

**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

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM IN OPPOSITION  
TO THE DAYTON POWER AND LIGHT COMPANY'S  
MOTION TO STRIKE THE TESTIMONY OF  
KEVIN M. MURRAY, J. EDWARD HESS, AND JOSEPH G. BOWSER**

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**March 14, 2013**

**Attorneys for Industrial Energy Users-Ohio**

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**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
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On March 7, 2013, The Dayton Power and Light Company (“DP&L”) moved to strike portions of the testimony of Industrial Energy Users-Ohio’s (“IEU-Ohio”) witnesses Murray, Hess, and Bowser on grounds that their testimony was not based on personal knowledge and contained inadmissible testimony that were conclusions of law. IEU-Ohio’s witnesses have presented regulatory opinions, not legal opinions, which present mixed questions of law, fact, and policy. The Public Utilities Commission of Ohio’s (“Commission”) precedent and Ohio law allow expert testimony in the manner

presented by IEU-Ohio's witnesses. Accordingly, DP&L's motion lacks merit and should be denied.

## **I. OVERVIEW OF IEU-OHIO'S WITNESSES' TESTIMONY**

DP&L seeks to strike testimony concerning transition revenue, corporate separation, and DP&L's financial integrity claim. IEU-Ohio's witnesses testify to the factual background relevant to these topics to provide context to the specific facts and regulatory conclusions contained in their testimonies. For instance, IEU-Ohio witnesses Murray and Hess testify to the regulatory history involving electric industry restructuring in Ohio. Specifically, their testimonies describe the regulatory framework that created the corporate separation requirements and DP&L's electric transition plan and the opportunity to recover transition revenue.

This testimony is essential to providing context and an understanding of the factual and legal implications of DP&L's requests in this case, *i.e.* the testimony will assist the trier of fact in its determination about whether DP&L's electric security plan ("ESP") is lawful and reasonable. "Whether that witness will aid the trier of fact in search of the truth" is the first of three requirements for expert witness testimony.<sup>1</sup> As demonstrated below, the Commission's precedent allows expert testimony with regulatory, rather than legal, conclusions which present mixed questions of law, fact, and policy. Commission and judicial treatment of similar conclusions provide the appropriate framework to deny DP&L's motion.

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<sup>1</sup> *State v. Clark*, 101 Ohio App.3d 389, 411, 655 N.E.2d 795 (Ohio App. 8 Dist.,1995) (*citing Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 159, 383 N.E.2d 564, 566–567 (1978)); Evid.R. 702.

## **II. PERSONAL KNOWLEDGE**

Although DP&L asserts that IEU-Ohio's witnesses' testimony contains statements that are not based on personal knowledge, DP&L's motion and memorandum in support fail to identify what portion of the witnesses' testimony it is referring to. Instead, DP&L includes a table with all the testimony it seeks stricken without any distinction as to the basis that it believes the testimony should be stricken. Therefore, the Commission should ignore this portion of DP&L's motion to strike for its lack of specificity.

Even if the Commission considers this argument, DP&L's motion to strike is meritless because all portions of these witnesses' testimony are based upon personal knowledge. DP&L does not include any explanation or cite any evidence to claim otherwise. Notably, Mr. Murray, Mr. Hess, and Mr. Bowser have all been deposed by DP&L and subjected to cross-examination about their personal knowledge of the contents of their pre-filed testimony. DP&L has had a chance to test the witnesses' personal knowledge and, tellingly, DP&L does not include any citations or references to any deficiencies uncovered during the depositions. Thus, this portion of DP&L's motion to strike should be denied.

## **III. OHIO LAW AND COMMISSION PRECEDENT ALLOW EXPERTS TO TESTIFY AS TO SUBSTANTIVE LEGAL ISSUES**

### **A. Commission Precedent**

The Commission's precedent allows expert witnesses submitting testimony before the Commission to include regulatory conclusions that are based upon mixed

questions of law, fact, and policy.<sup>2</sup> In Case Nos. 04-221-GA-GCR, *et al.*, Columbia Gas of Ohio, Inc. (“Columbia”) moved to strike portions of the Office of the Ohio Consumers’ Counsel’s (“OCC”) testimony on grounds that it contained testimony on substantive legal issues. Specifically, Columbia moved to strike testimony that read:

It is my understanding that Ohio Admin. Code 4901:1-14(07) and Ohio Admin. Code 4901:1-14(08) require that GCR prices be optimal and fair, just and reasonable. The 2003 Stipulation does not produce a GCR that is fair, just, and reasonable, because GCR customers are not receiving credits for off-system sales and capacity release transaction revenues.<sup>3</sup>

Columbia also moved to strike testimony that read:

It is my understanding that Ohio Admin. Code 4901:1-14(07) and Ohio Admin. Code 4901:1-14(08) require that GCR prices be optimal and fair, just and reasonable. I do not believe it is fair, just and reasonable to pass through excess capacity costs - costs in excess of actual GCR usage - to GCR customers.<sup>4</sup>

The Commission denied Columbia’s motion to strike on the basis that the experts were offering expert regulatory opinions and were not making legal arguments:

Columbia also claims that the testimony filed by the OCC witnesses contains legal conclusions and that such testimony should be stricken. The attorney examiner finds that, in the two examples raised by Columbia, the OCC witnesses were not making legal arguments; rather, they were merely providing their expert opinion regarding the costs and credits to be

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<sup>2</sup> In addition to the Commission cases discussed herein, the Commission accepted testimony in other cases which is substantially similar to what DP&L seeks to strike here. *See, e.g., In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Public Version of Direct Testimony of Kevin M. Murray (April 4, 2012) (testifying to many of the same topics as Mr. Murray included in his prefiled testimony in this case that DP&L seeks to strike); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case 12-1230-EL-SSO, Direct Testimony of William R. Ridmann at 10 (April 13, 2012) (testifying as to his understanding of Ohio law’s three-part analysis for considering stipulations).

<sup>3</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc.*, Case Nos. 04-221-GA-GCR, *et al.*, Motion of Columbia Gas of Ohio, Inc. to Strike the Testimony of the Ohio Office of the Consumers’ Counsel and of the PUCO Staff, and to Limit the Scope of Cross-Examination at 14 (Dec. 14, 2006) (hereinafter “*Columbia GCR Case*”).

<sup>4</sup> *Id.*

included in the gas cost recovery rates charged to residential customers. Therefore, Columbia's motion to strike should be denied.<sup>5</sup>

Similarly, in Case No. 02-1280-TP-UNC, the Commission denied a motion to strike that asserted that an expert witness was testifying on legal issues. In its memorandum contra the motion to strike, SBC Ohio argued that its expert witness was “testifying on economic and policy issues that are affected by and entwined with the legal rules governing a total element long run incremental cost (TELRIC) proceeding,” and claimed “that [its expert] Dr. Aron's references to the various orders, rules, and court decisions serve to put her testimony in proper context.”<sup>6</sup> The Commission denied the motion to strike holding that substantive analyses require some consideration of the appropriate regulatory context including a discussion of the relevant legal framework:

With respect to the objections specific to SBC [expert] witness Aron's testimony, the Commission agrees with SBC Ohio's contention that Dr. Aron's testimony, while relying on court and FCC decisions, is being offered in the context of her position as an economist and not that of an attorney. Any substantive TELRIC analysis requires some consideration of the relevant decisions.<sup>7</sup>

The testimony DP&L seeks to strike in this case is in accordance with the Commission's rationale from the SBC Ohio case and parts of what DP&L seeks to strike are nearly identical in form to the testimony that the Commission found proper in Columbia's GCR case. For example, DP&L seeks to strike the testimony of Kevin M. Murray at 10, which reads:

It is my understanding that SB 3 made the corporate separation requirements effective prior to January 1, 2001 effective date of customer choice. It also required the Commission to review and address the EDU's

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<sup>5</sup> *Columbia GCR Case*, Entry at 4-5 (Dec. 29, 2006).

<sup>6</sup> *In the Matter of the Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements*, Case No. 02-1280-TP-UNC, Entry at 2-3 (July 1, 2004).

<sup>7</sup> *Id.* at 3.

corporate separation plan as part of the service and rate unbundling process that took place in the electric transition plan (“ETC”) process.

Just as the Commission found in the Columbia GCR case and SBC Ohio case cited above, IEU-Ohio’s witnesses in this case have submitted prefiled testimony that contains their expert regulatory opinions on issues relevant to this case, which provides a necessary and relevant discussion of the law, fact, and policy that impact their regulatory conclusions. The Commission has expressly found this type of testimony is proper and admissible. IEU-Ohio’s witnesses have not submitted testimony that contains legal arguments.

## **B. Ohio Law**

Contrary to the assertions in DP&L’s motion, Ohio law allows expert witnesses to testify to substantive regulatory and legal issues. A common example of expert witness testimony on substantive legal issues is testimony as to ultimate issues. Evidence Rule 704 provides “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.” A legion of Ohio cases have allowed experts to testify to substantive legal issues.<sup>8</sup>

In *Boardman Molded Products, Inc. v. St. Elizabeth Hospital Medical Center*, 1990 WL 152475 at \*4-5 (Ohio App. 7 Dist.), the court considered whether the appellant

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<sup>8</sup> See, e.g., *Boardman Molded Products, Inc. v. St. Elizabeth Hosp. Medical Center*, 1990 WL 152475 at \*4-5 (Ohio App. 7 Dist.) (rejecting appellant’s argument that “an expert witness is *never* permitted to testify as to questions of law” finding that because of the complexity of the issues involved the trial court did not abuse its discretion in determining that testimony on the cause of a fire was “proper and necessary”) (emphasis in original); *Lamber v. Shearer*, 84 Ohio App.3d 266, 276, 616 N.E.2d 965 (Ohio App. 10 Dist. 1992); *Blanton v. International Minerals & Chem. Corp.*, 125 Ohio App.3d 22, 28-29, 707 N.E.2d 960 (Ohio App. 1 Dist. 1997) (trial court did not abuse its discretion in allowing expert who had testified to specific facts surrounding accident to testify as to his conclusion as to ultimate causation issue); *Johnoff v. Watson*, 2004 WL 2924600, 2004-Ohio-6882 (Ohio App. 6 Dist.) (allowed accident reconstruction expert to give his conclusion as to who caused accident after testifying to details of accident); *State v. Karns*, 80 Ohio App.3d 199, 202-203, 608 N.E.2d 1145 (Ohio App. 1 Dist. 1992).



was negligent in the ignition or spread of a fire; on appeal the appellant argued that the trial court had erred in allowing expert witness testimony that concluded the appellant was responsible for and was the proximate cause of the fire. The *Boardman* Court rejected the appellant's argument that "an expert witness is *never* permitted to testify as to questions of law" and found that because of the complexity of the issues involved the trial court did not abuse its discretion in allowing testimony on the ultimate substantive legal issues in the case.<sup>9</sup> Additionally, in *Blanton v. International Minerals & Chemical Corp.*, 125 Ohio App.3d 22, 28-29, 707 N.E.2d 960 (Ohio App. 1 Dist. 1997), the First District Court of Appeals held that the trial court did not abuse its discretion in allowing an expert to testify on the ultimate substantive legal issues where the expert provided a factual foundation for such testimony.

As explained by Judge Marsh from the Fourth District Court of Appeals, testimony on substantive legal issues is expressly allowed under Ohio's evidentiary rules:

While the appellees cite several cases which do contain blanket statements that an affidavit cannot state legal conclusions, I believe this holding is taken out of context and/or is legally incorrect. Evid.R. 704 provides that expert testimony is not objectionable solely because it embraces the ultimate issue. Thus, an expert may offer an opinion upon the ultimate legal issue which the jury must decide if the expert presents a factual foundation for that opinion. Civ.R. 56(E) requires affidavits to be made upon personal knowledge, to show affirmatively that the affiant is competent to testify and to set forth specific facts that would be admissible in evidence. If the affidavit satisfies those conditions, an expert surely must be able to render an opinion, *i.e.*, legal conclusion, upon the ultimate issue, assuming compliance with Evid.R. 702, 703 and 705 which are not at issue here. Taking the appellees' position literally, no plaintiff would ever be able to withstand a motion for summary judgment in a negligence

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<sup>9</sup> *Boardman Molded Products, Inc. v. St. Elizabeth Hospital Medical Center*, 1990 WL 152475 at \*4-5 (Ohio App. 7 Dist.).

case because the plaintiffs' expert would be prevented from concluding that the defendant breached the standard of care.

I believe the limitations upon legal conclusions are intended to prevent an affiant from presenting a purely conclusory affidavit that does not set forth the admissible facts upon which it is based. In other words, I agree that a mere conclusory statement without the supporting foundation would not be admissible in a summary judgment proceeding in light of the lack of factual basis for the opinion. However, I cannot agree with the appellees' position that an expert's affidavit is precluded from containing properly supported opinions on the ultimate issue, *i.e.*, legal conclusions.<sup>10</sup>

Thus, Ohio law clearly allows expert witness testimony on substantive legal issues.

The cases cited by DP&L either contradict its assertions or are distinguishable. In the first case cited by DP&L, *Niermeyer v. Cook's Termite & Pest Control, Inc.*, 2006 WL 330099, 2006-Ohio-640, ¶ 34 (Ohio App. 10 Dist.), the trial court struck an affidavit that contained legal conclusions without any factual foundation.

The trial court granted [the] motion to strike the affidavit on the basis that it stated only legal conclusions, and failed to outline any facts supporting such conclusions, thus failing to comply with Evid.R. 705 or Civ.R. 56. We agree with the trial court that the opinion was merely conclusory, and that Lachowicz did not support her conclusion with any facts. Affidavits that merely state legal conclusions or opinions without setting forth supporting facts are insufficient to meet the requirements of Civ.R. 56(E).

The *Niermeyer* Court's holding implicitly recognizes that testimony on legal conclusions is permissible if it contains the appropriate factual foundations. The *Niermeyer* Court did not hold that testimony on substantive legal issues was never allowed.

In the second case cited by DP&L, *Camp St. Mary's Association of the West Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, ¶ 40 (Ohio App. 3d Dist.), the court struck a "self-serving

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<sup>10</sup> *Deck v. Wellston City Schools*, Not Reported in N.E.2d, 1997 WL 113900 (1997 Ohio App. 4 Dist.), *concurring opinion of J. Marsh* at 6-7.

affidavit” that was “unsupported by any other evidence in the record” that was attached to the plaintiffs motion for summary judgment.

DP&L also cites two federal court cases at page 3 of its motion, but the first case’s holding was related to a judge “delegate[ing] his duty to determine the law of a case to an expert,”<sup>11</sup> and the second case merely quoted the first case.<sup>12</sup> These references to passing statements from federal court cases hardly establish the broad proposition of law DP&L asserts. For instance, the entirety of the District Court for the Southern District of Ohio’s analysis in the latter case is contained in the following paragraph:

The Government objects to Plaintiff's Exhibit 146, a portion of 14 C.F.R. Part 25. According to the Government, that regulation does not apply to the Piper Arrow. Regardless of the validity of that argument, this Court will decline to admit that exhibit into evidence. 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. Thus, the Sixth Circuit has held that “it is impermissible for a trial judge to delegate his duty to determine the law of a case to an expert. See *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir.1984); *Torres v. County of Oakland*, 758 F.2d 147, 150–51 (6th Cir.1985).” *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir.1991). See also, *Payne v. A.O. Smith Corp.*, 627 F.Supp. 226, 228 (S.D.Ohio 1985). Accordingly, the Court sustains Defendant's objection and will decline to receive Plaintiff's Exhibit 146 into evidence.<sup>13</sup>

The court was addressing the argument about whether or not a portion of the Code of Federal Regulations was applicable, not whether an expert could testify to substantive legal conclusions. Furthermore, the Federal Rules of Evidence, just like the Ohio Rules,

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<sup>11</sup> *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir. 1991).

<sup>12</sup> *Smith v. U.S*, No. 3:95cv445, 2012 WL 1453570 at \*17 (S.D. Ohio, April 26, 2012).

<sup>13</sup> *Id.*

allow expert witness testimony on ultimate legal issues.<sup>14</sup> Thus, there is no basis to take the holding from the two federal court cases cited by DP&L and stretch them to imply that experts are prohibited in federal court from testifying to substantive legal issues; the Federal Rules of Evidence expressly allow for such testimony.

**C. DP&L's has Filed Testimony in this Case that Would be Stricken Under its Proposed, but Incorrect, Standard of Review**

DP&L witnesses have submitted testimony similar to IEU-Ohio's that it seeks to strike, and testimony similar to what the Commission allowed in the cases cited above by IEU-Ohio. For example, DP&L witness Rabb's prefiled testimony at page 9 asserts that "[p]ursuant to ORC §4928.142(C)(3), a Company has the right to recover all costs incurred as a result of or related to the CBP." And DP&L's witness Malinak submitted testimony in this proceeding in which he testified that DP&L satisfied the legal requirement contained in Section 4928.143(C)(1), Revised Code, that an ESP be more favorable than a market rate offer ("MRO"). DP&L's testimony demonstrates that it is well aware of Commission precedent, which allows expert witnesses to offer testimony with regulatory conclusions based upon mixed questions of law, fact, and policy.

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<sup>14</sup> Fed. R. Evid. 704. The notes of the Advisory Committee on Proposed Rules accompanying Fed. R. Evid. 704 also demonstrate that the type of testimony IEU-Ohio seeks to admit would be proper under the federal rules as well.

*The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact.* In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. *The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.* 7 Wigmore §§1920, 1921; McCormick §12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore §1920, p. 17.

Fed. R. Evid. 704 (emphasis added).

#### IV. CONCLUSION

The testimony presented by IEU-Ohio's witnesses is proper. Commission practice allows expert witness testimony on regulatory issues that involve mixed questions of law, fact, and policy. Additionally, Ohio law allows experts to testify to substantive legal issues so long as they provide the necessary context and factual foundation for the testimony on the substantive legal issues. Accordingly, IEU-Ohio's witnesses' testimony is proper and DP&L's motion to strike should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum in Opposition to The Dayton Power and Light Company's Motion to Strike the Testimony of Kevin M. Murray, J. Edward Hess, and Joseph G. Bowser* was served upon the following parties of record this 14<sup>th</sup> day of March 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Memorandum in Opposition to DP&L's Motion to Strike electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio