BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Plan.	))))	Case No. 16-0649-EL-POR
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2019.	))))	Case No. 16-1369-EL-WVR

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

I. INTRODUCTION

This case involves a settlement that would require Ohioans to pay the Dayton Power and Light Company ("DP&L") too much money for energy efficiency through inappropriate retroactive ratemaking. Consumers should not have to pay such charges.

By agreement of the parties, the hearing in this case was strictly for the purpose of admitting testimony and other exhibits into the record and for setting a briefing schedule. Per the schedule set at hearing, initial briefs were filed on March 10, 2017 and reply briefs were filed on March 24, 2017.

On March 31, 2017, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Strike portions of DP&L's initial and reply briefs. The material OCC asked to be stricken includes:

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."

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.

In its Motion, OCC showed that the arguments presented in DP&L's post-hearing briefs inappropriately delve into matters that were not part of the record in this case. DP&L filed a memorandum contra OCC's Motion on April 17, 2017. As allowed under the Public Utilities Commission of Ohio's ("PUCO") rules,[1] OCC files this reply to DP&L's memorandum contra. DP&L's arguments against OCC's Motion to Strike are without merit. The PUCO should grant OCC's Motion and strike the portions of DP&L's initial and reply briefs identified in the Motion.[2]

II. RECOMMENDATIONS

A. DP&L's briefs included extra-record statements regarding evaluations of the cost effectiveness of its Portfolio that should be stricken.

OCC asked the PUCO to strike portions of DP&L's initial and reply briefs where DP&L makes assertions regarding the performance and cost effectiveness of its Portfolio.[3] The passages to be stricken refer to other PUCO cases and annual reports that DP&L filed with the PUCO. OCC noted that DP&L's assertions improperly rely on information that was not admitted as evidence in this proceeding and is unfair under PUCO precedent.[4]

In its response, DP&L claims that the statements in its briefs are based on record evidence. DP&L points to pages 2 and 9-11 of its Application (marked as DP&L Ex. 3) that compared actual energy efficiency savings to the statutory benchmarks.[5] This

[1] Ohio Adm. Code 4901-1-12(B)(2).

[2] If OCC does not respond to an argument put forth by DP&L, OCC's acquiescence to the argument should not be assumed.

[3] Motion at 3, 4, related to the passages marked as (a), (b), (c), and (g).

[4] *Id.* at 3-5.

[5] Memorandum Contra at 2.

portion of the Application also includes a discussion of the importance of the evaluation, measurement, and verification process and DP&L's independent evaluator.[6] DP&L also points to a single sentence in the testimony of Mr. Teuscher (marked as DP&L Ex. 2) with the broad statement that the programs in DP&L's filing are cost-effective and have been independently evaluated.[7] These portions of the record, however, are not cause to deny OCC's Motion.

The passages marked (a), (b), (c), and (g) do not reference and are not based on the portions of the record DP&L mentions in its memorandum contra. Instead, the passages are based on specific documents filed by DP&L in other cases.

The passage marked (a) specifically referenced DP&L's filings in Case Nos. 14-738-EL-POR, 15-777-EL-POR, and 16-851-EL-POR (Plan Year 2015) for the proposition that DP&L "exceeded its statutorily required energy efficiency and peak demand reduction benchmarks every year, and the plans have been independently scored as cost-effective."[8] The filings in those cases – which are not PUCO decisions – are being cited for the truth of the matter asserted.

Similarly, on page 9 of its brief, DP&L makes claims regarding the success of its programs "as *evidenced* by the Company's annual updated status reports, as identified above."[9] Again, DP&L's filings in the other cases are being used for the truth of the matter asserted. But these filings are not in the record of *this* case. They are extra-record documents and should be stricken as hearsay.

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[6] *See id.*

[7] *Id.* at 2-3.

[8] DP&L Brief at 8.

[9] *Id.* at 9 (emphasis added).

The passages marked (c) and (g) are based on the extra-record material cited in passages (a) and (b). Thus, they too convey conclusions based on extra-record material and should be stricken.

Further, the portions of the record cited by DP&L provide only general references to the issues addressed in passages (a), (b), (c), and (g). They do not support the specific conclusions reached in DP&L's briefs. For example, the charts submitted in Exhibit 1 to DP&L's memorandum contra show the costs of DP&L's energy efficiency programs and a comparison of the results of the programs and the statutory benchmarks. The charts, however, make no conclusion regarding the cost effectiveness of the programs. They do not provide a basis for the assertions in DP&L's briefs.

In addition, as discussed below, whether OCC participated in the other cases or DP&L's filings in the other cases were substantively challenged[10] is irrelevant. DP&L did not submit the filings into the record of *this* proceeding, and thus they could not be examined *here* to test the assertions DP&L made in its briefs. Passages (a), (b), (c), and (g) should be stricken as unlawful hearsay.

B. DP&L's argument concerning application of the administrative notice precedent in the *Columbia Gas* case misconstrues OCC's position and is misleading.

DP&L misstates OCC's position regarding precedent for the *Columbia Gas* case.[11] DP&L claims that OCC cited the case for the proposition that DP&L should not be able to cite to documents filed in other PUCO proceedings.[12] But DP&L conveys only

[10] Memorandum Contra at 3.

[11] *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, et al., Opinion and Order (December 21, 2016) ("O&O").

[12] Memorandum Contra at 4, citing OCC Motion at 2.

part of OCC's position. In fact, what OCC said was that the PUCO in *Columbia Gas* (and the other cases cited in footnote 13 of OCC's Motion) ruled that parties cannot cite to documents filed in other proceedings "unless those documents are either admitted into the record or administratively noticed."[13] OCC's position is consistent with and supported by the PUCO's decision in *Columbia Gas* and the other cases cited in OCC's Motion.

Also, DP&L contends that the PUCO in *Columbia Gas* denied OCC's motion to strike.[14] But DP&L discusses only one of the motions to strike from that case. In fact, the PUCO granted other OCC motions to strike regarding Columbia's reply brief in that case.

Columbia had cited a joint motion for an extension of time in the case as part of its argument that serious bargaining had occurred. OCC pointed out that the joint motion had not been admitted into evidence and the portions of Columbia's reply brief addressing the joint motion should be stricken. The PUCO agreed.[15]

The PUCO also granted OCC's motion to strike portions of Columbia's reply brief *referring to its application in another case*, Case No. 11-5028-GA-UNC, et al. ("*2011 DSM Case*"). The PUCO granted OCC's motion to strike even though OCC participated in the *2011 DSM Case*: "While OCC was a party to Columbia's *2011 DSM Case*, the reply brief reflects Columbia's interpretation of its application and OCC has not

[13] OCC Motion at 2 (footnote omitted).

[14] Memorandum Contra at 4.

[15] O&O, ¶35.

been afforded an opportunity to challenge the information as presented in Columbia's reply brief."[16]

Here, DP&L's references to its filings in its previous portfolio cases reflect its interpretation of these filings. The PUCO should grant OCC's Motion.

C. DP&L's arguments that the PUCO should take administrative notice of documents referenced in several passages are without merit.

DP&L claims that the PUCO should take administrative notice of the documents referenced in several of the passages identified in OCC's Motion to Strike. DP&L attempts to distinguish this case from two cases cited by OCC where administrative notice was denied.[17] DP&L's arguments are meritless.

DP&L asserts that the *AEP* case is inapposite because it was issued in a remand proceeding, which is not the case here.[18] DP&L's argument is illogical. The PUCO should not allow briefs to assert conclusions based on extra-record material, period. The procedural posture of the case should be irrelevant.

DP&L also contends that the *FirstEnergy* case does not apply because none of the evidentiary issues in that case are present in this case.[19] DP&L states that the information there was stricken or denied admission by the attorney examiner, was blatant hearsay, and referred to dockets concerning other utilities.[20]

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[16] *Id.*, ¶36.

[17] *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO, et al., Order on Remand (October 3, 2011) ("*AEP*"); *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, et al., Opinion & Order (March 31, 2016) ("*FirstEnergy*").

[18] Memorandum Contra at 4-5.

[19] *Id.* at 5.

[20] *Id.*

But DP&L's briefs include blatant hearsay – documents cited for the truth of the matter asserted. These documents were not submitted in the record of this proceeding, and could not be examined in relation to this proceeding.

Contrary to DP&L's arguments,[21] administrative notice of these documents in the briefing stage of this proceeding would prejudice OCC. OCC could only respond to these documents in its reply brief. This would require OCC to reference extra-record material. Administrative notice thus is improper.

Regarding passages (j) and (k), DP&L argues that the PUCO should take administrative notice of the record in Case No. 16-329-EL-RDR.[22] DP&L claims that this would include only the procedural record. But in its reply brief, DP&L discusses the contents of a staff recommendation in that case, which has not been placed in the record of this proceeding.[23] OCC has not had the opportunity to question the PUCO Staff regarding its recommendation and to challenge DPL's assertions. This prejudices OCC's argument regarding lost distribution revenues in this case. In addition, the remaining portions of passages (j) and (k) are argumentative and irrelevant to this proceeding. DP&L's statements also may prejudice OCC's intervention in Case No. 16-329-EL-RDR, which has not yet been ruled upon.

Regarding passage (e), DP&L claims that the PUCO should take administrative notice of the Amended Stipulation in Case No. 16-395-EL-SSO. DP&L states it could only discuss the Amended Stipulation in its reply brief in this case because the Amended

[21] *Id.* at 6.

[22] Memorandum Contra at 5-6.

[23] DP&L Reply Brief at 16, n. 50.

Stipulation was filed four days after DP&L's brief was filed.[24] DP&L asserts that there are no facts or issues in dispute regarding the Amended Stipulation, and thus there is nothing for OCC to challenge. DP&L is wrong.

Contrary to DP&L's assertions, the meaning and significance of the paragraph in the Amended Stipulation *are* in dispute. OCC has argued that the Settlement in this case does not benefit customers and the public interest because it places no monetary or time limits on DP&L's collection of lost distribution revenues from consumers.[25] The paragraph of the Amended Stipulation included in DP&L's reply brief goes to the heart of OCC's argument. But OCC does not have an opportunity to question any witnesses regarding the actual effect of the Amended Stipulation on DP&L's collection of lost distribution revenues from customers. This is patently unfair and highly prejudicial to OCC. DP&L should not be allowed to use the extra-record Amended Stipulation to argue against OCC's position.

D. The "common sense argumentative statements" and "commonly known facts" DP&L claims to be in its briefs are actually subjective statements that lack evidentiary support, and they should be stricken.

In passage (d), DP&L claims that collecting lost distribution revenues from customers incentivizes utilities to conduct certain activities.[26] In passage (h), DP&L asserts that rate adjustment mechanisms (i.e., riders) help utilities avoid "prohibitively costly rate cases…."[27] DPL argues that these passages should not be stricken because they merely state concepts that are "commonly known and understood facts in the

[24] Memorandum Contra at 6.

[25] *See* OCC Brief at 7-15.

[26] DP&L Brief at 10.

[27] DP&L Reply Brief at 8.

industry."[28] But DP&L does not cite anything that supports this notion. The PUCO should reject DP&L's argument.

DP&L claims that it is "self-evident and universally understood" that rate cases are expensive and time consuming. [29] Even if true, this does not support the idea that rate cases are *cost prohibitive*, as stated in DP&L's reply brief. Prohibitively costly suggests a degree of severity greater than merely being expensive and time consuming. Webster, for example, notes that "prohibitive costs" are those which tend to preclude use or purchase.[30] DP&L's reply brief thus goes beyond what DP&L claims to be "self-evident and universally understood."

Passages (f) and (i) reference attempts to settle DP&L's distribution rate case. DP&L argues that OCC's motion to strike these passages should be denied because OCC did not seek to strike DP&L's description of the PUCO's procedural entry in that case.[31] DP&L's argument is flawed. The description of the March 22 Entry in the distribution case merely tells what the PUCO did in an official document. Reference to the March 22 Entry thus is permissible. But the description of efforts by DP&L and the PUCO Staff to resolve the rate case is not found in the March 22 Entry. It is argumentative and prejudicial hearsay, and should be stricken.

III. CONCLUSION

DP&L has not presented valid arguments against OCC's Motion to Strike. DP&L's references to extra-record material in its briefs, cited in OCC's Motion, are

[28] Memorandum Contra at 7.

[29] *Id*.

[30] *See* https://www.merriam-webster.com/dictionary/prohibitive.

[31] Memorandum Contra at 8.

unfair and highly prejudicial to OCC and the consumers it represents. The PUCO should grant OCC's Motion to Strike.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Memorandum Contra Motion to Strike was served on the persons stated below via electronic transmission this 24th day of April 2017.

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Summary: Reply Reply to Memorandum Contra Motion to Strike Portions of The Dayton Power & Light Company's Post Hearing Briefs by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.