**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider. | ))) | Case No. 12-2881-EL-FAC |

**MEMORANDUM CONTRA THE DAYTON POWER & LIGHT COMPANY’S**

**MOTION FOR MODIFICATION OF THE PROCEDURAL SCHEDULE**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**I. INTRODUCTION**

Dayton Power and Light Company (“DP&L” or the “Utility”) has filed a Motion to modify the procedural Schedule (that relates to due process for parties) in this case where DP&L seeks approval for collecting its fuel charges from electric customers. DP&L requests that the procedural schedule in the recent Entry of September 24, 2013, be modified. That schedule requires the filing of all testimony on October 31, 2013.

DP&L requests that the procedural schedule be modified so that intervenors file testimony first, on October 31, 2013. DP&L proposes that it not file testimony until November 21, 2013, when it proposes that it “and others” file “rebuttal” testimony. DP&L bears the burden of proof in this case per R.C. 4928.143(B)(2)(a).[[1]](#footnote-1)

The Office of the Ohio Consumers’ Counsel (“OCC’) represents DP&L’s 513,526 residential utility consumers who are included among the customers that pay the fuel charges that are at issue in this case. The Public Utilities Commission of Ohio (“PUCO” or “Commission”) should deny DP&L’s motion for the following reasons.

**II. ARGUMENT**

**A. DP&L’s Motion Should Be Denied Because It Would Unfairly Establish A Process Where The Party (DP&L) Bearing The Burden Of Proving Its Fuel Costs Are Prudent Is Permitted To File Its Direct Case As Rebuttal. DP&L Should File Its Testimony First, To Provide Other Parties The Opportunity To Review.**

DP&L’s motion would turn procedure and fairness upside down. Given that it bears the burden of proof, DP&L should file its direct case (with testimony) first. But DP&L wants to file last.

In Case Number 09-1012-EL-FAC, the Utility filed an application seeking to establish a bypassable fuel recovery rider to be effective January 1, 2010.[[2]](#footnote-2) Under the rider, DP&L collects retail fuel and purchased power costs from customers. In the present case, the PUCO selected Energy Ventures Analysis, Inc. (“EVA”) to perform an audit on DP&L’s 2012 fuel costs and fuel management practices. Pursuant to R.C. 4928.142 (D)(l)-(2) and 4928.143(B)(2)(a), an electric utility may recover, among other things, the costs of fuel and purchased power. However, these costs must be *prudently incurred*, in order for the PUCO to authorize recovery through a fuel adjustment clause (FAC). Accordingly, DP&L bears the burden in this case of proving that the fuel and purchased power costs it collected from customers for 2012 were prudently incurred.

 DP&L proposed a modified procedural schedule whereby intervenors would file testimony first, and the Utility files rebuttal testimony twenty-one days later. DP&L’s reasoning for the proposed change is to allow the Utility a “fair opportunity to file a single set of testimony and responses to the issues raised in the Audit Report and with respect to any new issues or arguments that interveners [sic] may raise.”[[3]](#footnote-3) This rationale is flawed.

DP&L bears the burden of proof in this proceeding to establish its costs of fuel and purchased power were “prudently incurred.”[[4]](#footnote-4) In this case, EVA (the independent auditor for this proceeding) filed its report on the management and performance and financial audit of the fuel and purchased power rider of DP&L on June 14, 2013. Thus, the purpose of DP&L’s initial testimony is not to respond to, or rebut, all issues raised by intervenors in this case. Instead, DP&L’s burden in this proceeding is to prove that its fuel practices for 2012 were prudent. As part of meeting its burden, the Utility could address in direct testimony issues that include but are not limited to its perspectives on the audit report.

 The PUCO’s prior rules with respect to fuel proceedings required utilities to file their direct expert testimony first (no later than sixteen days prior to the commencement of hearing). All other testimony (including intervenor testimony) was to be filed after the utility, seven days prior to the commencement of hearing.[[5]](#footnote-5) These rules promoted fairness for all involved in the process, including for intervenors and the PUCO Staff who quite appropriately could see the basis for the utility’s direct case before filing testimony.

The PUCO’s rules provide examples, in other kinds of cases, where the utility is required to file testimony first. For example, per Ohio Admin. Code 4901:1-35-03 (A), the utility filing an application for a standard service offer must file direct testimony first in the case. In addition, the utility in a general rate proceeding must file testimony first.[[6]](#footnote-6) And under Ohio Admin. Code 4901-1-29(A)(1)(d), a utility must file testimony first in an emergency rate proceeding. Finally, utilities must file testimony first in purchased gas adjustment proceedings.[[7]](#footnote-7) Indeed, there appears to be no circumstance in the PUCO’s rules where intervenors file testimony first in a case where a utility bears the burden of proof.

Gas cost recovery (“GCR”) proceedings are very similar procedurally to the FAC cases. In GCR proceedings an independent auditor reviews a utility’s compliance with the GCR mechanism as delineated in Ohio Admin. Code 4901:1-14-07. The auditor then files a report with its findings. The utility files direct testimony first, followed by direct testimony to be presented by any other party.[[8]](#footnote-8)

DP&L’s request that intervenors file testimony first in a case where the Utility bears the burden of proof is contradictory to the PUCO’s rules and precedent (and contrary to the fundamental concept of burden of proof). DP&L has cited no authority to support its arguments in this regard.

 The Attorney Examiner provided an evidentiary hearing date in the procedural schedule. Thus, DP&L will not only have the opportunity to present evidence in support of its positions in this case, it will also have the chance to cross-examine intervenor and PUCO Staff witnesses, if it so chooses. In addition, under Ohio Admin. Code 4901-1-29(A)(2), a party may request the opportunity to file rebuttal testimony, if necessary. It is therefore improper for the procedural schedule to provide DP&L an opportunity for rebuttal testimony, and as its initial testimony, at this time.

 Granting DP&L’s Motion will unduly prejudice intervenors, who do not bear the burden of proof in this case. To require intervenors to file testimony prior to the Utility is to shift the burden of proof to the intervenors (i.e., require intervenors to prove DP&L’s fuel practices were imprudent). This is wrong, contrary to the legal standard of “burden of proof,” and contradictory to R.C. 4928.143(B)(2)(a). As such, DP&L’s Motion should be denied.

**B. DP&L’s Motion Should Be Denied As It Is Procedurally Flawed.**

The proper mechanism in which to challenge the Attorney Examiner’s September 24, 2013 Entry was an Interlocutory Appeal, not a Motion. DP&L’s Motion challenges the substance of the procedural schedule set-forth by the Attorney Examiner as it seeks to require intervenors to file testimony first in a case where the Utility bears the burden of proof.

To this end, DP&L maintains that the procedural schedule should be modified so that DP&L has the opportunity to respond to all testimony filed in the case. The Utility implies the procedural schedule set by the Attorney Examiner is unfair to DP&L because DP&L will not be able to respond to issues raised by intervenors unless intervenors file testimony first.[[9]](#footnote-9) Under Ohio Admin. Code 4901-1-15(A), any party who is adversely affected thereby may take an interlocutory appeal to the PUCO from any ruling made under Ohio Admin. Code 4901-1-14. Thus, the appropriate mechanism in which to challenge the procedural schedule was an interlocutory appeal, not a Motion.

DP&L’s interlocutory appeal would have been due on September 30, 2013.[[10]](#footnote-10) Thus, DP&L’s Motion is untimely, even if it were considered an Interlocutory Appeal, which it is not.[[11]](#footnote-11) DP&L’s Motion should be denied on procedural grounds.

**III. CONCLUSION**

 The PUCO should deny DP&L’s Motion. DP&L bears the burden of proof in this case. That means it should not be permitted to file its testimony last among parties, which would be prejudicial to parties. In addition, the Utility’s Motion is procedurally flawed. In this regard, the relief it seeks should have been sought as an Interlocutory Appeal of the September 24, 2013 Entry, not a Motion.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

*/s/ Kyle L. Kern*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below via electronic transmission this 8th day of October 2013.

 */s/ Kyle L. Kern*\_\_\_\_\_\_\_\_\_\_\_\_

 Kyle L. Kern

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**SERVICE LIST**

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1. OCC has not yet determined if it will file testimony. Also, OCC is the only party to move to intervene in this case at this time. [↑](#footnote-ref-1)
2. See generally, *In the Matter of the Application of The Dayton Power and Light Company to Revise its Fuel Adjustment Clause*, Case No. 09-1012-EL-FAC, Application (October 30, 2009). [↑](#footnote-ref-2)
3. DP&L Motion at 2. [↑](#footnote-ref-3)
4. R.C. 4928.143(B)(2)(a). [↑](#footnote-ref-4)
5. See former Ohio Admin. Code 4901-1-29(A)(1)(e) and (f). [↑](#footnote-ref-5)
6. Ohio Admin. Code 4901-7-01, Appendix A, Chapter II (A)(6). [↑](#footnote-ref-6)
7. Ohio Admin. Code 4901-1-29(A)(1)(e) and (f). [↑](#footnote-ref-7)
8. See, for example, Case No. 11-218-GA-GCR, Entry, where the procedural schedule set-forth provided that the utility’s witness file testimony first, followed by other parties (April 5, 2011), and Case No. 12-209-GA-GCR, et al., Entry, where the direct testimony of utility witnesses was prior to all other testimony (January 23, 2012). [↑](#footnote-ref-8)
9. DP&L Motion at 2. [↑](#footnote-ref-9)
10. It would have been due on September 30, 2013 as September 29 was a Sunday. Also, note that *in In the Matter of the Complaint of Greg Hart, Inc. Infosytstems Resources Inc., and The Ohio Public Communications Association, Complainants, v. The Ohio Bell Telephone Company, Cincinnati Bell Telephone Company, and United Telephone Company of Ohio*, Case No. 92-1953-TP-CSS, the PUCO found that a Motion for Continuance of the procedural schedule (filed more than five days after the ruling) was an “untimely request for an interlocutory appeal.” (August 17, 1993). [↑](#footnote-ref-10)
11. Ohio Admin. Code 4901-1-15(C) contains specific requirements for the filing of interlocutory appeals that were not followed by DP&L in its October 4, 2013 Motion. [↑](#footnote-ref-11)