

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	
Dayton Power and Light Company to)	Case No. 20-1651-EL-AIR
Increase its Rates for Electric)	
Distribution.)	

In the Matter of the Application of the)	
Dayton Power and Light Company for)	Case No. 20-1652-EL-AAM
Accounting Authority.)	

In the Matter of the Application of Dayton)	
Power and Light Company for Approval)	Case No. 20-1653-EL-ATA
of Revised Tariffs.)	

**MOTION TO STRIKE
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In an attempt to strengthen its position, DP&L introduced new non-record evidence in the May 18, 2022 oral argument, consisting of recent credit rating agencies' reports on the impact a rate freeze would have on DP&L's credit ratings.¹ The PUCO should strike the non-record evidence DP&L included in its oral argument beginning at page 13, line 22, through page 14, line 5.

At oral argument, DP&L continued its efforts to justify its non-fulfillment of the distribution rate freeze promise it agreed to and the PUCO approved as part of DP&L's 2009 electric security plan settlement. Seeking to have its cake and eat it too, DP&L proposes to charge nearly half a million residential consumers an additional \$120.8 million per year for electric distribution service while at the same time collecting a \$76

¹ Tr. at 13:22-14:5.

million per year so-called stability charge from consumers. But that is contrary to its 2009 agreement and contrary to the PUCO Order approving that agreement.²

The grounds for this Motion to Strike are further described in the attached Memorandum in Support.

Respectfully submitted,

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/s/ John Finnigan
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² *In the Matter of the Application of DP&L for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Settlement at ¶18 (Feb. 24, 2009); Opinion and Order (June 24, 2009).

In the Matter of the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution.))))	Case No. 20-1651-EL-AIR
In the Matter of the Application of the Dayton Power and Light Company for Accounting Authority.)))	Case No. 20-1652-EL-AAM
In the Matter of the Application of Dayton Power and Light Company for Approval of Revised Tariffs.)))	Case No. 20-1653-EL-ATA

On May 18, 2022, the PUCO held an oral argument in this case, in response to DP&L’s request,³ which was opposed by OCC.⁴ In opening remarks. Chair French indicated that the argument “is not an opportunity to introduce new evidence in the case.”⁵ Chair French also ruled that the arguments “will be incorporated into the official record of this case.”⁶

Nonetheless, DP&L introduced new, non-record materials during oral argument pertaining to recent credit rating agencies' reports on the impact a rate freeze would have on DP&L's credit ratings.⁷ DP&L claimed that credit rating agencies "recently issued reports that say...a rate freeze would have an adverse impact on AES Ohio's credit

⁷ Tr. at 13.

ratings.”⁸ In full, DP&L discussed credit agency reports from the Hearing Transcript at page 13, line 22, to page 14, line 5 as follows:

And the various credit rating agencies have recently issued reports that say they are watching this case, and a rate freeze would have an adverse impact on AES Ohio's credit ratings. And,

your Honor, a utility like AES Ohio who has poor credit ratings, that's going to lead to higher cost of debt, and its also poor credit ratings and unreliable service could make it very difficult for AES Ohio to attract additional investment.

These reports are not part of the record in this case. The reports on which DP&L relies in fact were issued in April and May of 2022, notably after the evidentiary hearing and the briefing in these cases had concluded. The transcript reference to the new, non-record material should be stricken.

The PUCO has routinely granted motions to strike arguments on the sole basis that they introduce non-record evidence to which other parties have been afforded no opportunity to respond.⁹ And the Supreme Court of Ohio has upheld these PUCO decisions to grant motions to strike non-record evidence.¹⁰

⁸ *Id.*

⁹ See, e.g., *In re FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order (Nov. 21, 2006), at 2 (granting motion to strike non-record evidence, in part, because “the opposing party would have no opportunity to conduct cross-examination concerning the document or refute the statements contained in the document.”) *In re the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order, (May 5, 2010), at 8-9 (granting motion to strike certain portions of post-hearing briefs “for reliance upon non-record evidence.”).

¹⁰ See *Toliver v. Vectren Energy Delivery of Ohio, Inc.*, 145 Ohio St.3d 346, 2015-Ohio-5055, 49 N.E.3d 1240, ¶ 35 (The Court upheld the PUCO’s grant of Vectren’s Motion to Strike evidence that was introduced after the hearing because it would deny Vectren its right to cross-examine the witness on the documents or to introduce evidence to rebut the information in the documents.); see also *Payphone Assn. v. PUC*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 19 (“PAO makes substantive arguments based on these letters as if they were part of the record in this case. Because they were not in evidence, we disregard PAO's arguments concerning them.”).

The record in this case does not include the reports DP&L references. As such, no party has had an opportunity to address arguments based on them. The PUCO should strike from the record all references to credit agency reports that DP&L Counsel referenced on page 13, line 22 through page 14, line 5.

Respectfully submitted,

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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 29th day of June 2022.

/s/ John Finnigan

John Finnigan

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Motion to Strike by Office of the Ohio Consumers' Counsel
electronically filed by Mrs. Tracy J. Greene on behalf of Finnigan, John