

**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.)	

**REPLY IN SUPPORT OF MOTION TO COMPEL RESPONSES TO
DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In opposing the Office of the Ohio Consumers' Counsel's ("OCC") motion to compel responses to discovery, which OCC filed to protect consumers,¹ the Dayton Power & Light Company ("DP&L") relies on two arguments, both of which fail.² First, DP&L argues that OCC's discovery requests seek irrelevant information. DP&L is wrong—the information is relevant. Second, DP&L argues that OCC is not entitled to the information it seeks because the PUCO Staff is not subject to discovery. This argument fails because the discovery is being sought from DP&L, not the PUCO Staff.

The PUCO should grant OCC's Motion to Compel and require DP&L to provide the requested documents immediately.

¹ Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel (Oct. 31, 2017) (the "Motion to Compel").

² 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 (Nov. 15, 2017) (the "Memo Contra").

I. THE DOCUMENTS THAT OCC SEEKS ARE RELEVANT AND THEREFORE ARE DISCOVERABLE.

Whether the documents that OCC seeks are relevant is not a close call: they are.

In its March 22, 2017 Entry in this case, the PUCO ordered its Staff to issue a Request for Proposals for an audit of DP&L's plant in service. The RFP specifically contemplated the creation of at least two documents: (1) a "Draft report of findings" and (ii) a "Final report of findings."³ DP&L, however, now claims that the draft report and communications related to that report are irrelevant to this case.⁴ In other words, DP&L's argument is that the PUCO ordered an auditor to create an irrelevant document. This cannot have been the PUCO's intent.

In support of its strained interpretation of the PUCO's broad discovery rules,⁵ DP&L relies on a single Power Siting Board case, *In re Application of Champaign Wind, LLC*,⁶ which does not apply here. In citing this case, DP&L omits at least two key details. First, the party in *Champaign* filed a motion to compel production of drafts of the opposing party's application filed in the case.⁷ OCC is not seeking drafts of DP&L's application. Second, there was no audit in the *Champaign* case, as there is here, so it provides no insight on how the PUCO should handle discovery requests for relevant draft audit reports.⁸

³ Entry (Mar. 22, 2017), Request for Proposals at 4.

⁴ Memo Contra at 3-4.

⁵ See *Ohio Consumers' Counsel v. PUCO*, 11 Ohio St. 3d 300, 320 (2006) (discovery rules have been "liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding").

⁶ Case No. 12-160-EL-BGN, Opinion & Order (May 28, 2013).

⁷ *Champaign*, Opinion & Order at 11.

⁸ See generally *id.* (no mention of any audit or audit report).

Furthermore, DP&L cites no authority for the proposition that Power Siting Board cases have precedential value in PUCO cases involving electric distribution utilities. Power Siting Board proceedings operate under their own statute (R.C. 4906) and their own set of rules (Ohio Administrative Code Chapter 4906), which are distinct from the statutes and rules that apply to electric distribution utility cases. For this reason, too, the PUCO should not rely on Power Siting Board cases in interpreting the independent discovery laws and rules that apply in this case involving DP&L.

Ohio Adm. Code 4901-1-16(B) allows discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence. The draft audit reports OCC seeks to obtain from DP&L fit this description. The PUCO should require DP&L to provide the documents to OCC.

II. DP&L IS NOT PART OF THE PUCO STAFF. IT CANNOT REFUSE TO PRODUCE DOCUMENTS IN ITS POSSESSION BASED ON THE PUCO'S RULES EXEMPTING ITS STAFF FROM DISCOVERY.

DP&L's second argument is easily dismissed. Under R.C. 4901.16, PUCO employees and agents are prohibited from divulging certain information about public utilities. DP&L argues that this law prohibits DP&L from producing documents in its possession through discovery.⁹ But this law does not apply to DP&L. DP&L is not an employee of the PUCO. Nor is DP&L an agent of the PUCO. Indeed, the PUCO addressed this very issue in an earlier case involving a motion to compel by OCC, ordering the utility to produce the requested documents.

⁹ Memo Contra at 7.

In *In re Application of Columbus Southern Power Co. for Authority to Amend its Filed Tariffs to Increase the Rates & Charges for Electric Service*,¹⁰ OCC moved for an order compelling the utility to produce documents in its possession.¹¹ The utility argued that R.C. 4901.16 authorized it to refuse to produce the documents in question because they involved communications between the utility and the PUCO Staff.¹² The PUCO granted OCC's motion to compel, ruling that R.C. 4901.16 "only prevents premature disclosure of information by the staff of the Commission" and that "[n]othing in that section prevents [a utility] from providing information to parties in a case."¹³

Ohio Adm. Code 4901-1-16(I) similarly provides that the PUCO Staff is not subject to discovery in PUCO proceedings. DP&L argues that this rule allows DP&L to refuse to produce documents in its possession through discovery.¹⁴ But again, DP&L is not a member of the PUCO Staff, so this rule does not apply.

Nothing in the law, and nothing in the PUCO's rules, provides that utilities may refuse to produce documents simply because the PUCO Staff might otherwise be exempt from producing them. The documents that OCC seeks are in DP&L's possession. OCC is not asking the PUCO Staff or the auditor to produce them; OCC is asking DP&L to produce them. DP&L is not a member of the PUCO Staff for purposes of discovery in this case (or for any other purpose) and thus cannot hide behind discovery rules that apply exclusively to the PUCO Staff.

¹⁰ PUCO Case No. 91-418-EL-AIR, 1991 Ohio PUC LEXIS 1033 (Aug. 23, 1991).

¹¹ *Id.* at *1.

¹² *Id.*

¹³ *Id.* at *2 (emphasis added).

¹⁴ Memo Contra at 6.

III. CONCLUSION

The documents that OCC seeks are relevant and are reasonably calculated to lead to the discovery of admissible evidence. DP&L is not part of the PUCO Staff, so it cannot refuse to produce documents in its possession based on laws and rules that apply exclusively to the PUCO Staff and its agents. The PUCO should order DP&L to immediately produce all of the documents that OCC requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply in Support of Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 22nd day of November 2017.

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Summary: Reply Reply in Support of Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.