing the wide range of considerations – including both factual and legal policy considerations – that bear upon such determinations.

In the context of Dr. Rose's testimony, he testifies that because the Company has already recovered significant stranded generation costs, the Company's claim for "financial integrity" is essentially a claim for additional stranded generating costs. In commenting on these facts and DP&L's claim for \$687.5 million in additional costs, OCC submits that he also appropriately addresses the fact that the authorized period for recovering such costs has already ended.

Similarly, Dr. Duann testifies regarding the fact that the SSR is designed to subsidize the shortfalls in the operations of DP&L's competitive generation business. Dr. Duann also offers testimony as to whether such subsidization is consistent with regulatory objectives and the scope of the Commission's determination in this ESP proceeding.

Just as DP&L has contended that the projected performance – financial integrity – of its competitive generation business is an appropriate issue for consideration in an electric security plan proceeding, it is proper for OCC witnesses to take issue with

whether it is appropriate that such financial performance be considered. The testimony of OCC's witnesses address plainly why DP&L's claims lack merit from a factual and regulatory policy standpoint. They are on point with DP&L's claims and must stand.

IV. CONCLUSION

For the reasons stated above, DP&L's Motion to Strike portions of the testimony of OCC witnesses Dr. Rose and Dr. Duann should be denied. DP&L's attempt to strike such testimony is inconsistent with Commission precedent and policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was provided to the persons listed below electronically this 14th day of March 2013.

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Summary: Memorandum Memorandum Contra to Motion of the Dayton Power and Light Company to Strike Testimony by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.