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 Nos. 12-426-EL-SSO
In the matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	)))	Case Nos. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	)))	Case Nos. 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 Nos. 12-429-EL-WVR
In the matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case Nos. 12-672-EL-RDR

MOTION OF FIRSTENERGY SOLUTIONS CORP., INDUSTRIAL ENERGY USERS-OHIO, INTERSTATE GAS SUPPLY, INC. D/B/A IGS ENERGY, THE OHIO ENERGY GROUP, SOLARVISION, LLC, AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO STRIKE IMPROPER REBUTTAL TESTIMONY OF DONA R. SEGER-LAWSON AND REQUEST FOR EXPEDITED RULING

Pursuant to Commission Rules 4901-1-12 and 4901-1-27, FirstEnergy Solutions Corp. ("FES"), Industrial Energy Users-Ohio ("IEU-Ohio"), Interstate Gas Supply, Inc. d/b/a IGS Energy ("IGS"), The Ohio Energy Group, SolarVision, LLC and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "Movants") request that portions of the rebuttal testimony of The Dayton Power and Light Company ("DP&L") witness Dona R. Seger-Lawson, filed on March 26, 2013, be stricken from the record. The following sections of the testimony constitute improper rebuttal testimony:

Section II, p. 1, line 5 – p. 5, line 18

Section VI, p. 23, lines 3-19

Proper rebuttal testimony is limited to evidence which is given to rebut new evidence presented by the opposing party. Here, Ms. Seger-Lawson seeks to provide (1) a history of DP&L's provision of "below market" rates during the last decade; (2) her recollection of DP&L's decisions not to complete corporate separation during the last decade; and (3) a rehash of Messrs. Jackson's and Herrington's testimony that the SSR subsidy would assure DP&L's financial integrity. Yet no intervenor has put at issue DP&L's retail pricing or its corporate status during the last decade. With regard to the latter, the only issue in dispute is whether DP&L's timely corporate separation now is a better option for customers than DP&L's favored $800+ million subsidy that all of its customers will have to pay. And Ms. Seger-Lawson's testimony regarding R.C. § 4928.143(B)(2)(d) cannot be accepted as legal analysis and has no merit otherwise as rebuttal. Indeed, Ms. Seger-Lawson fails to tie her testimony on these points to <u>any</u> intervenor evidence submitted in this proceeding. Because the entirety of this testimony could have been offered in DP&L's direct case and is not in rebuttal to any evidence provided by the opposing intervenor parties, this testimony has no place in this proceeding and should be stricken.

In the alternative, Movants ask that they and other intervenors be given the opportunity to file sur-rebuttal testimony to respond to Ms. Seger-Lawson's new "evidence". Her statements should not be allowed to stand unrebutted on the record.

Movants further request, pursuant to Rule 4901-1-12 of the Ohio Administrative Code, that an expedited ruling be issued.[1] Ms. Seger-Lawson is scheduled to testify on March 28,

[1] Movants are not in a position to certify that no party objects to this request.

2013, and it is critical that this motion be decided prior to the testimony or potential cross-examination of Ms. Seger-Lawson.

A memorandum in support of this motion is attached hereto and incorporated herein.

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BEFORE THE
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MEMORANDUM IN SUPPORT OF MOTION OF FIRSTENERGY SOLUTIONS CORP., INDUSTRIAL ENERGY USERS-OHIO, INTERSTATE GAS SUPPLY, INC. D/B/A IGS ENERGY, THE OHIO ENERGY GROUP, SOLARVISION, LLC, AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO STRIKE IMPROPER REBUTTAL TESTIMONY OF DONA R. SEGER-LAWSON AND REQUEST FOR EXPEDITED RULING

I. Introduction

On March 26, 2013, The Dayton Power & Light Company ("DP&L") filed the Rebuttal Testimony of Dona R. Seger-Lawson which, among other things, discusses DP&L's history of providing retail service in the 2000s following implementation of S.B. 3 and offers her opinion that DP&L's proposed $800+ million subsidy meets the elements of R.C. § 4928.143(B)(2)(d). None of this testimony is, in fact, rebuttal testimony. DP&L did not provide any testimony in its direct case regarding its provision of retail service during the 2000s and did not discuss its

history of corporate separation during the 2000s. Likewise, no intervenor provided direct testimony on these topics. Likewise, Ms. Seger-Lawson's discussion of R.C. § 4928.143(B)(2)(d) is simply a rehash of DP&L witness Jackson's and Herrington's testimony. Indeed, Ms. Seger-Lawson fails to reference any intervenor testimony she is seeking to rebut in these sections of her testimony. Rebuttal testimony is limited to testimony needed to rebut evidence presented by the adverse party. As the testimony of Ms. Seger-Lawson does not rebut any evidence presented by an adverse party, but instead offers evidence which could have been presented as part of DP&L's direct case, this improper "rebuttal" testimony should be stricken.

II. Legal Standard

Rebuttal testimony:

> is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is that evidence which has become relevant or important only as an effect of some evidence introduced by the other side.

Nickey v. Brown, 7 Ohio App. 2d 32, 35 (1982) (quoting 31 CORPUS JURIS SECUNDUM 818 *Evidence* § 2). *See also State v. McNeill,* 83 Ohio St. 3d 438, 446 (1998) ("Rebutting evidence is that given to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence.")

Further, the scope of rebuttal testimony is limited by the evidence voluntarily offered by the opposing party; it is not the equivalent of introducing evidence in a party's case-in-chief. *See Nickey*, 7 Ohio App. 2d at 35. "The failure of a party to present evidence in its case in chief is not an excuse to present that evidence on rebuttal." *Blandford v. A-Best Products Co.*, Cuyahoga App. Nos. 85710 and 86214, 2006-Ohio-1332, at ¶ 19.

The Commission has a long-standing policy of striking improper rebuttal testimony which does not meet this standard. "Even a cursory review of the testimony reveals that the CLEC witnesses are not attempting to rebut ***new evidence*** elicited during cross examination or on redirect examination." *In re Ameritech Ohio's Economic Costs*, Case No. 96-922-TP-UNC, 2001 WL 280125 (January 29, 2001 Entry, ¶ 5) (emphasis added). "The Commission has routinely limited rebuttal to testimony that a party ***could not have presented as part of their direct case.***" *Id.* at ¶ 8. Based on this clear legal standard, the Attorney Examiner struck improper rebuttal testimony, and this decision was later upheld by the Commission. *See In re Ameritech Ohio's Economic Costs*, Case No. 96-922-TP-UNC (October 4, 2011 Opinion and Order at 24).

In another decision precisely on point, applicants sought to supplement the evidentiary record on rebuttal with new evidence in support of their direct case. The attorney examiner struck this new evidence, finding that it should have been presented as part of the direct case of the applicants since it did not respond to any evidence provided by the opposition:

> The attorney examiner notes that the burden of proof unquestionably lies with the joint applicants in this matter. Unless specifically stated otherwise, it has always been Commission precedent to require applicants in all formal proceedings to present their prima facie case via their direct testimony. Therefore, joint applicants should have been aware of their obligation to include [new evidence] as part of their direct case.
>
> * * *
>
> Rebuttal testimony is appropriate for the purpose of contradicting the opponent's evidence. Such evidence should be utilized for the purpose of demonstrating that intervenors criticisms were actually addressed in joint applicants' direct case or that such criticisms are unjustified based on the existing record. Through the introduction of their [new evidence], joint applications are not attempting to accomplish either of these two objectives, but rather are supplementing the record by either including commitments on

> issues not previously presented or now, for the first time, providing specific detail to previously stated generic commitments. Neither of these purposes is supported . . . ."

In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control, Case No. 98-1398-TP-AMT, pg. 4 (July 16, 1999).

As shown by this authority, proper rebuttal testimony is limited to testimony which (a) could not have been presented as part of the direct case, and (b) responds to new evidence presented by the opposition. Neither of these criteria are satisfied with respond to the "rebuttal" testimony of Ms. Seger-Lawson; thus, the testimony should be stricken.

III. Argument

Section II of Ms. Seger-Lawson's testimony does not seek to rebut new evidence raised by intervenors but, instead, raises two new issues that DP&L apparently believes will bolster its case-in-chief. First, she seeks to introduce evidence that DP&L provided below-market generation rates to its customers in the 2000s. This evidence is not offered to rebut any evidence submitted by an intervenor. To the contrary, Ms. Seger-Lawson explains at page 3 of her testimony that she believes this history is important to bolster Mr. Chambers' discussion of DP&L's financial integrity. Her argument, apparently, is that the Commission should provide subsidies to DP&L over the next five years because DP&L did the Commission a favor in the 2000s. This distasteful quid-pro-quo argument could have been made by DP&L in its direct testimony; it does not rebut any counter-argument made by intervenors. Put another way, no intervenor has offered evidence regarding DP&L's retail pricing in the 2000s, and Ms. Seger-Lawson has not pointed to an intervenor that has. This is not proper rebuttal.

Second, Ms. Seger-Lawson offers her explanation of why DP&L did not complete corporate separation during the 2000s. Although Ms. Seger-Lawson cites to Mr. Randazzo's testimony to the General Assembly in 2007[3] (his recommendations were not adopted into law), this is not evidence in this proceeding. She suggests that IEU has taken an inconsistent position in this proceeding,[4] but she fails to identify any actual evidence submitted by IEU that her testimony is intended to rebut. The only evidence submitted on corporate separation is offered by FES's witnesses Noewer and Lesser, and their testimony relates to DP&L's option of achieving corporate separation in the next year instead of imposing over $800 million in unlawful generation subsidies on captive ratepayers over the next five years. At issue is not whether DP&L should have completed corporate separation in the 2000s; instead, what matters is whether DP&L's corporate separation by the end of 2014 is a better, lower-cost option than DP&L's proposed $800+ million subsidy. Notably, she offers no evidence to show that the proposed ESP with its massive subsidies (that all of DP&L's customers will have to pay) is the least-cost option. Ms. Seger-Lawson's testimony does not rebut, and is not intended to rebut, any evidence submitted by intervenors.

Similarly, Ms. Seger-Lawson's statements on page 23 of her testimony, lines 3-19, that the SSR satisfies R.C. § 4928.143(B)(2)(d) also are not offered in response to intervenor testimony. Given that she is not qualified to offer legal analysis, her opinion could only have value if it were rebutting facts related to the SSR subsidy. But her statements are merely conclusions in support of Mr. Jackson's and Mr. Herrington's testimony regarding financial integrity and the need to extend the subsidy over five years. She is supporting their direct testimony, not rebutting intervenor testimony.

[3] Rebuttal Testimony, p. 5.

As shown by the foregoing, Ms. Seger-Lawson is not responding to new evidence introduced by the opposing parties. Therefore, Section II of Ms. Seger-Lawson's testimony, as well as page 23, lines 3-19 of her testimony, are not proper rebuttal testimony and should be stricken.

Respectfully submitted,

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[4] *Id.*, p. 5 ln. 18.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Strike Improper Rebuttal Testimony and Request for Expedited Ruling* was served this 27th day of March, 2013, via e-mail upon the parties below.

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Motion OF FIRSTENERGY SOLUTIONS CORP., INDUSTRIAL ENERGY USERS-OHIO, INTERSTATE GAS SUPPLY, INC. D/B/A IGS ENERGY, THE OHIO ENERGY GROUP, SOLARVISION, LLC, AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO STRIKE IMPROPER REBUTTAL TESTIMONY OF DONA R. SEGER-LAWSON AND REQUEST FOR EXPEDITED RULING electronically filed by Mr. James F Lang on behalf of FirstEnergy Solutions Corp.