BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 16-649-EL-POR
The Dayton Power and Light Company for	:	
Approval of Its Energy Efficiency Portfolio	:	Case No. 16-1369-EL-WVR
Plan	:	

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

I. Law and Argument

The Office of the Ohio Consumers' Counsel's ("OCC") Motion to Strike portions of the Dayton Power and Light Company's ("the Company") post-hearing Briefs should be denied in total. OCC's Motion to Strike ignores documents and evidence that were admitted into the record. OCC's Motion to Strike seeks to strike references to other filings before the Commission that can be administratively noticed, and which clearly do not prejudice OCC in any material way. Finally, OCC's Motion to Strike seeks to strike certain statements that contain nothing more than generally known facts and common sense extensions of arguments made by the Company.

OCC has listed subparts (a) – (k) in its Motion to Strike which identify portions of the Company's post-hearing Briefs that OCC seeks to strike. Many of these subparts deal with the same or similar issues, and for ease of reference and efficiency, the Company will group them together and respond accordingly.

A. **The Company has admitted evidence into the record that establishes that the Company's energy efficiency programs have historically exceeded the statutory benchmarks and have been independently evaluated as cost-effective.**

Subparts (a), (b), (c) and (g) seek to strike portions of the Company's Briefs containing statements that the Company has historically exceeded it statutorily required benchmarks, that the plans have been independently scored as cost-effective, and that cite to the Company's annual energy efficiency update filings. OCC claims these statements are not supported by any evidence in the record. This is simply false.

The Company's June 15-16, 2016 Application for approval of its Energy Efficiency Portfolio ("2016 Application") was marked as Company Exhibit 3 at the February 7, 2017 hearing, and admitted into the record. The Company's proposed 2017-2019 Portfolio Plan is part of the 2016 Application. Pages 9-11 of the 2017-2019 Portfolio Plan specifically discuss the Company's past program performance, and contain graphics showing the Company's actual savings in cumulative demand and savings versus the corresponding benchmarks.[1] Page 11 also discusses the importance of evaluation, measurement and verification ("EM&V") of these programs and how the Company's independent evaluator, The Cadmus Group, has routinely received praise from the state's independent evaluator.

Page 2 of the Company's 2016 Application provides "DP&L's energy efficiency programs have been exceedingly successful and DP&L is currently five (5) years ahead of the cumulative energy efficiency and peak demand benchmarks, as set forth in R.C. §4928.66(A)(1)(a) and R.C. §4928.66(A)(1)(b)." Finally, Company Witness Tyler A. Teuscher, on page 6 of his testimony, states the Stipulation and Recommendation, which grew out of the

[1] Attached hereto as Exhibit 1.

original filing, "extends a wide array of cost-effective programs that reach a broad range of interested parties, and which have been regularly independently evaluated."[2]

With specific reference to the Company's citation to its annually filed energy efficiency update filings, the Commission can take administrative notice[3] of the fact that while OCC moved to intervene in the 2014 and 2016 filings (but not 2015), those updates were not substantively challenged,. Regardless, as explained above, the Company did admit evidence into the record to support the fact that the Company's energy efficiency programs have historically exceeded the statutory benchmarks, and have been independently scored as cost-effective. The citations to these annual update filings only reinforce this position, so there is no real prejudice to OCC in this instance.

Accordingly, the statements referred to in subparts (a), (b), (c), and/or (g) are supported by evidence in the record. OCC had the opportunity to challenge the 2016 Application, including the proposed 2017-2019 Portfolio Plan, as well as Mr. Teuscher's testimony. However, OCC permitted their admission into the record of this case.

B. <u>The Company's references to other filings before the Commission do not prejudice OCC in any manner and the Commission can take administrative notice of these filings.</u>

OCC also argues that the Company's citation to certain filings in other Commission proceedings is improper. Once again, OCC's arguments are misplaced. "There is neither an absolute right for nor an absolute prohibition against the commission taking administrative notice of facts outside the record of the case." *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 227 (2016) (citing *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8 (1995)). Each

[2] Company Exhibit 2, admitted into the record at the February 7, 2017 public hearing before the PUCO.
[3] See Section B., infra.

case must be resolved on its specific facts, and in all cases the complaining party must demonstrate prejudice. *Id.*

The precedent cited by OCC is not persuasive. OCC cites to *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC, [4] for the proposition that the Company should not be able to cite to documents filed in other Commission proceedings.[5] However, what OCC chose not to highlight in *In re Columbia Gas of Ohio, Inc.* was that OCC moved to strike portions of OPAE's initial and reply briefs that cited to a Stipulation filed in Columbia Gas' 2008 distribution rate case, a Stipulation that had been addressed in Columbia Gas' initial brief. The Commission ultimately determined that references to that Stipulation would not be stricken because OCC was a party to the 2008 distribution rate case, and because OCC had the opportunity to address the arguments in its reply brief.[6]

The Company has already addressed the citations to its annual energy efficiency portfolio updates for 2014, 2015 and 2016 above (addressed in subparts (a), (b), (c), and (g) of OCC's Motion to Strike), and the reality that the underlying facts at issue are contained in the record of this case. Nevertheless, as in *In re Columbia Gas of Ohio, Inc.*, these annual update citations were contained and discussed in the Company's Initial Brief (pg. 8) and available for challenge in OCC's Reply Brief. Further, OCC is a party to two of the three annual update cases.

In *In re AEP*, Case No. 08-917-EL-SSO, the Commission granted OCC's motion to strike portions of AEP's post-hearing briefs *on remand*, which raised factual issues regarding POLR charges of *other utilities* after the Supreme Court of Ohio reversed a previous Commission ruling because "the Commission's decision that the POLR charge is cost-based was against the

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[4] *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs of its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC.

[5] OCC's Motion to Strike at pg.2.

[6] *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC, Opinion and Order at ¶ 32 (December 21, 2016).

manifest weight of the evidence."[7] In so ruling, the Commission specifically stated that "it would be improper to take administrative notice of the information *at this stage in the proceedings.*"[8] This matter, however, is procedurally postured in a remarkably different way (not on remand) and OCC's motion to strike does not target factual information relating to other Ohio utilities.

OCC also relies upon a specific portions of an order in *In re FirstEnergy*, Case No. 14-1279-EL-SSO, FirstEnergy's ESP IV, much of which was limited to information had been "[*expressly*] *stricken* from the record or *denied admission* into the record by the attorney examiners," constituted blatant hearsay (newspaper article), or was a part of dockets concerning other utilities.[9] None of the information that OCC is seeking to strike here was expressly excluded by the attorney examiner, introduces or relies upon hearsay, or cites to information from other utilities' cases.

Regarding OCC subparts (j) and (k), OCC challenges references to the docket in the Company's Energy Efficiency Rider Update Case, No. 16-0329-EL-RDR ("EER Update"). OCC has moved to intervene in that case, and is aware of the filings in that docket. Regardless, the vast majority of what OCC seeks to have stricken simply recounts the procedural record in that case. OCC has the burden of establishing prejudice in this instance. Is OCC arguing that it has been prejudiced by not having the ability to challenge when certain filings were made in

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[7] *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, 08-917-EL-SSO, Order on Remand at pp. 3, 9 (October 3, 2011) (emphasis added).
[8] *Id.* at 9 (emphasis added).
[9] *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, 14-1297-EL-SSO, Opinion and Order at pg. 37 (March 31, 2016) (emphasis added). See also pgs. 169-172 of the Fifth Entry on Rehearing in Case No. 14-1297-EL-SSO (October 12, 2016), reaffirming the March 31, 2016 Opinion and Order.

other proceedings? There is nothing to be challenged here, there is no prejudice to OCC, and this argument is without merit.

Regarding OCC subpart (e), and specifically the March 14, 2017 Amended Stipulation in the Company's ESP Case, No. 16-0395-EL-SSO, it would have been impossible for the Company to have admitted this Amended Stipulation into the record on February 7, 2017 because the Amended Stipulation was not filed until approximately five (5) weeks after the hearing in this case. In fact, the Amended Stipulation was note filed until four (4) days after the Company's Initial Brief was due. Regardless, the portion of the Company's Reply Brief that OCC seeks to strike simply recites when the Amended Stipulation was filed and quotes language contained in that Amended Stipulation. This is not a disputed fact or issue. Again, there is nothing to be challenged by OCC. The Company is not claiming this is the final outcome of the ESP case. There can be no prejudice to OCC in the Commission taking administrative notice of the plain text of the Amended Stipulation in the ESP case. Accordingly, because OCC has not been prejudiced in any of these instances, its Motion to Strike the identified portions of the Company's post-hearing briefs should be denied.

C. Common sense argumentative statements should not be stricken and the Commission can take judicial notice of commonly known facts.

OCC's request to strike the portions of the Company's Briefs identified in subparts (d) and (h) should be denied. Specifically, referencing subpart (d), OCC seeks to strike the following partial sentence on page 10 of the Company's Initial Brief: "incentivizes the utility to continue research, create and administer energy efficiency programs that will result in reduced energy consumption and usage." This partial sentence relates to the rationale behind allowing utilities to recover lost distribution revenues. Further, subpart (h) seeks to strike the following from page 8 of the Company's Reply Brief:

> The creation and implementation of rate adjustment mechanisms, such as for lost distribution revenue recovery, prevents the need for constant rate base cases, which are incredibly time consuming and expensive. Without such rate adjustment mechanisms, utilities, such as the Company, would be caught in a never-ending cycle of prohibitively costly rate cases – surely this cannot be what OCC intends.

The Commission, like a court, should take judicial notice of "whatever is generally known or ought to be generally known within the limits of their jurisdiction, for the court is presumed to know what is of common knowledge."[10] Company Witness Teuscher's testimony and the 2016 Stipulation, both admitted into the record, explain that lost distribution revenues will be recovered through the EER until such time as they are incorporated into a distribution decoupling rider.[11] The Stipulation itself also provides the evidentiary support for these arguments because the Stipulation expressly states that lost distribution revenues will be reset consistent with the outcome of the Company's pending distribution rate case. The statements that OCC seeks to strike in subparts (d) and (h) are commonly known and understood facts in the industry, and are natural and common sense extensions of the Company's arguments as to why lost distribution revenue recovery is justified and should be recovered in this manner.

Lost distribution revenues are specifically identified and recoverable under O.A.C. 4901:1-39-07(A). It is self-evident that this statutorily created system is designed to avoid the need to full-blown rate cases related to this type of recovery. It is also self-evident and universally understood that rate cases are expensive and time-consuming endeavors for all parties involved. Further, because lost distribution revenue recovery makes a utility whole, the utility has a natural and economic incentive to create and administer cost effective and successful programs. These are the types of generally known facts within the Commission's jurisdiction

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[10] *Brackett, et al. v. Moler Raceway Park, et al.*, 2013 WL 1196506 at *10 (12th App. Dist.).
[11] Teuscher Testimony at pg.4; 2016 Stipulation at pgs. 11 and 13.

that should be judicially noticed. Striking these types of statements and arguments would seriously curtail any party's ability to advocate for its position before the Commission - a party must be able to articulate why the underlying facts support its case.

Lastly, in subparts (f) and (i), OCC seeks to strike portions of the Company's Reply Brief referring to efforts to resolve the Company's Distribution Rate Case, No. 15-1830-EL-AIR. OCC did not attempt to strike the Company's description of the Commission's March 22, 2017 Entry containing the procedural status and plan for the Distribution Rate Case. The statements that OCC seeks to strike are merely characterizations of this procedural status. Accordingly, the Commission should not strike the portions of the Company's Briefs referred to in OCC subparts (d), (f), (h) or (i).

II. Conclusion

OCC's Motion to Strike ignores documents and evidence in the record, misconstrues the Commission's ability to take administrative notice of certain non-prejudicial filings/facts, and inexplicably targets generally known facts and common sense argumentative statements that articulate support for the Company's case. For all of the foregoing reasons, OCC's Motion to Strike should be denied in total.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following via electronic mail on April 17th, 2017.

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Programs	Program Costs			
Residential Programs	**2017**	**2018**	**2019**	**3-Year Total**
Efficient Products	$ 5,345,485	$ 5,115,244	$ 4,937,540	$ 15,398,269
HVAC Equipment	$ 1,654,750	$ 1,672,071	$ 1,684,761	$ 5,011,582
Appliance Recycling	$ 773,874	$ 786,490	$ 799,625	$ 2,359,989
Income Eligible Efficiency	$ 1,311,376	$ 1,376,085	$ 1,444,003	$ 4,131,464
School Education	$ 392,880	$ 400,657	$ 408,805	$ 1,202,342
Home Audit	$ 848,586	$ 897,319	$ 952,828	$ 2,698,733
Behavior Change	$ 1,429,696	$ 1,371,337	$ 1,363,027	$ 4,164,060
Energy Savings Kits	$ 962,239	$ 986,933	$ 1,013,779	$ 2,962,951
Multi-Family Direct Install	$ 873,883	$ 885,964	$ 898,272	$ 2,658,119
Residential Total	$ 13,592,769	$ 13,492,100	$ 13,502,640	$ 40,587,509
Business Programs	**2017**	**2018**	**2019**	**3-Year Total**
Prescriptive	$ 5,592,164	$ 5,845,725	$ 6,111,182	$ 17,549,071
Custom	$ 3,029,687	$ 3,242,462	$ 3,378,700	$ 9,650,849
Commercial Midstream	$ 1,034,058	$ 1,155,994	$ 1,293,308	$ 3,483,360
Small Business Direct Install	$ 1,359,213	$ 1,537,752	$ 1,689,962	$ 4,586,927
Combined Heat and Power	$ 511,095	$ 606,728	$ 702,380	$ 1,820,203
Mercantile Self-Direct	$ 750,316	$ 677,328	$ 618,610	$ 2,046,254
Business Total	$ 12,276,533	$ 13,065,989	$ 13,794,142	$ 39,136,664
Cross-Sector Programs	**2017**	**2018**	**2019**	**3-Year Total**
Customer Education	$ 1,200,000	$ 1,207,500	$ 1,215,375	$ 3,622,875
Pilot Program	$ 1,293,465	$ 1,327,904	$ 1,364,839	$ 3,986,208
Smart Grid	$ -	$ -	$ -	$ -
Non-Programmatic Savings	$ 1,400,000	$ 1,300,000	$ 1,300,000	$ 4,000,000
T&D Infrastructure Improvement	$ -	$ -	$ -	$ -
Cross-Sector Total	$ 3,893,465	$ 3,835,404	$ 3,880,214	$ 11,609,083
Other Costs	**2017**	**2018**	**2019**	**3-Year Total**
Evaluations, Measurement & Verification	$ 1,552,158	$ 1,593,485	$ 1,637,807	$ 4,783,450
Other Costs Total	$ 1,552,158	$ 1,593,485	$ 1,637,807	$ 4,783,450
PORTFOLIO TOTAL	**$ 31,314,925**	**$ 31,986,978**	**$ 32,814,803**	**$ 96,116,706**

Table 2 Summary of Program Costs for 2017-2019 Plan

Compliance with Ohio Benchmark Targets

Based on the past performance of DP&L's current programs and the projected performance of the programs in this portfolio plan, DP&L projects that it will exceed the compliance benchmarks of O.R.C. §4928.66(A)(1)(a) and O.R.C. 4928.66(A)(1)(b). Presented below in Figures 1 and 2 are DP&L's projections for energy and demand compared to the benchmarks. Results from years 2009 through 2015 are actuals, as reported in DP&L's annual portfolio reports. Results from 2016 are estimates.

EXHIBIT 1

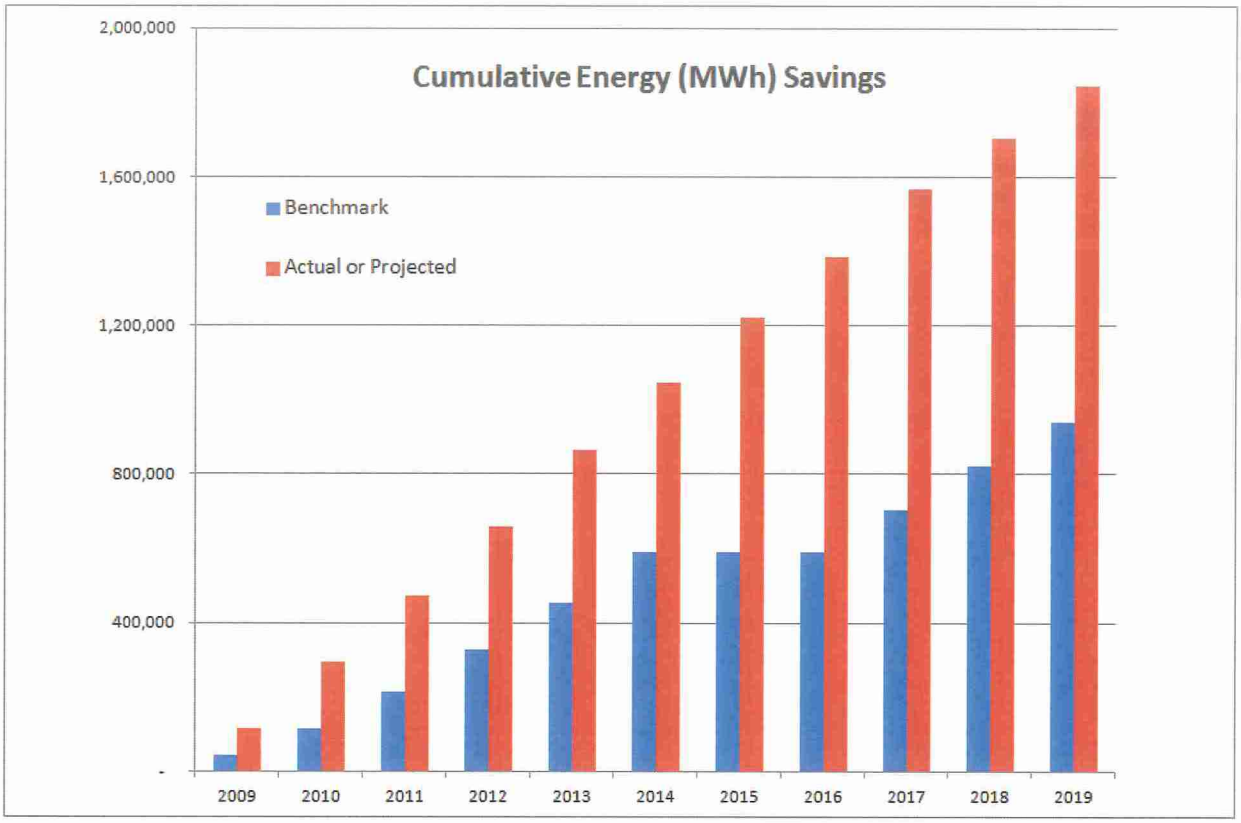

Figure 1 Cumulative Energy (MWh) Savings for 2017-2019 Plan

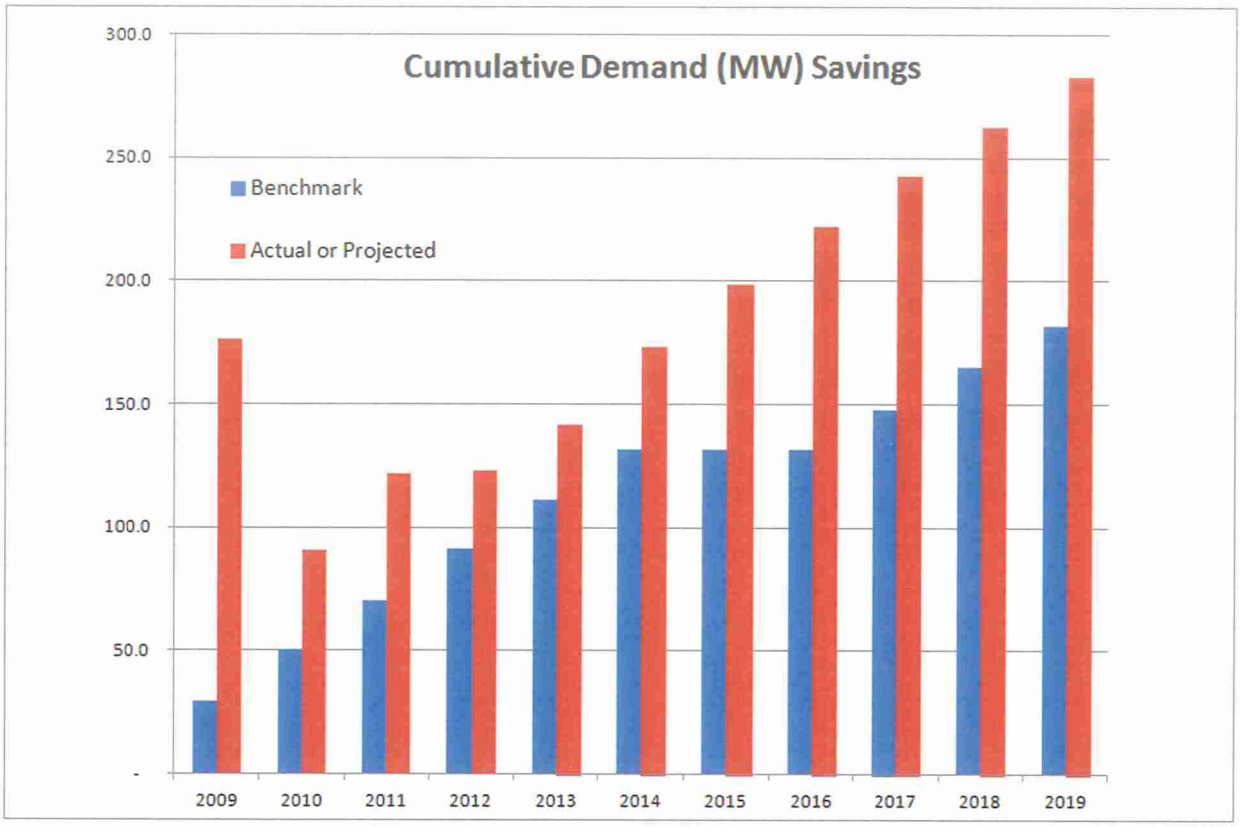

Figure 2 Cumulative Demand (MW) Savings for 2017-2019 Plan

Evaluations, Measurement & Verification

Effective evaluation, measurement and verification (EM&V) play an important role in a quality energy efficiency portfolio. EM&V activities ensure that reported savings are verified, energy and demand calculations are valid, program delivery is effective, customers are satisfied and the overall portfolio is cost-effective.

To date, DP&L's evaluation efforts, in conjunction with its independent evaluator, The Cadmus Group, have been received positively by the state's independent evaluator. In its review of the 2011 program year evaluations, the state's independent evaluator, Evergreen Economics, stated "we found that the Cadmus evaluation report adheres to industry best practices for evaluating DP&L's program offerings. The report is of high quality and provides the details necessary to substantiate the savings estimates provided. We have a high level of confidence in the evaluation research."[2] DP&L received similar comments in Evergreen's 2012 and 2013 program year evaluation reports. DP&L is pleased with this positive feedback and believes it is establishing a solid record of program implementation accompanied by an appropriate level of EM&V. Going forward, DP&L plans to follow the same EM&V process that resulted in the positive review by the independent statewide evaluator.

[2] PUCO Case No. 13-1027-EL-UNC, Evergreen Economics "Report of the Ohio Independent Evaluator," page 30.

Summary: Memorandum The Dayton Power & Light Company's Memorandum in Opposition to The Office of Ohio Consumers' Counsel's Motion to Strike Portions of The Dayton Power & Light Company's Post-Hearing Briefs electronically filed by Mr. Jeremy M. Grayem on behalf of Dayton Power & Light