

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 16-0649-EL-POR
Approval of its Energy Efficiency and)
Peak Demand Reduction Portfolio Plan.)

In the Matter of the Application of The)
Dayton Power and Light Company for)
Approval of Its Energy Efficiency and) Case No. 16-1369-EL-WVR
Peak Demand Reduction Program)
Portfolio Plan for 2017 through 2019.)

**MOTION TO STRIKE PORTIONS OF THE DAYTON POWER & LIGHT
COMPANY'S POST-HEARING BRIEFS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Dayton Power & Light Company's post-hearing briefs inappropriately rely on allegations, assertions, and information that was not part of the record in this case. PUCO precedent on this issue is straightforward:

- Parties can cite record evidence.
- Parties can cite PUCO Orders and Entries.
- Parties cannot cite facts not in evidence.
- Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.

This precedent is reasonable and fair to all parties. The PUCO gives parties ample opportunity to present evidence and allows other parties to test that evidence. This is done by permitting all parties to (i) file testimony, (ii) attend a hearing before an Attorney Examiner, (iii) present documents and request that they be admitted into the record,

(iv) request administrative notice of documents, and (v) cross-examine witnesses at the hearing.

To protect the integrity of the PUCO's administrative process—which in this case will affect over 450,000 million consumers—the Office of the Ohio Consumers' Counsel ("OCC") respectfully moves to strike the portions of DP&L's briefs that rely on non-record allegations, opinions, and assertions. It is unfair for parties, on brief and after the fact, to rely on information that was not subject to scrutiny by other parties and was not subject to the PUCO's reasonable administrative process.

The PUCO should strike the following portions of DP&L's March 10 initial brief¹ and March 24 reply brief²:

DP&L's Initial Brief:

- a) Page 8, first full paragraph, beginning with the words "Further, these" and through the end of that paragraph ending with "as cost-effective."
- b) Page 9, the sentence in the first partial paragraph starting with "The Company's" and ending with "identified above."
- c) Page 9, the last sentence in the first full paragraph starting with "The Company" and ending with "benchmarks."
- d) Page 10, in the first full paragraph, starting with the words "incentivizes the utility" and through the end of that sentence ending with "and usage."

DP&L's Reply Brief:

- e) Page 4, the last sentence of the first full paragraph starting with "On March 14" and continuing through to the end of the block quote that ends with the words "non-bypassable

¹ <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=a5f3b08b-4a7a-42cb-9384-78274f6993a2>

² <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=8dfe66d9-9cb2-4970-a138-af3ca5ee8235>

- f) Page 5, the second sentence in the first full paragraph starting with "The Company and Commission Staff" and ending with "rate case."
- g) Page 7-8, starting in the last sentence on page 7 with the words "the Company's programs" and through the end of that sentence on page 8 with the words "as cost-effective," plus the corresponding footnote 23 on page 8.
- h) Page 8, the sentence in the first partial paragraph that begins with "The creation" and through the end of that paragraph with the words "OCC intends."
- i) Page 12, in the second full paragraph, the phrase beginning with "is diligently" and ending with "resolution."
- j) Page 15, the second sentence in the last partial paragraph beginning with "That filing" and ending with "other parties."
- k) Page 15-16, starting in the last partial paragraph with the words "yet OCC" and through the end of that paragraph on page 16 ending with "to date," plus the corresponding footnote 50 on page 16.

As described in the attached memorandum in support, the PUCO should strike these portions of the briefs because they cite to information that is not evidence in this proceeding and constitutes hearsay. Allowing off-record, untested information is prejudicial to OCC and consumer interests. It is inappropriate for the PUCO to rely on such information in deciding how much DP&L can charge its customers for energy efficiency.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Christopher Healey
Christopher Healey (0086027)
Counsel of Record
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Healey]: (614) 466-9571
Telephone [Etter]: (614) 466-7964
christopher.healey@occ.ohio.gov
terry.etter@occ.ohio.gov
(Both will accept service via email)

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MEMORANDUM IN SUPPORT

The PUCO has developed a process for resolving its proceedings. All parties in this case were permitted to file testimony.³ DP&L, the PUCO Staff, and OCC took advantage of that opportunity and filed testimony in January 2017.⁴ No other party chose to file testimony. The PUCO scheduled a hearing for February 7, 2017.⁵ The PUCO held the February 7 hearing.⁶ All parties were allowed to appear at the hearing, to cross-examine witnesses, and to otherwise present evidence to the Attorney Examiner, but they mutually agreed to waive those rights in favor of a more expedited process.⁷ The

³ Entry ¶ 2 (Dec. 20, 2016).

⁴ Company Ex. 1 (Teuscher Testimony); PUCO Staff Ex. 1 (Braun Testimony); OCC Ex. 1 (Shutrump Testimony).

⁵ Entry ¶ 4 (Dec. 20, 2016).

⁶ February 7, 2017 Transcript, available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=4a4d2d3c-aaff-4feb-a476-e9089d2b0c51>.

⁷ See Joint Motion for (I) Modifications to the Procedural Schedule and (II) Admission of Exhibits and Request for Expedited Treatment (Feb. 6, 2017); Tr. at 10:4-7 (Attorney Examiner noting that no party objected to the motion).

Attorney Examiner then provided all parties an opportunity to file post-hearing briefs and reply briefs.⁸

The record in this case was closed on February 7, 2017.⁹ But now, in its briefs and after the fact, DP&L cites extensively in its briefs to facts, opinions, and information that were not admitted into the record. This should not be permitted, consistent with PUCO precedent. The PUCO's precedent regarding post-hearing briefs is fair, reasonable, and importantly, very easy to comply with. Parties can cite record evidence in their briefs. Parties can cite documents that have been administratively noticed.¹⁰ Parties can cite PUCO orders and entries.¹¹ Parties cannot cite facts not in evidence.¹² Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.¹³

Despite this precedent, DP&L's post-hearing briefs repeatedly rely on information that is not part of the record in this case. DP&L's infractions fall into two primary

⁸ Tr. at 10:9-11.

⁹ Tr. at 10:14-15.

¹⁰ *Canton Storage & Transfer Co. v. PUCO*, 72 Ohio St. 3d 1, 8 (1995).

¹¹ Opinion & Order ¶ 31, *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (Dec. 31, 2016).

¹² Order on Remand at 9-10, *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO (granting a motion to strike portions of AEP's initial post-hearing brief that included non-record information); 5th Entry on Rehearing at 169-72, *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (Oct. 12, 2016) (granting motions to strike portions of rehearing briefs that included information and statements that were not part of the evidentiary record).

¹³ Opinion & Order at 37, *In re Application of [FirstEnergy] for Authority to Provide a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (Mar. 31, 2016) (granting motions to strike portions of reply briefs that cited to documents filed in other PUCO proceedings); *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (Dec. 31, 2016) (striking portion of a post-hearing brief that cited a motion filed in the same case because the motion was not admitted into the evidentiary record).

categories: (i) citations to documents filed in other PUCO proceedings that were not admitted into the record, and (ii) statements that are not based on record evidence.

The PUCO should strike the portions of DP&L's briefs that improperly rely on information that has not been admitted as evidence in this proceeding and that constitutes hearsay. The PUCO should not consider or rely on that information, which is outside a fair hearing process, in deciding the merits of this case affecting over 450,000 consumers.

I. RECOMMENDATIONS

A. The PUCO should strike all portions of DP&L's briefs that rely on documents filed in other PUCO proceedings because those documents are not part of the record in this energy efficiency portfolio case.

DP&L's briefs rely on (i) the results of DP&L's 2013, 2014, and 2015 energy efficiency programs, as filed in Case Nos. 14-738-EL-POR, 15-777-EL-POR, and 16-851-EL-POR,¹⁴ (ii) a stipulation that was purportedly filed in Case No. 16-395-EL-SSO,¹⁵ and (iii) OCC's motion to intervene in Case No. 16-329-EL-RDR.¹⁶ These documents were not admitted into the evidentiary record. DP&L did not offer these documents as evidence. DP&L offered no testimony supporting the information in these documents. Yet now, when there is no opportunity to test DP&L's assertions, it relies on this non-record information in its arguments to the PUCO. This is unfair and should not be permitted, consistent with PUCO practice.

DP&L's reliance on non-record information is improper and violates PUCO precedent. The PUCO has continuously rejected efforts by parties to include information

¹⁴ See portions of DP&L's briefs labeled above as (a), (b), and (g).

¹⁵ See portions of DP&L's briefs labeled above as (e).

¹⁶ See portions of DP&L's briefs labeled above as (j) and (k).

in a brief that is not part of the record, including information that was submitted in other PUCO proceedings.¹⁷ In doing so, the PUCO has defended fairness in its processes by noting: "If we were to allow evidence to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document."¹⁸

Because DP&L did not seek admission of these documents into the record, OCC had not had the opportunity to test DP&L's extra-record information. This prejudices OCC and the consumers it represents. The portions of DP&L's briefs that reference these documents should be stricken, consistent with PUCO precedent.

B. The PUCO should strike all portions of DP&L's briefs that rely on facts, opinions, or allegations not supported by evidence.

Throughout its post-hearing briefs, DP&L makes statements that are not based on record evidence:

- On page 9 of its initial brief, DP&L claims that its energy efficiency programs have "historically exceeded" the statutory energy efficiency benchmarks.¹⁹ The record does not include any evidence of DP&L's historical energy efficiency performance.
- On page 10 of its initial brief, DP&L opines that allowing a utility to collect lost revenues "incentivizes the utility to continue to research, create and administer energy efficiency programs..."²⁰ The record does not include any evidence showing what impact lost revenues have on incentivizing DP&L.

¹⁷ See footnotes 12-13 above.

¹⁸ In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture, PUCO Case No. 06-786-TR-CVF, Opinion and Order at 3 (November 21, 2006).

¹⁹ See portions of DP&L's briefs labeled above as (c).

²⁰ See portions of DP&L's briefs labeled above as (d).

- On page 5 of its reply brief, DP&L asserts that DP&L has "worked diligently" to "work toward an expedient resolution of the rate case."²¹ DP&L similarly states, on page 12 of its reply brief, that it is "diligently working" towards a resolution of its rate case.²² The record does not include any evidence that supports these assertions.
- On page 8 of its reply brief, DP&L claims that rate cases are "incredibly time consuming and expensive" and that they are "prohibitively costly."²³ The record does not contain any information about the cost of DP&L's or any other utility's rate cases or whether rate cases are "prohibitively costly."

DP&L had the opportunity to seek to introduce information on these topics into the record, when OCC could test the alleged evidence. DP&L declined to do so. The portions of DP&L's briefs that rely on these non-record facts should be stricken, consistent with PUCO precedent and fairness in PUCO proceedings.

II. CONCLUSION

For reasons of fairness to parties and to its own decision-making, the PUCO does not allow parties to cite information in their briefs that they (or others) did not enter into the evidentiary record in the proceeding. DP&L's briefs rely on information that is not evidence. OCC has not been provided the opportunity to test, via cross-examination or otherwise, the information now appearing for the first time in DP&L's brief and reply brief. The use of this information is unfair and highly prejudicial to OCC and the consumers it represents. The PUCO should grant OCC's motion to strike.

²¹ See portions of DP&L's briefs labeled above as (f).

²² See portions of DP&L's briefs labeled above as (i).

²³ See portions of DP&L's briefs labeled above as (h).

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Healey]: (614) 466-9571
Telephone [Etter]: (614) 466-7964
christopher.healey@occ.ohio.gov
terry.etter@occ.ohio.gov
(Both will accept service via email)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike was served on the persons stated below via electronic transmission this 31st day of March 2017.

/s/ Christopher Healey _____

Christopher Healey

Assistant Consumers' Counsel

SERVICE LIST

John.jones@ohioattorneygeneral.gov

tdougherty@theoec.org

mleppla@theoec.org

jfinnigan@edf.org

joliker@igsenerg.com

dparram@bricker.com

cmooney@ohiopartners.org

jeremy.grayem@icemiller.com

mfleisher@elpc.org

bojko@carpenterlipps.com

perko@carpenterlipps.com

sam@mwncmh.com

mpritchard@mwncmh.com

fdarr@mwncmh.com

mwarnock@bricker.com

dborchers@bricker.com

Attorney Examiner:

Richard.bulgrin@puc.state.oh.us

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Summary: Motion Motion to Strike Portions of the Dayton Power & Light Company's Post-Hearing Briefs by the Office of the Ohio Consumer's Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.