

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton	)	
Power and Light Company for an Increase in	)	Case No. 15-1830-EL-AIR
Electric Distribution Rates.	)	

In the Matter of the Application of the Dayton	)	
Power and Light Company for Approval to Change	)	Case No. 15-1831-EL-AAM
Accounting Methods.	)	

In the Matter of the Application of the Dayton	)	Case No. 15-1832-EL-ATA
Power and Light Company for Tariff Approval.	)	

---

**MOTION TO STRIKE DIRECT TESTIMONY OF J. EDWARD HESS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

The Office of the Ohio Consumers' Counsel ("OCC") moves to strike the direct testimony of J. Edward Hess, filed on behalf of marketers. In the testimony, Mr. Hess proposes single-issue ratemaking that would be unlawful in this rate case. The proposal is designed to increase the price of the standard service offer ("SSO" or the "standard offer") of the Dayton Power and Light Company ("DP&L"). Thus, the proposal would provide a competitive advantage to energy suppliers like Interstate Gas Supply ("IGS") and the members of the Retail Energy Supply Association ("RESA"), who sponsor the testimony. Because the PUCO has no authority to approve single-issue ratemaking as part of DP&L's distribution rate case, the PUCO has no jurisdiction to consider Mr. Hess's testimony. The testimony is also irrelevant under Ohio Rules of Evidence 401 and 402. On behalf of the 460,000 residential DP&L customers, OCC asks the Public Utilities Commission of Ohio ("PUCO") to strike this testimony.

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**

65 East State Street, 7th Floor  
Columbus, Ohio 43215-4213  
Telephone [Healey]: 614-466-9571  
Telephone [Etter]: 614-466-7964  
christopher.healey@occ.ohio.gov  
terry.etter@occ.ohio.gov  
(will accept service via email)

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton	)	
Power and Light Company for an Increase in	)	Case No. 15-1830-EL-AIR
Electric Distribution Rates.	)	

In the Matter of the Application of the Dayton	)	
Power and Light Company for Approval to Change	)	Case No. 15-1831-EL-AAM
Accounting Methods.	)	

In the Matter of the Application of the Dayton	)	Case No. 15-1832-EL-ATA
Power and Light Company for Tariff Approval.	)	

---

**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DIRECT  
TESTIMONY OF J. EDWARD HESS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

**I. BACKGROUND AND INTRODUCTION**

IGS and energy marketers at RESA jointly filed the Hess Testimony. Mr. Hess believes that certain of DP&L's distribution costs should be allocated only to those customers who take generation from its standard offer and not those customers who have signed a contract with a third-party generation marketer<sup>1</sup> (like IGS or other RESA members).<sup>2</sup>

Thus, Mr. Hess recommends that the PUCO establish two new riders for DP&L's customers: (1) "a credit rider for all customers allowing them to avoid distribution costs that support the SSO administrative and processing costs," and (2) "an avoidable rider that collects these costs directly from non-shopping customers."<sup>3</sup> Mr. Hess does not

---

<sup>1</sup> Customers who sign a contract with a marketer are referred to as "shopping" customers or "Choice" customers. See <http://www.energychoice.ohio.gov>.

<sup>2</sup> Hess Testimony at 4.

<sup>3</sup> *Id.* at 5:4-9.

propose any adjustment allowing SSO customers to avoid distribution costs that support Choice administrative and processing costs. Nor does he propose an avoidable rider that collects those costs directly from shopping customers.

The result of Mr. Hess's proposal is that the typical residential customer using 1,000 kWh per month from DP&L's standard offer would pay an additional \$19 per year.<sup>4</sup> At the same time, the typical marketer customer using 1,000 kWh would receive a \$24 annual discount.<sup>5</sup> The \$43 differential between what standard offer customers and Choice customers pay under the proposal would encourage customers to leave the standard offer and sign a contract with marketers, like IGS or other RESA members.

The PUCO should strike Mr. Hess's testimony. His proposal for two new riders is single-issue ratemaking, and single-issue ratemaking is not allowed in base rate cases governed by R.C. 4909.15. The PUCO lacks authority to approve Mr. Hess's proposal here.

His testimony is also irrelevant and inadmissible under Ohio Rules of Evidence 401<sup>6</sup> and 402.<sup>7</sup> There is nothing in Mr. Hess's testimony that is "of consequence"<sup>8</sup> in this case because his testimony goes to issues beyond the PUCO's authority.

---

<sup>4</sup> See *id.* at JEH 1 ( $12 * (1,000 * (\$0.003585 - 0.0020050)) = \$18.96$ ).

<sup>5</sup> *Id.* ( $12 * (1,000 * -0.0020050) = -\$24.06$ ). See also *id.* at 13:5-6 ("The net impact to SSO customers is an increase and the net impact to shopping customers is a decrease.").

<sup>6</sup> Ohio R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.").

<sup>7</sup> Ohio R. Evid. 402 ("Evidence which is not relevant is not admissible.").

<sup>8</sup> Ohio R. Evid. 401.

## II. ARGUMENT

### A. On behalf of marketers, Mr. Hess proposes single-issue ratemaking, which is unlawful under R.C. 4909.15 in a base rate case.

The PUCO is a creature of statute that may only exercise the authority granted to it by the Ohio General Assembly.<sup>9</sup> The Supreme Court of Ohio, in *Columbus Southern Power Co. v. PUCO*,<sup>10</sup> explained how this general rule applies to R.C. 4909.15:

While the General Assembly has delegated authority to the PUCO to set just and reasonable rates for public utilities under its jurisdiction, it has done so by providing a detailed, comprehensive and, as construed by this court, mandatory ratemaking formula under R.C. 4909.15.<sup>11</sup>

This detailed, comprehensive ratemaking formula provides that distribution rates are set based on (i) the value of the utility's property used and useful in rendering service to customers as of a date certain, (ii) the utility's revenues and expenses during a test period, and (iii) the opportunity for the utility to earn a fair and reasonable rate of return.<sup>12</sup>

Utilities may also charge customers under a separate statutory scheme found in R.C. 4928.143. Under this statute, the PUCO may authorize additional charges to customers under an electric security plan, or ESP. An ESP may include, among other things, single-issue ratemaking: "Notwithstanding any other provision of Title [49] if the Revised Code to the contrary ... (2) [An electric security] plan may provide for or

---

<sup>9</sup> See, e.g., *Disc. Cellular, Inc. v. PUCO*, 112 Ohio St. 3d 360, 373 (2007).

<sup>10</sup> 67 Ohio St. 3d 535 (1993).

<sup>11</sup> *Id.* at 537.

<sup>12</sup> R.C. 4909.15(B).

include, without limitation, any of the following ... (h) Provisions regarding the utility's distribution service, including ... provisions regarding single issue ratemaking.”<sup>13</sup>

Notably, the words “single issue ratemaking” appear nowhere in the law that applies to base rate cases, R.C. 4909.15. The PUCO recognized the distinction between base rate cases under R.C. 4909.15, which do not allow single-issue ratemaking, and ESP cases under R.C. 4928.143, which do: “[S]ingle-issue ratemaking and incentive ratemaking is not authorized by R.C. Chapter 4909; however, R.C. 4928.143(B)(2)(h) explicitly authorize ‘single issue ratemaking’ and ‘incentive ratemaking.’”<sup>14</sup> Ohio’s 2008 energy law allowing single-issue ratemaking (and other utility-friendly rate mechanisms that disfavor consumers) is more than accommodating enough for electric utilities—without *ultra vires* expansion of that ratemaking into base rate cases.

The Supreme Court of Ohio, in *Pike Natural Gas Company v. PUCO*, found that the PUCO can only approve a single-issue adjustment clause when authorized by statute.<sup>15</sup> There, the utility proposed an excise tax adjustment clause that would have allowed it to “pass through immediately to its customers any increase in state excise taxes resulting from increased gas costs.”<sup>16</sup> The Court found that this adjustment clause—the same as a “rider” using today’s terminology—was unlawful because there was no statute specifically authorizing it.<sup>17</sup>

---

<sup>13</sup> R.C. 4928.143(B)(2)(h).

<sup>14</sup> *In re Application of [FirstEnergy] for Authority to Provide a Standard Service Offer*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 290 (Oct. 12, 2016).

<sup>15</sup> 68 Ohio St. 2d 181, 183 (1981).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 183-87.

This interpretation is consistent with general principles of statutory construction, as described by both the Supreme Court of Ohio and United States Supreme Court. *See, e.g., NACCO Indus. v. Tracy*, 79 Ohio St. 3d 314, 316 (1997) (“Congress is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“Where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).<sup>18</sup>

RESA/IGS witness Hess proposes two new riders for DP&L customers: (i) a “credit rider for all customers allowing them to avoid distribution costs that support the SSO administrative and processing costs” and (ii) “an avoidable rider that collects these costs directly from non-shopping customers.”<sup>19</sup> This is unlawful single-issue ratemaking. Single-issue ratemaking is allowed in ESP cases.<sup>20</sup> This is not an ESP case; it is a base rate case governed by R.C. 4909, where single-issue ratemaking is unlawful. The PUCO lacks the authority to approve Mr. Hess’s proposal for single-issue ratemaking in this case. It should strike his irrelevant testimony.<sup>21</sup>

### **III. CONCLUSION**

Mr. Hess’s testimony (for marketers who do not like the availability of the standard offer for consumers) proposes unlawful single-issue ratemaking that would inflate the amount that customers pay for the competitive standard service offer. The

---

<sup>18</sup> *See also* R.C. 1.42 (“Words and phrases shall be read in context....”).

<sup>19</sup> Hess Testimony at 5.

<sup>20</sup> R.C. 4928.143(B)(2)(h).

<sup>21</sup> Ohio R. Evid. 401, 402.

PUCO has no authority to approve what Mr. Hess proposes, and the testimony is irrelevant and inadmissible under Ohio Rules of Evidence 401 and 402. The PUCO should strike his testimony.

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**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215-4213  
Telephone [Healey]: 614-466-9571  
Telephone [Etter]: 614-466-7964  
christopher.healey@occ.ohio.gov  
terry.etter@occ.ohio.gov  
(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 2nd day of May 2018.

/s/ Christopher Healey  
Christopher Healey  
Assistant Consumers' Counsel

## **SERVICE LIST**

Thomas.mcnamee@ohioattorneygeneral.gov  
Bojko@carpenterlipps.com  
ORourke@carpenterlipps.com  
ghiloni@carpenterlipps.com  
sechler@carpenterlipps.com  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com  
jkylern@BKLawfirm.com  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
jlang@calfee.com  
talexander@calfee.com  
slesser@calfee.com  
jvickers@elpc.org  
tdougherty@theOEC.org  
mleppla@theOEC.org  
jfinnigan@edf.org  
swilliams@nrdc.org  
rdove@attorneydove.com  
kfield@elpc.org  
mfleisher@elpc.org

Attorney Examiners:  
gregory.price@puc.state.oh.us  
patricia.schabo@puc.state.oh.us

Michael.schuler@aes.com  
djireland@ficlaw.com  
jsharkey@ficlaw.com  
Kurt.Helfrich@ThompsonHine.com  
Stephanie.Chmiel@ThompsonHine.com  
Michael.Austin@ThompsonHine.com  
mfleisher@elpc.org  
dparram@taftlaw.com  
thomas.jernigan.3@us.af.mil  
cmooney@ohiopartners.org  
dborchers@bricker.com  
mwarnock@bricker.com  
ejacobs@ablelaw.org  
joliker@igsenergy.com  
lhawrot@spilmanlaw.com  
dwilliamson@spilmanlaw.com  
charris@spilmanlaw.com  
mjsettineri@vorys.com  
glpetrucci@vorys.com  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com  
glover@whitt-sturtevant.com  
jdoll@djflawfirm.com

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/2/2018 5:01:12 PM**

**in**

**Case No(s). 15-1830-EL-AIR, 15-1831-EL-AAM, 15-1832-EL-ATA**

Summary: Motion Motion to Strike Direct Testimony of J. Edward Hess by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.