

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	:	

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**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  
(APRIL 11, 2014 DISCOVERY REQUESTS)**

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**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 – Second Set (April 11, 2014) ("April 11, 2014 Discovery Requests"), which includes 32 interrogatories and 40 requests for production of documents. Those discovery requests are in addition to the 113 interrogatories and 47 requests for production of documents in the 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").<sup>1</sup>

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<sup>1</sup> The March 28, 2014 Discovery Requests were the subject of the May 2, 2014 Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel ("First Motion to Compel"). DP&L responded to that motion in 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 (filed May 19, 2014).

As demonstrated 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 in this proceeding 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 April 11, 2014 Discovery Requests do not address any issue pending before the Commission.

Moreover, even if The Office of the Ohio Consumers' Counsel ("OCC") were entitled to conduct discovery, many of the April 11, 2014 Discovery Requests are objectionable for several independent reasons. Specifically,

1. OCC seeks information related to an ongoing sales process in which DP&L is attempting to sell its generation assets. 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; and
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 the April 11, 2014 Discovery Requests. May 14, 2014 Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel ("Second Motion to Compel"). As demonstrated below, the Commission should deny the Second 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.").

## **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. March 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 includes 113 interrogatories and 47 requests for production of documents. Two weeks later, OCC propounded the April 11, 2014 Discovery Requests, which includes an additional 32 interrogatories and 40 requests for production of documents. Only the latter are the subject of the Second Motion to Compel.

DP&L objected to each of the April 11, 2014 Discovery Requests on various independent grounds. May 1, 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 (Second Set April 11, 2014) (attached to the Second Motion to Compel as Exhibit 2). In addition, DP&L filed the Motion for Protective Order on April 22, 2014, which concerned both the March 28, 2014 Discovery Requests and the April 11, 2014 Discovery Requests. OCC filed the Second Motion to Compel on May 14, 2014.

**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**

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DP&L should not be compelled to respond to OCC's April 11, 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 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 Nos. 05-732-EL-MER, et al., 2005 Ohio PUC LEXIS 633, \*5-6 (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., 1999 Ohio PUC LEXIS 104, \*1-2 (June 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 April 11, 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.<sup>2</sup>

OCC does not contest that the April 11, 2014 Discovery Requests are extensive. Indeed, they contain 32 interrogatories and 40 requests for production of documents, which are in addition to the 113 interrogatories and 47 requests for production of documents in the March 28, 2014 Discovery Requests. Given their scope, it would be unduly burdensome for

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<sup>2</sup> 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.

OCC also relies on In the Matter of the Complaint of the Office of Consumers' Counsel v. Ohio Bell Telephone Co., No. 93-576-TP-CSS, 1993 Ohio PUC LEXIS 671 (July 27, 1993). Motion to Compel, p. 23, n. 73. In that case, the Commission rejected a utility's argument that discovery should not proceed while the Commission was considering whether there were reasonable grounds for a complaint. *Id.* at \*2. However, in allowing discovery, the Commission expressly relied on the fact that 12 days earlier, in a separate proceeding, the same utility had served a notice of deposition while the Commission was considering a motion to dismiss. *Id.* ("Ohio Bell cannot engage in discovery when it sues Ohio Bell, but, under the same circumstances, refuse to respond to other discovery when it does not sue Ohio Bell."). Similar facts are not present here.

DP&L to answer those discovery requests when there are no issues before the Commission that would make use of such discovery. Indeed, OCC has maintained 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 April 11, 2014 Discovery Requests are objectionable.

**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-119 asks, "Is there a minimum price for a third party to purchase its assets that is acceptable to DP&L?" In addition, RPD-50 requests "all documents that pertain to identifying a price that the generating assets must be purchased at to allow DP&L to maintain its financial integrity."

The discovery requests that OCC propounded that will interfere with the sale process include: INT-114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 143; RPD-49, 50, 51, 54, 57, 58, 59, 76, 79, 81, and 83. April 11, 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 an ongoing sales process 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 INT-116 asks DP&L to identify "**all** material changes in market conditions that DP&L is aware of . . . and that affected its decision to explore the possible sale of its generation assets to a third party." (Emphasis in original.) (internal citation and quotation markets omitted). Identifying and assembling documents responsive to that request alone would be an unduly burdensome task.

OCC's unduly burdensome requests include INT-115, 116, 117, 126, 127, 131, 133, 134, 135, 138, 139, 140, 143, 144; RPD-49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62,



63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 and 87.

April 11, 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 expressly seeks information from AES or DPL Inc. in INT-132. April 11, 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,

*Judi L. Sobek / JS*

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Judi L. Sobek (0067186)  
THE DAYTON POWER AND  
LIGHT COMPANY  
1065 Woodman Drive  
Dayton, OH 45432  
Telephone: (937) 259-7171  
Telecopier: (937) 259-7178  
Email: judi.sobek@dplinc.com



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Charles J. Faruki (0010417)  
(Counsel of Record)  
Jeffrey S. Sharkey (0067892)  
FARUKI IRELAND & COX P.L.L.  
500 Courthouse Plaza, S.W.  
10 North Ludlow Street  
Dayton, OH 45402  
Telephone: (937) 227-3705  
Telecopier: (937) 227-3717  
Email: cfaruki@ficlaw.com

Attorneys for The Dayton Power and  
Light Company

## **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 (April 11, 2014 Discovery Requests) has been served via electronic mail upon the following counsel of record, this 29th day of May, 2014:

Rocco O. D'Ascenzo, Esq.  
Associate General Counsel  
Elizabeth Watts, Esq.  
Associate General Counsel  
DUKE ENERGY OHIO, INC.  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Elizabeth.Watts@duke-energy.com  
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
Jody Kyler Cohn, Esq.  
BOEHM, KURTZ & LOWRY  
36 East Seventh Street Suite 1510  
Cincinnati, OH 45202-4454  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com  
jkylercohn@BKLawfirm.com

Attorneys for Ohio Energy Group

Mark A. Whitt, Esq. (Counsel of Record)  
Andrew J. Campbell, Esq.  
Gregory L. Williams, Esq.  
WHITT STURTEVANT LLP  
The KeyBank Building  
88 East Broad Street, Suite 1590  
Columbus, OH 43215  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com  
Williams@whitt-sturtevant.com

Mark A. Hayden, Esq.  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com

James F. Lang, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, OH 44114  
jlang@calfee.com

N. Trevor Alexander, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1100 Fifth Third Center  
21 E. State St.  
Columbus, OH 43215-4243  
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp.

Melissa R. Yost, Esq., (Counsel of Record)  
Maureen R. Grady, Esq.  
Edmund "Tad" Berger, Esq.  
Assistant Consumers' Counsel  
Office of The Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
yost@occ.state.oh.us  
grady@occ.state.oh.us  
berger@occ.state.oh.us

Attorneys for Office of the Ohio

Attorneys for Interstate Gas Supply, Inc.  
Vincent Parisi, Esq.  
Lawrence Friedeman, Esq.  
Matthew White, Esq.  
INTERSTATE GAS SUPPLY, INC.  
6100 Emerald Parkway  
Dublin, OH 43016  
vparisi@igsenergy.com  
@igsenergy.com  
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Samuel C. Randazzo, Esq.  
Frank P. Darr, Esq.  
Matthew R. Pritchard, Esq.  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17th Floor  
Columbus, OH 43215-4225  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Joseph M. Clark, Esq.  
21 East State Street, Suite 1900  
Columbus, OH 43215  
joseph.clark@directenergy.com

Attorney for Direct Energy Services, LLC  
and Direct Energy Business, LLC

Consumers' Counsel

Kimberly W. Bojko, Esq.  
Mallory M. Mohler, Esq.  
CARPENTER LIPPS & LELAND LLP  
280 North High Street, Suite 1300  
Columbus, OH 43215  
Bouko@carpenterlipps.com  
Mohler@carpenterlipps.com

Attorneys for The Ohio Manufacturers'  
Association Energy Group

Amy B. Spiller, Esq.  
Deputy General Counsel  
Jeanne W. Kingery, Esq.  
Associate General Counsel  
DUKE ENERGY COMMERCIAL ASSET  
MANAGEMENT, INC.  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Amy.Spiller@duke-energy.com  
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Commercial  
Asset Management, Inc.

Thomas W. McNamee, Esq.  
Assistant Attorney General  
Public Utilities section  
180 East Broad Street, 6th Floor  
Columbus, OH 43215-3793  
thomas.mcnamee@puc.state.oh.us

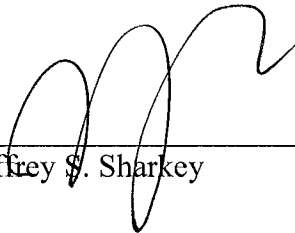
Attorney for PUCO Staff

M. Howard Petricoff, Esq.  
Gretchen L. Petrucci, Esq.  
VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
mhpetricoff@vorys.com  
glpetrucci@vorys.com

Attorneys for the Retail Energy Supply  
Association

Anne M. Vogel, Esq.  
American Electric Power Service  
Corporation  
155 West Nationwide Blvd., Suite 500  
Columbus, OH 43215  
amvogel@aep.com

Attorney for AEP Generation Resources  
Inc.



---

Jeffrey S. Sharkey

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