

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 13-2420-EL-UNC
The Dayton Power and Light Company	:	
for Authority to Transfer or Sell Its	:	
Generation Assets	:	

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO THE MOTION TO COMPEL RESPONSES TO DISCOVERY BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(MARCH 28, 2014 DISCOVERY REQUESTS)**

I. INTRODUCTION AND SUMMARY

The Dayton Power and Light Company ("DP&L") is under no obligation to answer the irrelevant and unnecessary Interrogatories and Request for Production of Documents Propounded upon The Dayton Power and Light Company by The Office of the Ohio Consumers' Counsel – First Set (March 28, 2014) ("March 28, 2014 Discovery Requests"), which include 113 interrogatories and 47 requests for production of documents. As shown in The Dayton Power and Light Company's Motion for a Protective Order ("Motion for Protective Order") (filed April 22, 2014), the comment period adopted by the Attorney Examiner has passed, and the Public Utilities Commission of Ohio ("Commission") has not decided whether to hold a hearing in this proceeding. March 4, 2014 Entry, ¶¶ 4-5. Thus, the March 28, 2014 Discovery Requests by The Office of the Ohio Consumers' Counsel ("OCC") do not address any issue pending before the Commission.

Moreover, even if OCC were entitled to conduct discovery, many of the March 28, 2014 Discovery Requests are objectionable for several independent reasons.

Specifically,

1. OCC seeks information related to a sales process in which DP&L is attempting to sell its generation assets. That sale process is ongoing, and discovery regarding that process may interfere with and may jeopardize that process, and should not be permitted;
2. Many of OCC's individual discovery requests are overbroad, and responding to them would be unduly burdensome;
3. OCC is not entitled to conduct discovery as to AES or DPL Inc.

Finally, given these objections, assembling privileged documents and creating a privilege log would be unduly burdensome, and DP&L should not be required to do so until the objections outlined above are resolved.

OCC now seeks to compel DP&L to respond to most of the March 28, 2014 Discovery Requests.¹ As demonstrated below, the Commission should deny the Motion to Compel and grant the protections that DP&L seeks in the Motion for Protective Order. Ohio Admin. Code § 4901-1-23(D) ("If the motion [to compel] is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may issue such protective order as would be appropriate under rule 4901-1-24 of the Administrative Code.").

¹ OCC has not moved to compel responses to INT-11, 13, 27, 34, 36, 58, 59, 61, 64, 65, 72, and 90, and RPD-12, 26, 26-28, and 44. Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel ("Motion to Compel"), p. 2. Additionally, OCC has not moved to compel responses to Interrogatories and Request for Production of Documents Propounded upon Dayton Power and Light Company by The Office of the Ohio Consumers' Counsel - Second Set (April 11, 2014) ("April 11, 2014 Discovery Requests") in this motion.

II. BACKGROUND

This proceeding was commenced on December 30, 2013 when DP&L filed the Application of The Dayton Power and Light Company to Transfer or Sell Its Generation Assets ("Application"). DP&L has requested a waiver of any hearing in this matter under Ohio Admin. Code § 4901:1-37-09(D) because the Commission has already conducted an extensive evidentiary hearing as to whether DP&L should be ordered to transfer its generation assets. Application, ¶ 18 (citing In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan, et al., Case Nos. 12-426-EL-SSO, et al.). DP&L's request for a hearing waiver is consistent with Ohio Admin. Code § 4901:1-37-02(C), which allows the Commission to "waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown."

Shortly after DP&L filed the Application, the Attorney Examiner adopted a schedule for comments and objections in this proceeding. Jan. 3, 2014 Entry, ¶ 3. The Attorney Examiner further stated that "[a]fter comments and reply comments are received and the issues raised therein considered, a decision will be made regarding [DP&L's] requests for waivers." Id. at ¶ 4. Following a supplemental application by DP&L, the Attorney Examiner adopted a new comment schedule under which comments and objections were to be filed by March 25, 2014, and reply comments were to be filed by April 7, 2014. Mar. 4, 2014 Entry, ¶ 4. The Attorney Examiner reiterated that a decision on DP&L's request for a hearing waiver would be reached after consideration of the comments and reply comments. Id. at ¶ 5.

The time for comments has now passed, and the Commission has not decided whether to hold a hearing. Consequently, there are no pending issues before the Commission for the parties to litigate. Despite that fact, OCC propounded the extensive March 28, 2014

Discovery Requests, which include 113 interrogatories and 47 requests for production of documents.

DP&L objected to each of OCC's discovery requests on various independent grounds. April 17, 2014 The Dayton Power and Light Company's Objections and Responses to Interrogatories and Request for Production of Documents by The Office of the Ohio Consumers' Counsel (First Set March 28, 2014) (attached to OCC's Motion to Compel). After exhausting all reasonable means for resolving this discovery dispute, DP&L filed the Motion for Protective Order on April 22, 2014.² OCC filed its Motion to Compel ten days later.

III. THE COMMISSION SHOULD DENY THE MOTION TO COMPEL BECAUSE (1) THE COMMISSION HAS NOT DECIDED WHETHER TO HOLD A HEARING, AND (2) EVEN IF DISCOVERY IS ALLOWED, MANY OF OCC'S REQUESTS ARE OBJECTIONABLE

DP&L should not be compelled to respond to OCC's March 28, 2014 Discovery Requests. Indeed, the Ohio Administrative Code protects parties from discovery requests that cause "annoyance, embarrassment, oppression, or undue burden or expense." Ohio Admin. Code § 4901-1-24(A). This rule "provides a remedy where a response to discovery requests would be unduly burdensome or costly." In the Matter of the Petition of OHIOTELNET.COM, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with ALLTEL Ohio, Inc., Case No. 00-1601-TP-ARB, 2001 Ohio PUC LEXIS 1012, *16 (Jan. 11, 2001).

As demonstrated below, the Commission should conclude that DP&L is not required to respond to OCC's discovery requests because (1) the Commission has not decided

² The Motion for Protective Order also seeks relief as to the April 11, 2014 Discovery Requests.

whether to hold a hearing, and (2) the discovery requests are objectionable for three independent reasons. Moreover, DP&L should not be forced to create a privilege log at this time.

A. OCC IS NOT ENTITLED TO DISCOVERY BECAUSE NO HEARING HAS BEEN SCHEDULED

The Commission has previously decided that discovery was not proper while the Commission was deciding the scope of its review. In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company, et al., Case No. 05-732-EL-MER, 2005 Ohio PUC LEXIS 633, *6-7 (Dec. 7, 2005) ("Cinergy Case"). In the Cinergy Case, Cinergy Corp. and Duke Energy Holding Corp. jointly filed an application for the Commission's consent and approval to change the control of the Cincinnati Gas & Electric Company. Id. at *1. The Commission issued an entry that provided an opportunity for interested persons to file comments to "identify the issues which the Commission should consider," and that stayed discovery until the Commission "determine[d] the scope and nature of its review." Id. at *1-2. The Commission later rejected OCC's argument that the Commission should lift the stay on discovery, stating that because "we have not yet determined whether a hearing will be held, we find that it is not appropriate to lift the stay on discovery." Id. at *7. Accord: In the Matter of the Commission's Investigation into the Adequacy of Electricity Generation of Ohio's Investor-Owned Electric Utility Companies, et al., Case Nos. 99-190-EL-COI, et al. (Jun. 1, 1999) ("Inasmuch as the Commission does not intend at this time to hold hearings in either of these proceedings, IEU-OH's motion to compel discovery filed on May 14, 1999 should be denied.").

The same reasoning applies here. The comment period adopted by the Attorney Examiner has ended, and the Commission has not decided whether to hold a hearing. Thus, OCC's March 28, 2014 Discovery Requests are not relevant to any issue pending before the Commission. Moreover, it would be particularly inappropriate to compel DP&L to respond to OCC's extensive discovery requests given how unduly burdensome they are. DP&L should not be subject to unduly burdensome discovery requests, particularly when it remains uncertain whether there will even be a hearing.³

OCC does not contest that the March 28, 2014 Discovery Requests are extensive. Indeed, they contain 113 interrogatories and 47 requests for production of documents. Given their scope, it would be unduly burdensome for DP&L to answer those discovery requests when there are no issues before the Commission that would make use of such discovery. Indeed, OCC maintains that discovery is needed only "for whatever comes next," not any pending matter before the Commission. Motion to Compel, p. 12. This weak rationale does not justify the substantial burden that OCC's discovery requests would impose. The Commission should, therefore, deny OCC's Motion to Compel.

B. EVEN IF DISCOVERY IS ALLOWABLE, MANY OF OCC'S DISCOVERY REQUESTS ARE OBJECTIONABLE

Even if OCC is entitled to responses in this proceeding, many of the March 28, 2014 Discovery Requests are objectionable.

³ OCC erroneously relies on In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program, et al., Case Nos. 11-5351-GA-UNC, et. al., 2012 Ohio PUC LEXIS 97 (Jan. 27, 2012) for the proposition that discovery may be necessary before a hearing is scheduled. That case is distinguishable. Columbia Gas of Ohio, Inc. moved to stay discovery because the Commission had not yet determined the nature or scope of any future proceedings. The Commission allowed discovery, but explained that "[t]he discovery process [would] aid the parties in the preparation of their comments and reply comments in these cases and, ultimately, better inform the Commission's review of the application." Discovery was, therefore, relevant to an issue pending before the Commission, namely a comment period. In this case, however, OCC's discovery requests are not relevant to any issue pending before the Commission.

**1. Many of OCC's Discovery Requests are Improper Because
They Will Interfere with the Sales Process**

As stated in DP&L's Supplemental Application, ¶ 7, DP&L may transfer its generation assets to an affiliate, for that affiliate to sell them to a third party. OCC has proposed many discovery requests related to that sale process. For example, INT-66 asks DP&L to "identify the amount of the purchase price or transfer price," and INT-95(b) asks whether "DP&L or AES [has] had any preliminary discussions with any prospective buyers."

The discovery requests that OCC propounded that will interfere with the sale process include: INT- 1, 3, 4, 23, 46, 57, 59, 60, 61, 62, 64, 65, 66, 72, 95, 106, 107, and RPD-12, 17, 18, 24, 25, 26, 27, 28, 31, 45. March 28, 2014 Discovery Requests.

It is unreasonable and inappropriate to conduct discovery as to a sales process that is ongoing. Indeed, potential buyers may be unwilling to participate in a sales process if they know that the sales process is subject to contemporaneous discovery. OCC's requests for discovery regarding a sales process that is ongoing may interfere with that process. The Commission should thus rule that DP&L does not need to respond to discovery requests that seek information related to the ongoing sales process.

Further, that discovery is premature, because DP&L does not even know whether an asset sale agreement will be reached. It is unreasonable and premature to conduct discovery as to a sale process, for a sale that may never occur.

Finally, if an actual sale were to occur this year, DP&L has already proposed disclosing the fair market value of the generation assets 75 days before the transfer date, leaving ample opportunity for the Commission to evaluate the sale. Supplemental Application, p. 2. If

DP&L's Supplemental Application is inadequate, however, that issue should be resolved by the Commission when deciding whether to grant DP&L's waivers. March 4, 2014 Entry, ¶¶ 2, 5. The issue should not be forced by OCC in a discovery dispute while the Commission's decision is pending.

2. Many of OCC's Discovery Requests Are Overbroad

Many of OCC's discovery requests are overbroad, and it would be unduly burdensome for DP&L to respond to them. As but one example -- OCC's RPD-29 asks for "all documents in your possession, custody or control that pertain to 'current poor market conditions.'" March 28, 2014 Discovery Requests. Identifying and assembling documents responsive to that request alone would be an unduly burdensome task.

OCC's unduly burdensome requests include INT- 5, 6, 7, 8, 9, 10, 11, 20, 22, 23, 28, 30, 38, 40, 49, 50, 51, 52, 53, 54, 61, 72, 80, 84, 99, 105, 106, 107, 109, 110, 112, and RPD- 6, 7, 8, 9, 10, 11, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 27, 29, 31, 32, 33, 34, 39, 42, 44, 46, 47. March 28, 2014 Discovery Requests.

3. OCC Is Not Entitled to Compel Discovery as to AES or DPL Inc.

Moreover, OCC seeks information and documents that are beyond the knowledge and control of DP&L. As the Commission has repeatedly held, affiliates of a utility are not subject to discovery. In the Matter of Duke Energy Ohio, Inc., No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at *8-9 (PUCO Dec. 13, 2010) (granting IEU's motion to compel but limiting IEU's original request for "any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM" to "require Duke to produce only information and

documents within the possession of Duke Energy Ohio, not its affiliates") (emphasis added); In the Matter of Manchester Group, LLC, No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988, at *1-3 (Nov. 13, 2009) (denying complainant's motion to compel Columbia Gas to produce 'all documents and correspondence of Columbia and Columbia's affiliates, subsidiaries, and parent companies that relate to the sale of Columbia Service Partners (CSP) to the CSP Acquisition Company" as to the "document not in possession of Columbia 'because such request is overbroad, but granting the motion to compel as to the documents in the possession of Columbia) (emphasis added); Feb. 13, 2013 Transcript of Proceedings, p. 145 (Case No. 12-0426-EL-SSO) (denying motion to compel production of documents in possession of DP&L's affiliates at discovery conference). DP&L, therefore, has no duty to obtain access to information and documents that are known and controlled only by AES and DPL, Inc.

OCC's discovery requests that expressly seek information from AES or DPL Inc. are INT-4, 24, 95(b), and RPD-28, 36. March 28, 2014 Discovery Requests. AES and DPL Inc. are not subject to discovery in this matter, and the Commission should not require DP&L to respond to discovery requests.

**C. DP&L SHOULD NOT BE COMPELLED TO ASSEMBLE
PRIVILEGED DOCUMENTS AND PREPARE A PRIVILEGE LOG
UNTIL THE OTHER ISSUES IN THIS MOTION ARE RESOLVED**

Finally, many of OCC's discovery requests seek documents that are privileged. Those privileged documents are in the custody of many different custodians, and assembling those privileged documents and creating a privilege log would require many hours of work by many different persons.

In light of the objections to OCC's discovery requests identified above, it would be unduly burdensome to require DP&L to assemble privileged documents and prepare a privilege log. Indeed, it would be unduly burdensome for DP&L even to determine which discovery requests seek privileged materials, because DP&L would need to identify which documents were responsive to each OCC request before DP&L could determine whether those documents are privileged. DP&L asks that it not be required to assemble privileged documents and prepare a privilege log, unless and until the Commission concludes that OCC is entitled to conduct discovery in this proceeding. The Commission should, therefore, reject OCC's demand for a privilege log.

For the foregoing reasons, the Commission should deny OCC's Motion to Compel and grant DP&L the protections that DP&L seeks in the Motion for Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel (March 28, 2014 Discovery Requests) has been served via electronic mail upon the following counsel of record, this 19th day of May, 2014:

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