

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company for)	Case No. 13-2442-EL-UNC
Authority to Amend its Corporate)	
Separation Plan.)	

**REPLY TO DAYTON POWER & LIGHT COMPANY'S
MEMORANDUM CONTRA
MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. Discovery Rights Are Not Limited When The PUCO Requests That Parties File Comments Or When A Hearing Has Not Yet Been Scheduled.....	3
B. OCC’s Discovery Requests Are Not Unduly Burdensome Or Overly Broad.....	6
C. The Billing Rates And Terms Of Service Between DP&L And Its Affiliated Entities, And The Allocation Of Such Charges, Is Information Required To Be Maintained By DP&L As Part Of A Cost Allocation Manual Under Ohio Admin. Code 4901:1-37. Thus, DP&L’s Claims That This Information Is Beyond The Control Of DP&L Is Inconsistent With The Requirements Of The PUCO’s Rules And Should Be Rejected.....	8
D. DP&L Should Be Required To Produce A Privilege Log To Aid The PUCO In Determining Whether A Privilege Exists.	12
III. CONCLUSION.....	14

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REPLY TO MEMORANDUM CONTRA

I. INTRODUCTION

Dayton Power & Light Company (“DP&L” or “Utility”) seeks to evade answering questions about its Fourth Amended Corporate Separation Plan (“4th Amended Plan”), which could substantially impact electric service and rates charged to customers. After an initial comment process regarding DP&L’s plan, the Office of the Ohio Consumers’ Counsel (“OCC”) sought information related to DP&L’s proposals. OCC served discovery on claims made in DP&L’s plan. But DP&L has refused to answer those questions. On May 30, 2014, in a related proceeding involving DP&L’s proposed sale or transfer of its generation assets, the Attorney Examiner rejected DP&L’s position that the fact that a hearing has not yet been scheduled prevents OCC from obtaining discovery.¹ The Attorney Examiner should similarly reject DP&L’s claims to this effect in this proceeding.

As emphasized by OCC in its Motion to Compel, the law affords ample rights of discovery to every party in a proceeding² and the PUCO’s rules provide that the right to

¹ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Entry of May 30 2014 at 3.

² R.C. 4903.082.

discovery begins with commencement of a proceeding.³ DP&L has failed to cite to any law or regulation that limits a party's rights to discovery simply because a hearing has not been scheduled. Yet DP&L seeks to limit OCC – and presumably other parties – from inquiring into the basis of its claims because a hearing has not yet been scheduled.

DP&L cites to two PUCO cases – 9 and 15 years old respectively – where the PUCO denied parties discovery because the PUCO found that a hearing was not necessary for its review. In the instant case, however, the PUCO's rules provide that the PUCO “shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing.”⁴ A hearing – and ample rights to discovery – are necessary to protect customers from proposed revisions to DP&L's corporate separation plan that could impact the rates customers pay to the Utility and retail sales of generation in the competitive market.

Although DP&L's claims are largely focused on denying OCC's rights to discovery in its entirety, DP&L's Memo Contra also claims that OCC's discovery requests are overly broad and therefore unduly burdensome to answer, and that OCC has improperly asked for discovery of AES and DPL Inc. DP&L also contends that a privilege log would be unduly burdensome and should not be required until its objections on the merits are resolved. All of these issues were discussed in OCC's Motion to Compel. The arguments lack merit and should be rejected. DP&L should be compelled to respond.

³ Ohio Admin. Code 4901-1-17(A).

⁴ R.C. 4928.17(B).

II. ARGUMENT

A. **Discovery Rights Are Not Limited When The PUCO Requests That Parties File Comments Or When A Hearing Has Not Yet Been Scheduled.**

DP&L makes the statement that because the PUCO requested and received comments on DP&L's 4th Amended Plan, and the PUCO has not yet scheduled a hearing, means that OCC's discovery requests "are thus not relevant to any pending issue before the Commission."⁵ But all of the issues before the Commission are "pending" and thus are subject to discovery in this proceeding. The PUCO received comments on DP&L's filing. But the PUCO has not yet developed an evidentiary record in this matter. Additionally the extent to which a record will be opened and considered has not been defined by any PUCO Order or Entry. OCC's discovery is designed to elicit information related to the Utility's proposals in its filing. Such information then may be relied on for testimony or cross-examination at a future hearing on DP&L's proposed revisions.

With no PUCO order limiting the scope of this proceeding or directing that a hearing shall be limited to specific issues, it must be presumed that all of the issues in this matter are currently subject to discovery. And the PUCO's rules adopt the broad discovery test found in Ohio Civil Rule 26(b)(1). Under the PUCO's rules⁶ (and Civ. Rule 26(b)(1)), discovery is permitted of information which appears "reasonably calculated to lead to the discovery of admissible evidence." The PUCO has described its test as one of reasonable calculation, not certainty. This test for relevancy is much broader than the test to be utilized at trial. "Evidence is only irrelevant by the discovery

⁵ DP&L Memo Contra at 5.

⁶ Ohio Admin. Code 4901-1-16(B).

test when the information sought will not reasonably lead to the discovery of admissible evidence.” Under this broad discovery test, OCC’s discovery—which seeks information on essential issues in the case—is clearly relevant.

Further, the PUCO’s rules recognize that discovery commences when the proceeding commences.⁷ And a hearing should be held in this matter given the significant impact that DP&L’s proposals will likely have on customers. OCC’s discovery is directed toward determining the factual underpinnings of DP&L’s proposals as well as the impact of its proposals.

DP&L appears to suggest that if OCC was intending to perform discovery, it should have conducted that discovery before filing Comments to DP&L’s 4th Amended Plan.⁸ While DP&L would seemingly seek to impose a limit on when discovery can be sought, the PUCO rules do not contain such limits absent a PUCO order.

Moreover, the time frame for submitting Comments on the plan allowed little time to serve discovery and receive responses prior to filing such comments -- even if DP&L would have provided substantive responses. The Application was filed on December 30, 2013 and Comments had to be filed by February 4, 2014. And, based on the Comments and Reply Comments, the Attorney Examiner determined that the parties “provided sufficient reason in their comments to warrant further consideration of the application by the Commission” and suspended the application. While the application is suspended, OCC is seeking to gather information through discovery. That information is intended to assist the PUCO in its determination of the issues in this matter.

⁷ Ohio Admin. Code 4901-1-17(A).

⁸ DP&L Memo Contra at 6, n. 3.

DP&L points to a PUCO decision in a merger case⁹ to support its position that parties' rights to discovery may not automatically attach where a hearing has not been scheduled. In the *Cinergy* case, the PUCO reviewed a change in control of the holding company for Cincinnati Gas & Electric Company. In an Entry issued two weeks after that application was filed and before many parties had moved to intervene -- and before the PUCO had considered intervention of many parties, the PUCO scheduled a comment process specifically to consider the nature and scope of its review. In the interim, it prevented discovery from commencing. Here however, there has been no PUCO order preventing discovery from commencing—nor should there be.

In the *Cinergy* case, the PUCO was acting pursuant to R.C. 4905.02(A)(2) – the utility merger statute – which specifically provides the PUCO with discretion to set a hearing “if the commission considers a hearing necessary.” Although the PUCO has discretion to consider whether to conduct a hearing on a corporate separation plan, this corporate separation plan was filed in conjunction with and is inextricably linked to DP&L’s sale or transfer of generation assets. In that context, the PUCO’s rules specifically require a hearing where an application proposes to alter the PUCO’s jurisdiction over a utility’s generation assets. Ohio Admin. Code 4901:1-37-09(D). And that rule should be applied to this case, too, where DP&L’s 4th Amended Plan will likely be effective during the time frame both before and after the utility’s generating assets are divested.

⁹ *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, pp. 6-7 (Dec. 7, 2005 (“Cinergy”).

B. OCC's Discovery Requests Are Not Unduly Burdensome Or Overly Broad.

DP&L claims that OCC's discovery requests are unduly burdensome, pointing to the number of such requests (16 interrogatories and 14 requests for production of documents).¹⁰ DP&L also claims that OCC's discovery requests are "overbroad" because they seek support and documentation of DP&L's proposed revisions to its corporate separation.¹¹

As emphasized in OCC's Motion to Compel, this is a case where DP&L has presented a lengthy corporate separation plan with significant revisions, including an entirely new relationship with AES US Services, LLC. Significantly, the corporate separation revisions are offered in the context of DP&L's anticipated divestment of its generating assets. That divestment will increase the need for transparency of all affiliate transactions. And transparency will be needed to prevent unfair competitive advantages and to prevent improper subsidies—subsidies that are prohibited by Ohio law.¹² Thus, the failure to properly assess these changes could impact both the rates customers pay in the retail generation market and the rates paid to DP&L.

OCC's discovery requests may be followed up with other discovery requests once OCC receives initial responses, but certainly OCC's requests are not extensive and impose little burden on DP&L. These initial discovery requests are necessary simply to understand and assess DP&L's proposed revisions to its corporate separation plan and their potential impact on the competitive market and customer rates. The discovery is

¹⁰ DP&L Memo Contra at 4-5.

¹¹ DP&L Memo Contra at 6.

¹² See R.C. 4928.02(H); 4928.17(A)(3).

aimed at determining whether the corporate separation plan meets the statutory requirements of R.C. 4928.17.

Moreover, DP&L has failed to explain how responding to these discovery requests would be unduly burdensome. DP&L has only attempted to discuss the specifics of a single discovery request – and, even so, DP&L ***misrepresented*** that discovery request in its Memo Contra. Specifically, DP&L states that OCC’s RPD-4 requested “any documents relating to corrective actions that DP&L has taken in the past five years’ *without any context or limitation* to those actions being related to the corporate separation plan at issue in this proceeding.”¹³

But DP&L is wrong. OCC’s RPD-4 asked for the following, specifically limiting the requested information:

RPD-4: Please identify any corrective action, including disciplinary action, that DP&L has taken in the last 5 years as per the compliance procedures on page 18 of the 4th Amended Corporate Separation Plan or previous corporate separation plans.

The discovery request that DP&L claims provides no context or limitation relating to the corporate separation plan specifically refers to the compliance procedures on page 18 of the plan. DP&L is wrong to suggest that this discovery request is “overbroad” in any respect. OCC submits that the other discovery requests are similarly tailored to address DP&L’s specific proposals and revisions in its 4th Amended Corporate Separation Plan. Thus, DP&L’s claims of undue burden are merely conclusory statements devoid of a meaningful factual basis..

¹³ DP&L Memo Contra at 6 (Emphasis added).

C. The Billing Rates And Terms Of Service Between DP&L And Its Affiliated Entities, And The Allocation Of Such Charges, Is Information Required To Be Maintained By DP&L As Part Of A Cost Allocation Manual Under Ohio Admin. Code 4901:1-37. Thus, DP&L's Claims That This Information Is Beyond The Control Of DP&L Is Inconsistent With The Requirements Of The PUCO's Rules And Should Be Rejected.

DP&L claims that OCC interrogatories INT-8, 9, 10 and 11 and RPD-10 and 11 seek “information and documents that are beyond the knowledge and control of DP&L.”¹⁴ DP&L’s limitation of its claim to these five discovery requests is a substantial change from the claims made in DP&L’s initial objections that claimed all of OCC’s interrogatories and requests for production of documents were objectionable on this basis. But if DP&L’s claim is true, DP&L is ignoring its responsibilities under the Ohio Administrative Code.

Under Ohio Admin. Code 4901:1-37, the PUCO’s corporate separation rules specifically require utilities to provide information regarding the “financial arrangements between the electric utility and all affiliates.”¹⁵ Electric utilities are required to maintain the Cost Allocation Manual (CAM), “documenting how costs are allocated between the electric utility and affiliates” to ensure that “no cross-subsidization is occurring between the electric utility and its affiliates.”¹⁶ The clear intent of the rules is to ensure openness and transparency of all transactions, including the cost and basis of charges, and the fair allocation of such costs between and among the electric utility and its affiliates. Without the information requested by OCC, OCC would be unable to determine the reasonableness of affiliate charges or their fair allocation. Thus, OCC would not be able

¹⁴ DP&L Memo Contra at 6-7.

¹⁵ Ohio Admin. Code 4901:1-37-05(A)(4).

¹⁶ Ohio Admin. Code 4901:1-37-08(A) – (C).

to determine whether or not cross-subsidization is occurring. OCC would emphasize that the PUCO's corporate separation rules require extensive documentation and retention of affiliate transaction information for at least 3 years.¹⁷

The specified interrogatories and document requests are as follows:

- INT-8. To the extent not included in the agreements between AES US Services and its affiliated entities, please provide billing rates and payment terms for affiliated services and materials and supplies that will be charged by AES US Services to its affiliated entities.
- INT-9. To the extent not included in the agreements between AES US Services and its affiliated entities, please provide billing rates and payment terms for affiliated services and materials and supplies that will be charged to AES US Services by its affiliated entities.
- INT-10. Are the billing rates and payment terms charged by AES US Services for affiliated services and materials and supplies the same to each of AES US Services' affiliated entities? If not, please explain why not.
- INT-11. Are the billing rates and payment terms that any affiliated entity may charge AES US Services for affiliated services and materials and supplies the same? If not, please explain why not.
- RPD-10. Please provide a copy of any and all agreements between AES US Services and any affiliated entities.
- RPD-11. To the extent that billing rates and payment terms applicable to services and materials and supplies provided between AES US Services and its affiliates are included in documents other than agreements, please provide such documents.

OCC's interrogatories and document requests clearly inquire into the billing rates and terms of service between AES US Services and its affiliates, including DP&L. This information is clearly within the scope of information required to be maintained by

¹⁷ Ohio Admin. Code 4901:1-37-08(D)(1) – (9) and (G).

DP&L as part of its Cost Allocation Manual under Ohio Admin. Code 4901:1-37-08.

DP&L's claims that affiliate information regarding the relationship between DP&L and its affiliates is beyond DP&L's control would be inconsistent with the clear requirements of the PUCO's rules and should be rejected.

With respect to the cases cited by DP&L that "affiliates of a utility are not subject to discovery," OCC would emphasize that the cases cited did not concern information required to be maintained as part of a corporate separation plan. Certainly, information which is required to be maintained by the electric utility as part of its CAM (per Ohio Admin. Code 4901:1-37-08) is subject to discovery. If DP&L is claiming that the information requested is not required to be maintained in its CAM, it should identify what information is and is not included in the scope of the CAM.

The Attorney Examiner's rulings relied upon by DP&L (to support its position that discovery should not be had) were decisions that prevented discovery only when the documents were not in the utility's possession or control.¹⁸ Additionally, the Attorney Examiner's ruling in DP&L's ESP 2 case was based upon DP&L's claim that it did not have access to the documentation requested.¹⁹ And in the case involving Columbia Gas of Ohio and its affiliate, Columbia Service Partners ("CSP") relied upon by DP&L, the

¹⁸ *In the Matter of Duke Energy Ohio, Inc.*, Case No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at *8-9, Entry of December 13, 2010; *In the Matter of Manchester Group, LLC*, Case No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988 at *1-3, Entry of November 13, 2009; *In the Matter of the Application of The Dayton Power and Light Company* for Approval of its Electric Security Plan, : Case No. 12-426-EL-SS0, Transcript of Proceedings of January 30, 2013, p. 145.

¹⁹ *In the Matter of the Application of The Dayton Power and Light Company* for Approval of its Electric Security Plan, : Case No. 12-426-EL-SS0, Transcript of Proceedings of January 30, 2013, p. 20.

Attorney Examiner held that discovery of the billing arrangements between Columbia and CSP was appropriate.²⁰

Moreover, OCC's discovery requests are directed to statements made in DP&L's 4th Amended Corporate Separation Plan, where it describes its "compliance" with Commission rules for corporate separation plans.²¹ Thus, one would expect that information upon which the statements were based would be known by DP&L or in DP&L's possession. To the extent that is not the case, the fact that documents may be in the possession of an affiliate or parent does not insulate DP&L from its obligation to provide sufficient responses to appropriate discovery requests. Under Ohio Admin. Code 4901-1-19, interrogatories may elicit "facts, data, or other information *known or readily available* to the party upon whom the interrogatories are served."

Certainly, the discovery OCC seeks is known by DP&L or readily available to it. Just because the information may be in the possession of an affiliate or parent company does not mean it is not known by DP&L or readily available to DP&L. Indeed, DP&L has made no such claim that the information is not readily available to it.

DP&L has a legal duty to discover and produce readily available evidence pertaining to its case.²² In other words, if DP&L has access to the information sought, then it must produce it.²³ Clearly, the information sought is either known by DP&L or

²⁰ *In the Matter of Manchester Group, LLC*, Case No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988 at *1-3, Entry of November 13, 2009.

²¹ Application of December 30, 2013, pp. 19-30.

²² See, e.g., *In the Matter of the Complaint of Carpet Color Systems v. Ohio Bell Telephone Co.*, Case No. 85-1076-TP-CSS, Opinion at 22 (May 17, 1988); *General Dynamics Corp. v. Selb. Manufacturing Co.* (1973, CA8), 481 F.2d 1204, cert. den. (1974), 414 U.S. 1162.

²³ See *In the Matter of the Complaint of the Manchester Group, LLC. v. Columbia Gas of Ohio, Inc.*, Case No. 08-360-GA-CSS, Entry at 2 (Oct. 2, 2009)(granting the motion to compel "to the extent Columbia has access" to the relevant information sought in discovery).

readily available to it through its affiliates. It would be inconsistent with the PUCO's discovery rules and corporate separation rules to allow DP&L to shield the information from discovery by keeping the information with an affiliate or having its affiliate(s) obtain the information in the first instance. In either event, its affiliates are its agents and the information is within DP&L's control.

DP&L's arguments should be rejected for the reasons stated above.

D. DP&L Should Be Required To Produce A Privilege Log To Aid The PUCO In Determining Whether A Privilege Exists.

DP&L should be required to produce a privilege log in regard to information that it asserts is protected from discovery. Such a requirement would be consistent with the Attorney Examiner's May 30, 2014 Entry in the case involving the divestiture of DP&L's generation assets.²⁴

DP&L asks that it not be required to assemble privileged documents and a privilege log "until the Commission concludes that OCC is entitled to conduct discovery in this proceeding."²⁵ Again, DP&L's claim assumes that there is a presumption that OCC is not entitled to discovery. This is contrary to Ohio law and the PUCO rules as explained above.

It is uncontroverted that the burden of establishing whether a privilege applies rests upon the party asserting the privilege, not on the party seeking discovery.²⁶

²⁴ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Entry of May 30 2014 at 3.

²⁵ See *In the Matter of the Complaint of the Manchester Group, LLC. v. Columbia Gas of Ohio, Inc.*, Case No. 08-360-GA-CSS, Entry at 8 (Oct. 2, 2009)(granting the motion to compel "to the extent Columbia has access" to the relevant information sought in discovery).

²⁶ *Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648; *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997), cert. denied, 522 U.S. 1047 (1998).

The privilege must be proven document by document, with the demonstration typically being made with a privilege log.²⁷ Thus, a separate claim must be raised in response to each request for disclosure.²⁸

DP&L relied upon both the attorney-client privilege and the attorney work-product doctrine to avoid responding to OCC's discovery. But it made no attempt whatsoever to identify specific documents or information that these privileges apply to. DP&L merely claims that "each and every discovery request" is objectionable because it is privileged in some respect. DP&L's blanket assertion of privilege is insufficient to meet its burden.²⁹

DP&L should be compelled to provide information to enable OCC and the PUCO to determine whether privilege exists, and if it exists, whether it has been waived or is covered by an exception to privilege. DP&L has failed to demonstrate that either the attorney-client privilege or the attorney work-product/trial preparation doctrine applies to "each and every discovery request."

DP&L was asked by OCC to produce a privilege log, but declined to do so.³⁰ Such a log is a tool to enable parties to judge the validity of the privilege claim. It also assists the attorney examiner in evaluating the merits of a privilege claim.³¹ DP&L

²⁷ *United States v. Rockwell*, 897 F.2d 1255 (3rd Cir. 1990).

²⁸ Sec. 5.02[11a], 4 Weinstein's Federal Evidence, Chapter 503, Lawyer-Client Privilege.

²⁹ *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010).

³⁰ See Exhibit 1.

³¹ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶19 (Jan. 27, 2011).

should produce a privilege log, just as it has been required to produce one in connection with its application to sell or transfer its generation assets.³²

III. CONCLUSION

DP&L's arguments to prevent discovery from occurring should be rejected as lacking merit. DP&L's position is inconsistent with legal requirements pertaining to discovery. The PUCO should ensure that consumers are given ample and fair opportunity to evaluate DP&L's claims and proposals through the discovery process before consideration is given to proposals that could impact on the rates customers pay to the Utility and retail sales of generation in the competitive market.

Respectfully submitted,

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³² *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Entry of May 30 2014 at 3.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply to Dayton Power and Light Company's Memorandum Contra was provided to the persons listed below electronically this 12th day of June, 2014.

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