**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| 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 |

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

**MOTION FOR A PROTECTIVE ORDER**

**BY**

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# introduction

In order to protect the interests of their clients – in the case of the Office of the Ohio Consumers’ Counsel (“OCC”), the interests of residential customers -- parties to a proceeding are afforded ample discovery rights from the date the proceeding commences.[[1]](#footnote-1) In this proceeding, the Dayton Power & Light Company’s (“DP&L” or “Utility”) numerous proposals for charges it seeks to collect from customers, especially those set forth in its Supplemental Application of February 25, 2014, put residential customers at significant exposure to potentially unjust and unreasonable rate increases.

In order to get a clear understanding of the details and implications of DP&L’s requests for authority to charge its customers more money for their electric service, OCC served two (2) sets of discovery, consisting of 145 interrogatories and 87 requests for production of documents. These discovery requests are directed toward statements made in DP&L’s Application and Supplemental Application. Indeed, the vast majority of OCC’s discovery requests reference specific statements in DP&L’s filings.

On April 17, 2014, DP&L served objections and responses to OCC’s First Set of Discovery requests. DP&L did not provide a single substantive response to the 117 interrogatories and 47 requests for production of documents (“RPDs”) contained in OCC’s first set of discovery. Instead, DP&L objected to each and every one of OCC’s 117 interrogatories. Similarly, DP&L objected to each and every one of OCC’s 47 Requests for Production of Documents. Although OCC attempted to resolve DP&L’s objections as set forth in the attached electronic communication (Exhibit 1), DP&L rejected OCC’s efforts and advised OCC that it would stand on its objections (Exhibit 2). At the same time, on April 22, 2014, DP&L filed its Motion for Protective Order. This Memorandum Contra responds to DP&L’s Motion.

In its Motion for Protective Order, DP&L argues that “[u]nless and until a hearing is set in this matter, DP&L should not be required to respond to OCC’s discovery requests because they are not relevant to any pending issue.”[[2]](#footnote-2) DP&L also argues that OCC’s discovery requests are “unduly burdensome.”[[3]](#footnote-3) DP&L then lists four other grounds upon which it claims that “many of OCC’s discovery requests are objectionable.”[[4]](#footnote-4) DP&L requests that the PUCO not allow discovery unless the Attorney Examiner decides to hold a hearing.[[5]](#footnote-5) If discovery is allowed, DP&L asks that it need not be required to answer “many” of OCC’s requests and that it not be required to assemble its “privileged documents and create a privilege log” unless the PUCO requires DP&L to respond to the discovery.[[6]](#footnote-6)

As discussed below, DP&L’s Motion for Protective Order lacks merit and should be rejected. Rights to discovery commence at the initiation of a proceeding and no order terminating discovery has been entered.

Additionally, the PUCO’s rules specifically provide for a hearing on a sale or transfer of generation assets where jurisdiction over a generation asset will be altered, as it will here.[[7]](#footnote-7) Further, there are no grounds asserted by DP&L that would justify the PUCO waiving the hearing requirement.[[8]](#footnote-8) And OCC and many other parties have asked for rejection of DP&L’s requests for waiver of a hearing..

DP&L’s Application and Supplemental Application present numerous factual issues that could cost customers tens of millions, if not hundreds of millions, of dollars. DP&L represents that “the Commission already conducted an extensive evidentiary hearing in DP&L’s recent ESP proceeding (Case No. 12-426-EL-SSO, et al.) as to whether DP&L should be ordered to transfer its generation assets.” It then argues that there is no need for an additional hearing in this case. DP&L’s claims are misleading at best. The PUCO has ***never conducted*** a hearing on DP&L’s proposals in its Application and Supplemental Application. Both DP&L’s Application and Supplemental Application leave open even the most basic question whether the generation assets will be sold to a third party or transferred to an unregulated affiliate. And OCC and other parties have specifically requested that DP&L’s Application and Supplemental Application be rejected or that DP&L be required to file a further supplement providing essential details.

Despite OCC’s request that DP&L’s Application and Supplemental Application be rejected, OCC must proceed as if a hearing will be held, consistent with the PUCO rule that require such a hearing.[[9]](#footnote-9) Discovery rights begin immediately after a proceeding is commenced and “should be completed as expeditiously as possible.” OCC has commenced discovery despite the significant shortcomings of DP&L’s filings because a hearing is required by rule in this proceeding and the PUCO has not waived, nor should it waive, the requirement for a hearing. The PUCO should deny DP&L’s Motion for Protective Order.

**II. DISCOVERY STANDARDS AND PROCEDURES**

R.C. 4903.082 provides that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Under the PUCO’s rules, “discovery may begin immediately after a proceeding is commenced*.*”[[10]](#footnote-10)Nowhere in the PUCO rules is there any provision that limits discovery to only those proceedings which have a scheduled hearing.

The PUCO has adopted rules that specifically define the scope of discovery. Ohio Adm. Code 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (emphasis added).

The PUCO’s rule is similar to Ohio Civ. R.26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.[[11]](#footnote-11)

This scope of discovery is applicable to written interrogatories and requests for production of documents. Written interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the discovery is served, under Ohio Adm. Code 4901-1-19. Each interrogatory must be answered “separately and fully, in writing and under oath, unless objected to, in which case the reasons for the objection shall be stated in lieu of an answer. The answer shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them.”

Likewise, Ohio Admin. Code 4901-1-20 allows parties to a proceeding to make written requests to produce documents subject to the scope of discovery specified by Ohio Admin. Code 4901-1-16, “including writings, drawings, graphs, charts, photographs, or data compilations, which are in the possession, custody, or control of the party upon whom the request is served.” Ohio Admin. Code 4901-1-20(C) requires a written response to such requests within 20 days unless a proper objection shall be made specifying the “item or category” of the request to which objection is made.

Ohio Admin. Code 4901-1-24 provides that the PUCO, upon motion of a party or person from whom discovery is sought, may issue an order to protect that party or person “from annoyance, embarrassment, oppression, or undue burden or expense.” The PUCO may under this provision prohibit or limit discovery in various ways, or limit the use of information obtained through discovery. A motion for a protective order must set forth the basis for the motion, including citations to authorities relied upon, include copies of specific discovery requests that are the subject of the motion, and provide an affidavit of counsel setting forth that party’s efforts to resolve any differences.

OCC’s right to discovery is assured by law, rule and Supreme Court precedent.[[12]](#footnote-12) OCC is entitled to timely and complete responses to its discovery inquiries. DP&L’s Motion for Protective Order is without merit.

# ARGUMENT

## A. The PUCO’s Discovery Rules Provide That Discovery May Begin Immediately After A Proceeding Is Commenced And Should Be Completed As Expeditiously As Possible.

In support of its Motion for Protective Order, DP&L first argues that discovery should not “be had” because DP&L has requested a waiver of the required hearing in this proceeding and the Attorney Examiner has stated that he will make a decision regarding the request for waivers after comments and reply comments are received to the Supplemental Application.[[13]](#footnote-13) The fact that DP&L requested to waive hearing in this matter does not change the fact that parties are entitled to discovery as of the commencement of this proceeding. This right is provided under Ohio Admin. Code 4901-1-17. And it does not change the fact that DP&L has made two filings pertaining to the sale or transfer of generation assets, neither of which meets legal requirements. Both of those filings, especially DP&L’s Supplemental Application, present significant factual issues necessitating discovery and investigation. This is especially the case because of DP&L’s numerous requests for special rate treatment.

DP&L claims that a hearing should not be had in this proceeding because the Commission conducted a hearing on whether DP&L should be ordered to divest its generation assets in its recent Electric Security Plan (“ESP”) proceeding at Case No. 12-426-EL-SSO. This claim, however, is misleading. Although the PUCO ordered divestiture of DP&L’s generation assets in that case, the PUCO never evaluated any plan for divestiture. Instead, the PUCO merely required DP&L to file a divestiture plan by December 31, 2013.

DP&L’s Application, and then its Supplemental Application, were supposed to constitute such a plan but neither meets the legal requirements of a divestiture plan. DP&L’s suggestion that the issues presented in its Application and Supplemental Application were already the subject of a hearing is without basis. Indeed, DP&L’s Supplemental Application presents numerous, new requests for authority to collect additional charges from its customers that have never been addressed in any proceeding. And DP&L has not provided a definitive plan of separation for evaluation by the parties or by the PUCO in any proceeding. There are numerous components of a plan for separation that could affect the interests of residential customers and which should be the subject of a hearing, in addition to DP&L’s requests for special rate treatment.

DP&L’s Motion is without merit in light of Ohio law[[14]](#footnote-14) and the PUCO’s rules providing for commencement of discovery at the beginning of a proceeding. DP&L should not be protected from answering OCC’s discovery requests that will elicit essential facts necessary to establish a complete record for the PUCO to base its decision on.

## B. DP&L’s Claim That A Party Is Not Entitled To Discovery Where A Hearing Has Not Been Scheduled Should Be Rejected.

It is typical for discovery to commence as soon as a proceeding commences and parties intervene in such proceeding. But DP&L claims that where the PUCO establishes a comment process and a hearing has not been scheduled that parties are not entitled to discovery. DP&L bases its claim upon the PUCO’s decision in *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”). In that 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 the PUCO had not yet 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.

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.”Here, in contrast, 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).

While DP&L seeks waiver of the hearing requirement, its request has not been ruled upon. DP&L’s request was made (Dec. 30, 2013) as part of its initial application in this proceeding. As explained in OCC’s initial comments,[[15]](#footnote-15) and other parties’ comments, DP&L’s application lacked sufficient specificity for evaluation of DP&L’s proposal and, therefore, the PUCO should not grant DP&L’s requested waiver.

With the filing of DP&L’s Supplemental Application on February 25, 2014, there is even more reason for the PUCO to reject DP&L’s waiver request and hold a hearing as its rules require. While still lacking any specificity regarding its plans for sale or transfer of its generating assets, DP&L’s Supplemental Application presented a number of requests to collect additional charges from its customers that were not presented in its initial application. If approved, the requested charges could cost customers tens of millions, if not hundreds of millions, of dollars. Thus, the need for a hearing has become even more pronounced.

And while comments and reply comments have been filed in regard to DP&L’s Application and Supplemental Application, the PUCO has not in any way limited the discovery rights of the parties in this matter. Under the PUCO’s rules, parties are afforded rights to ample discovery under the law.[[16]](#footnote-16) Under the PUCO’s rules[[17]](#footnote-17) discovery may begin once a proceeding has commenced. This proceeding commenced when DP&L filed its initial application -- December 30, 2013.

DP&L’s flawed position that— discovery is only permitted when a hearing (required by the PUCO rules) is scheduled— is not supported by any PUCO rule.. Nowhere in the PUCO rules is there a provision that stays discovery pending its decision as to whether to waive a hearing--especially where the hearing is required under the PUCO rules.[[18]](#footnote-18) To the contrary, the PUCO’s rules provide for discovery to continue even in instances where there was no decision whether a hearing would be held.[[19]](#footnote-19) Additionally, nowhere in the PUCO rules is there a requirement that, in a pending case, discovery rights of parties end when a PUCO-initiated comment period ends.

Discovery is a necessary part of the analysis that OCC and all parties must undertake in order to evaluate the Utility’s proposal. The discovery process will aid the parties in understanding how DP&L’s proposals will affect customers. Ultimately, ample discovery rights should not be impeded by the Utility. Discovery provides the parties an opportunity to better inform the PUCO and assist it in its review of DP&L’s applications.

These “ample rights” to discovery necessarily include a party’s right to receive complete, timely responses to discovery requests so that parties are prepared for whatever comes next.[[20]](#footnote-20) But under DP&L’s approach, OCC and others have no rights. Fortunately, DP&L’s approach is not countenanced under law, rule, or practice. Nor should it be.

## C. OCC’s Discovery Requests Are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence And Are Not Unduly Burdensome.

DP&L claims that OCC’s discovery requests are “unduly burdensome.” But OCC’s discovery requests are no more burdensome to respond to than the burden placed upon OCC and other parties in seeking to understand the claims presented in DP&L’s Application and Supplemental Application. DP&L must be expected to support the statements it has made for the purposes of obtaining PUCO approval of its claims, including both its “plans” for sale or transfer of generation and its proposed special rate treatment. OCC’s discovery is clearly directed at the factual claims set forth in the Utility’s initial filing and supplemental application. Those discovery requests address the following issues:

Fair Market Value [Supplemental Application at ¶¶4,5]

(OCC INT-1-4, 57, 60) (OCC RPD- 17)

The current poor market conditions claimed by DP&L to require the Utility’s alleged need for the Service Stability Rider even after corporate separation [Supplemental Application at ¶9(a)]

(OCC INT-5-10, 56, 80, 69, 74, 79, 80, 97, 108-110) (OCC RPD-5-10, 16, 19-22, 29, 31-34, 45)

DP&L’s proposal to retain the environmental liabilities associated with its generating assets and charge such costs to customers [Supplemental Application at ¶9(b]

OCC INT 12, 14-16, 18-22, 67-68, 78, 83-85, 91-93, 96, 105) (OCC-RPD-35-37)

The utility’s proposal to charge customers all costs incurred by DP&L, such as financing costs, that are associated with the sale or transfer of DP&L’s generating assets [Supplemental Application at ¶9(c)]

OCC INT- 23, 74-76, 78, 81-82, 86-87) (OCC-RPD-46)

DP&L’s proposal to retain 4.9% ownership interest and obligations associated with its purchase power agreement with Ohio Valley Electric Corporation (“OVEC”) [Supplemental Application at ¶9(d)]

(OCC INT-24-26, 28-33, 37-38, 50-56, 69, 71, 98,104) (OCC RPD- 13, 23, 38-43)

DP&L’s proposal to permit DP&L to “temporarily maintain total long term debt of $750 million or total debt equal to 75% of rate base – whichever is greater” through 2018, in contravention of the terms of a previous settlement requiring a capital structure including at least 50% equity. [Supplemental Application at ¶9(e)]

(OCC INT- 39-46, 70, 100-103) (RPD-47)

DP&L’s proposed commitments contained on page 9 of its Supplemental Application

(OCC INT-47-49).

The effect of the sale or transfer of DP&L’s generation assets on the current and standard service offer and the public interest [Supplemental Application ¶12,13]

(OCC INT-62-63, 70, 77)

Communications with joint owners re: generation assets to be sold or transferred [Application ¶10(a)]

(OCC INT-73)

The bonds or debt securities that will need to be refinanced if DP&L sells or transfers its generating assets [Application ¶10(f)]

(OCC INT-75-76, 99, 111-112) (RPD 3,4)

Redemption activity related to DP&L’s bonds [Application ¶10(f)]

(OCC INT-81-82, 89)

Legal authority for the riders requested

(OCC INT-88)

Status of generation plants owned by the Utility that have closed or are proposed to be closed (i.e Hutchings, Beckjord) [Application¶10(c)(d)]

(OCC INT- 91-93) (RPD-14-15)

Operational changes in DP&L’s business and cost structure that will be required to accomplish corporate separation [Application ¶9]

(OCC INT-94)

Effect of DP&L’s rehearing petitions on plans for divestiture [Application ¶7]

(OCC-INT 106-107)

The PUCO’s rules adopt the broad discovery test found in Ohio Civil Rule 26(b)(1). Under the PUCO’s rules (and Civ. Rule 26(b)(1)), discovery is permitted of information “reasonably calculated to lead to the discovery of admissible evidence.” The PUCO has described its test as one of reasonable calculation, not certainty.[[21]](#footnote-21) This test for relevancy is much broader than the test to be utilized at trial. “Evidence is only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence.”[[22]](#footnote-22) Under this broad discovery test, OCC discovery—which seeks information on essential issues in the case—is clearly relevant. The essential information sought is derived solely from the Utility’s application and supplemental application. Both these documents frame the issues in this case. OCC’s discovery is relevant. The discovery is reasonably calculated to lead to the discovery of admissible evidence.

This is a case where DP&L has burdened the parties with two separate filings in three months. It is a case where, if DP&L prevails, then its customers will be paying tens of millions, if not hundreds of millions, of dollars more for electric service. Given the broad nature of the charges sought by DP&L, the PUCO should not protect DP&L from having to answer questions about the bases of those charges. Unfortunately, DP&L has not been forthcoming with meaningful information about its proposal to collect more money from customers and, in fact, has avoided sharing essential information needed to understand the basis and justification of its claims. Consequently, discovery is necessary to fill in the information that DP&L has failed to provide.

Moreover, DP&L has failed to explain how responding to these discovery requests would be unduly burdensome. All it has offered is conclusory statements devoid of factual support (*i.e,* information like the number of hours, the cost, or the volume of information that would be required to comply with the discovery). Federal case law[[23]](#footnote-23) has held that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must specifically show how each interrogatory is overly broad, burdensome, or oppressive, despite the broad and liberal construction afforded discovery rules.[[24]](#footnote-24) In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.[[25]](#footnote-25) General objections without specific support can waive the objection.[[26]](#footnote-26)

Here, the Utility has merely alleged that responding to each and every discovery request is unduly burdensome. These unsubstantiated assertions do not demonstrate how responding to OCC’s interrogatories and requests for production is unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support[[27]](#footnote-27) and the Utility has failed to do so, the PUCO should deny DP&L’s Motion.

DP&L should expect that detailed discovery will be “incident” to seeking from customers unspecified amounts of money over an unknown period of time. DP&L bears the burden of proving its applications meet the public interest provisions of R.C. 4928.17. Given the potential for increases to customers’ rates as a result of DP&L’s special rate treatment, it should expect discovery to be conducted. Ample rights of discovery are afforded parties in PUCO proceedings, by law,[[28]](#footnote-28) by rule[[29]](#footnote-29) and by precedent.[[30]](#footnote-30) DP&L’s Motion should be denied.

## D. DP&L’s Claim That OCC’s Discovery Is Improper Because It Will Interfere With An Ongoing Sales Process Is Without Merit And Is Not Grounds For Preventing Discovery.

DP&L argues that if it is required to provide responses to some of OCC’s discovery requests that this “will interfere with the sale process.”[[31]](#footnote-31) It identifies a total of 28 interrogatories out of 145 interrogatories and 21 requests for production of documents out of 87 such requests that it claims would work such interference.[[32]](#footnote-32) It points to two specific interrogatories, one asking for “all the proposed terms and conditions of the sale or transfer of DP&L’s generation assets” and the other asking whether there is “a minimum price for a third party to purchase” DP&L’s generation assets that is “acceptable to DP&L.”[[33]](#footnote-33)

DP&L’s argument that providing OCC with the proposed terms and conditions necessary for DP&L to divest its generation assets (including the sales price) will interfere with the sales process is without merit. DP&L should be required to provide OCC with the requested information. To the extent that DP&L can prove that some information that is responsive to OCC’s request is deserving of protection (e.g. trade secret or commercially sensitive information), that information can be provided to OCC subject to the terms of a protective agreement that does not allow for public disclosure of such information (subject to OCC’s rights under the protective agreement.) In this regard, if this is DP&L’s claim, then the PUCO should consider DP&L’s request as one to limit public disclosure of this information, not to prevent its discovery.

Moreover, it is clear that parties to this proceeding need to know the terms and conditions of any sale or transfer in order to fairly evaluate whether the sale or transfer is in the interest of their clients, i.e. customers. There may well be provisions in those terms and conditions that could impact on customers – such as DP&L’s proposal to retain future environmental liabilities. Likewise, DP&L’s proposal to continue its Service Stability Rider brings into consideration issues related to financial stability associated with sale or transfer of its generation. Consequently, it is essential that the parties are fairly apprised as to DP&L’s assessment of a minimum sale price. Such sale price will undoubtedly bear upon the financial integrity claims that underlie its proposed continuation of the Service Stability Rider after a sale or transfer.

DP&L discusses only these two specific discovery requests in claiming that they would interfere with the sales process. Presumably, these are the two items that it believes would provide the most interference. But, as discussed above, the information requested is essential to assessment of DP&L’s Application and Supplemental Application and could be provided under the terms of a protective agreement to the extent justified. Such an agreement would prevent any claimed harm.

Further, with respect to DP&L’s claim that this discovery is “premature, because DP&L does not even know whether an asset sale agreement will be reached,” OCC disagrees. DP&L is apparently engaged in a process currently. It presumably has proposed terms and conditions for a sale and has presumably assessed an acceptable price at which it would sell its generation. And it has presented a Supplemental Application that indicates that a sale may occur as early as 2014. If a sale were to occur as early as 2014, the ability of parties to assess the implications of a sale would be severely impaired if parties are denied access to the information requested. And the PUCO’s rules call for discovery to be performed as “expeditiously as possible”.[[34]](#footnote-34) The PUCO should ensure that all parties have ample opportunity to perform discovery on any proposed sale or transfer of generation assets before it becomes final. It is not premature to permit such discovery.

Moreover, under Ohio Admin. Code 4901-1-16(D)(3), if information is not known or does not exist currently, DP&L can answer accordingly. But then DP&L is obligated to update its response to reflect information that subsequently becomes known or existent. Consequently, DP&L can answer based on currently known and existent information but then supplement its response as appropriate. Therefore, it is not grounds to grant DP&L’s Motion for Protective Order that the information is not existent or not known at this time.

## E. DP&L’s Claims That OCC’s Discovery Requests Are Overly Broad Are Without Merit.

DP&L also claims that numerous of OCC’s discovery requests are “overbroad.” DP&L identifies 45 interrogatories (out of 145) and 65 requests for production (out of 87) that it claims are overbroad. But there is no merit in DP&L’s claims.

A review of the discovery requested shows that it is not overbroad. Instead, OCC merely asks for information that forms the basis for DP&L’s claims in its Application and Supplemental Application. Even the one request for documents specifically discussed by DP&L asks for documents “that pertain to ‘current poor market conditions’ referred to in your Supplemental Application at 3.” DP&L seeks to justify its continuation of its SSR charge after divestiture because of such “current poor market conditions” but it apparently does not believe that it should provide documentary support to corroborate its claims. DP&L could have been more specific in its Supplemental Application rather than making such a broad claim, but it chose not to. By stating its position based on such a broad claim, it opened itself up to discovery on the basis of such claim and cannot now argue that discovery should be denied on the basis that questions about such statement are overly broad.

DP&L’s claims that OCC’s discovery requests are overly broad cannot stand appropriate review. As an example, OCC-INT-7(a) asks “[w]hich DP&L business experienced financial losses in 2012” and the other subparts of this question ask for quantification for 2012 and the same information for 2013. Yet OCC-INT-7 is claimed to be overly broad. OCC-INT-11 asks DP&L to identify, on a specific plant basis, the “future environmental liabilities” that it identifies in ¶9(b) of its Supplemental Application. But DP&L claims that this request is also overbroad. OCC-INT-30 asks DP&L to “identify the OVEC costs that DP&L is currently recovering through its Fuel Rider, including the account number, the amount, a description of the charges, and who pays the charges.” And so on. It appears that DP&L will call just about any discovery request “overly broad” with no basis for doing so.

These discovery requests are not overly broad. They are stated to obtain further information based on the claims DP&L has made in its Application and Supplemental Application. It is not unduly burdensome for DP&L to respond to requests directly related to its claims. It may be that DP&L is unable to provide support for these claims. If so, that should be DP&L’s answer. For example, DP&L might have to state that it has not assessed “future environmental liabilities” on a specific plant basis in responses to OCC-INT-11. That might be a proper response, if true. And DP&L should supplement its answer consistent with the PUCO’s rules. But saying such information is overly broad or unduly burdensome to produce is not accurate or proper.

## F. DP&L Should Not Be Permitted to Avoid Answering Discovery In Regard to Information That is The Basis of Its Applications.

DP&L’s claim in its Motion for Protection that a limited number of interrogatories and requests for documents are not proper because they seek “information and documents that are beyond the knowledge and control of DP&L” appears to be inaccurate. A review of the specific discovery requests shows that the information again pertains to DP&L’s Application, not statements made by DPL Inc. or AES. For example, OCC-INT-4 asks whether DP&L has retained “an expert or outside consulting firm to assist in determining the FMV of the generation assets” and to identify such expert. OCC also asks DP&L to identify the department that will be responsible for FMV evaluation and the individuals who will be tasked with such responsibility, whether they are at DP&L, DPL Inc., or AES. Certainly, if DP&L employs outside persons (or any of its affiliates) to perform this assessment, it should reasonably be expected that DP&L would nonetheless have knowledge, if not control, of such information.

Similarly, OCC-INT-24 asks DP&L to identify “all efforts DP&L/AES has taken to obtain consent from other OVEC members” to allow DP&L to transfer its ownership interest in OVEC.” Certainly, it should be reasonably expected that if DP&L were seeking such consent, it might work through AES to do so. However, DP&L would still be knowledgeable of, if not in control over, such information. And again, for OCC-INT-95(b), if any party were having preliminary discussions to sell DP&L’s generating assets, it should reasonably be expected that DP&L would have knowledge of or be working with those individuals and entities having any such discussions.

Moreover, even if the PUCO were to entertain DP&L’s objection, it should nonetheless be overruled. OCC’s discovery requests are directed to statements made in DP&L’s Application and Supplemental Application. 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.[[35]](#footnote-35) In other words, if DP&L has access to the information sought, then it must produce it.[[36]](#footnote-36) Clearly, the information sought is either known by DP&L or readily available to it through its affiliates who were acting on DP&L’s behalf in obtaining such information. It would be inconsistent with the Commission’s discovery 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.

Moreover, the shielding of affiliate information from discovery runs counter to provisions under S.B. 221[[37]](#footnote-37) and the Ohio Admin. Code [[38]](#footnote-38) which requires disclosure of affiliate information,[[39]](#footnote-39) provided an appropriate discovery request is made. In particular, the Commission rules require utilities to provide information with respect to corporate separation (Ohio Admin. Code 4901-35-11, Appendix B, subsection (D)), and permit the PUCO Staff to investigate the operations of the electric utility affiliate, with the affiliates employees, officers, books, and records being made available to them.[[40]](#footnote-40)

DP&L’s Motion for Protection should be denied for the reasons stated above.

## G. DP&L’s Claims Of Privilege And The Burden Of Producing A Privilege Log Must Be Rejected.

DP&L claims that OCC’s discovery requests not only seek privilege documents, but that the documents are “in the custody of many different custodians” and broadly claims that assembling the privileged documents and creating a privilege log would “require many hours of work by many different persons.”[[41]](#footnote-41) On this basis, without a single iota of evidence or an affidavit attesting to such claim, DP&L claims undue burden in preparing a privilege log. Indeed, DP&L makes an entirely outlandish claim in stating that it would be “unduly burdensome for DP&L even to determine which discovery requests seek privileged materials.” 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 matter.”[[42]](#footnote-42)

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.

Moreover, a proper claim of privilege, whether attorney-client or trial preparation/work-product doctrine, requires a specific designation and description of information and documents within its scope as well as precise and certain reasons for preserving their confidentiality.[[43]](#footnote-43) Unless the description is precise, there is no basis on which to weigh whether a privilege exists. Hence, if a party is resisting discovery on a claim of privilege, it must show sufficient facts as to bring the identified and described discovery within the confines of the privilege.[[44]](#footnote-44)  DP&L did not.

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.[[45]](#footnote-45)

For instance, when claiming attorney-client privilege, the party raising the privilege must establish that the privilege applies to a particular communication that is sought to be disclosed.[[46]](#footnote-46) The mere existence of a lawyer-client relationship does not create, without the privilege being asserted with specificity, a “cloak of protection…draped around all occurrences and conversations which have any bearing, direct, or indirect upon the relationship of the attorney with his client.”[[47]](#footnote-47) The privilege must be proven document by document, with the demonstration typically being made with a privilege log.[[48]](#footnote-48) Thus, a separate claim must be raised in response to each request for disclosure.[[49]](#footnote-49)

A party wishing to protect a document from disclosure under the work-product doctrine also has the burden of proving that the materials should not be discoverable.[[50]](#footnote-50) The burden is fulfilled only if the party can show 1) the material is a document, electronically stored information or tangible thing; 2) prepared in anticipation of litigation and 3) prepared by a party or its representative.[[51]](#footnote-51) Upon a showing of all of these requirements, the burden shifts to the opposing party to show “good cause” for obtaining such documents.[[52]](#footnote-52) But here, even though attorney work-product privilege is also claimed, DP&L has failed to identify specifically what tangible information exists,

and how it meets the definition of work-product, or how tangible documents are responsive to OCC’s Interrogatories. So the burden has not shifted to OCC.[[53]](#footnote-53)

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 this burden.[[54]](#footnote-54)

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.[[55]](#footnote-55) 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.[[56]](#footnote-56) While the PUCO rules and practice do not generally require a privilege log to be produced if privilege is claimed, the PUCO has acknowledged that it is common practice for a privilege log to be produced in response to a motion to compel.[[57]](#footnote-57) Then the PUCO is required to follow up with an *in camera* inspection of each document identified as privileged.[[58]](#footnote-58) Such a practice is in line with the Ohio Supreme Court dictates in *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167. DP&L should produce a privilege log pending the PUCO’s consideration of its Motion for Protection.

# CONCLUSION

When utilities file applications to collect even more money from their customers, they should expect under law, rule, and reason that there will be thorough discovery. The law clearly provides parties with ample rights to “full and reasonable discovery.” R.C. 4903.082. And Ohio Adm. Code 4901-1-16, et seq further define the scope and time frame of that discovery, providing that it may begin after a proceeding is commenced.

Although a party may file for a Motion for Protection, DP&L has provided no reasonable basis for the PUCO to deviate from varying from the terms of the law in providing ample rights of discovery under R.C. 4903.082. OCC’s discovery is reasonable and proper, directed to the statements and claims made in DP&L’s Application and Supplemental Application and does not seek such information for the purpose of “annoyance, embarrassment, oppression, or undue burden or expense.” Nor has OCC sought discovery for any purpose other than one which is proper under the law and reasonably tailored to the claims made by DP&L. DP&L’s Motion for Protection should, therefore, be denied. Accordingly, OCC’s Motion to Compel should also be granted.

Respectfully submitted,

BRUCE J. WESTON

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Memorandum Contra The Dayton Power & Light Company’s Motion for a Protective Order by the Office of the Ohio Consumers’ Counsel was provided to the persons listed below electronically this 7th day of May, 2014.

*/s/ Edmund “Tad” Berger*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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1. Ohio Admin. Code 4901-1-17(A) provides that “Except as provided in paragraph (E) of this rule [pertaining to long-term forecast report proceedings], discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.” [↑](#footnote-ref-1)
2. DP&L Memorandum in Support of Motion for Protective Order (“DP&L Memo in Support”) at 1. [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. *Id.* at 1-2. [↑](#footnote-ref-4)
5. *Id.* at 2. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. Ohio Admin. Code 4901:1-37-09(D). [↑](#footnote-ref-7)
8. DP&L Application at 9-10; DP&L Supplemental Application at 10-11. [↑](#footnote-ref-8)
9. Ohio Adm. Code 4901:1-37-09(D) [↑](#footnote-ref-9)
10. Ohio Adm. Code 4901-1-17(A). Accord Ohio Civ. R.33 (A) (interrogatories may be served by any party without leave on the plaintiff “after commencement of the action.”). [↑](#footnote-ref-10)
11. *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O’Neill* (1996), 75 Ohio St. 3d 1479. [↑](#footnote-ref-11)
12. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300, 2006-Ohio-5789. [↑](#footnote-ref-12)
13. DP&L Memo in Support at 2-3. [↑](#footnote-ref-13)
14. R.C. 4903.082. [↑](#footnote-ref-14)
15. OCC Comments at 8-14 \*(eb. 4, 2014). [↑](#footnote-ref-15)
16. See R.C. 4903.082. [↑](#footnote-ref-16)
17. Ohio Admin. Code 4901:1-17. [↑](#footnote-ref-17)
18. Ohio Admin. Code 4901:1-37-09(D). [↑](#footnote-ref-18)
19. See, e.g., *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 1-5351-GA-UNC, Entry (Jan. 27, 2012)(permitting discovery even when the PUCO had not determined what further process would be necessary); cf., *In the Matter of the Complaint of the Office of Consumers’ Counsel v. Ohio Bell,* Case No. 93-576-TP-CSS, Entry (July 27, 1993)(rejecting utility’s position that it need not respond to discovery prior to a PUCO determination of whether reasonable grounds for complaint exist, finding it meritless). [↑](#footnote-ref-19)
20. See Rule 4901-1-23; *In re: Investigation into the Perry Nuclear Power Plant,* Case No. 85-521-EL-COI, Entry at 10 (Mar. 17, 1987)(observing that “the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly…”). [↑](#footnote-ref-20)
21. *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Cleveland Electric Illuminating Company and Related Matters*, Case No. 84-18-EL-EFC, Entry (Apr. 9, 1985). [↑](#footnote-ref-21)
22. *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 715 (citation omitted). [↑](#footnote-ref-22)
23. Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio’s rule is similar to the federal rules. Ohio Admin. Code 4901-1-24 allows a protective order to limit discovery to protect against “undue burden and expense.” C.R.26(c) similarly allows a protective order to limit discovery to protect against “undue burden and expense.” Cf. *In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be “specific and detailed as to the reasons why providing the responses to matters…will be unduly burdensome.” [↑](#footnote-ref-23)
24. *Trabon Engineering Corp. v. Eaton Manufacturing Co*. (N.D. Ohio 1964), 37 F.R.D. 51, 54. [↑](#footnote-ref-24)
25. *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297. [↑](#footnote-ref-25)
26. Id., citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264. [↑](#footnote-ref-26)
27. *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917. [↑](#footnote-ref-27)
28. R.C. 4903.082. [↑](#footnote-ref-28)
29. Ohio Admin. Code 4901 -1-16 (scope of discovery is wide—reasonably calculated to lead to the discovery of admissible evidence). [↑](#footnote-ref-29)
30. See, e.g., *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 320. [↑](#footnote-ref-30)
31. DP&L Memo in Support at 5. [↑](#footnote-ref-31)
32. Id. [↑](#footnote-ref-32)
33. *Id.* (referring to OCC-INT-61 and OCC-INT-119). [↑](#footnote-ref-33)
34. Ohio Admin. Code 4901-1-17(A). [↑](#footnote-ref-34)
35. 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. [↑](#footnote-ref-35)
36. 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). [↑](#footnote-ref-36)
37. See R.C. 4928.145. [↑](#footnote-ref-37)
38. Ohio Admin. Code 4901:1-35097. [↑](#footnote-ref-38)
39. See also *Ohio Consumers’ Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789 (holding that side agreements between utilities and third parties are discoverable). [↑](#footnote-ref-39)
40. See Ohio Admin Code 4901:1-37-07. [↑](#footnote-ref-40)
41. DP&L Memo in Support at 8. [↑](#footnote-ref-41)
42. Id. [↑](#footnote-ref-42)
43. See e.g., Notes to Decision of Ohio Civ. R. 26 citing *Frank W. Schjaefer, Inc. v. C. Garfield*, 82 Ohio App.3d 322 (Ohio App. 2 Dist. 1992).; Fed. R. Civ. P. 26(b)(5)(A).  *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer*, Case No. 10-2586-EL-SSO, Entry (Dec. 13, 2010)(holding that where the utility claimed privilege but did not elaborate on its claim, the examiner was unable to consider the assertion of privilege. Intervenor’s motion to compel was granted.) [↑](#footnote-ref-43)
44. See e.g. *In the matter of the Complaint of Office of Consumers’ Counsel v. Dayton Power & Light Co*., Case No. 90-455-GE-CSS, Entry (Aug. 16, 1990)(holding that the burden of proving an entitlement to an attorney client privilege must be met by the person asserting the privilege). [↑](#footnote-ref-44)
45. *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). [↑](#footnote-ref-45)
46. In re: *Guardianship of Marcia S. Clark*, 2009-Ohio-6577 at ¶8. [↑](#footnote-ref-46)
47. Sec. 5.02[8], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege (Matthew Bender 2d ed.). [↑](#footnote-ref-47)
48. *United States v. Rockwell,* 897 F.2d 1255 (3rd Cir. 1990). [↑](#footnote-ref-48)
49. Sec. 5.02[11a], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege. [↑](#footnote-ref-49)
50. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166. [↑](#footnote-ref-50)
51. See Ohio Civ. R. 26(B)(3) (2008). [↑](#footnote-ref-51)
52. Ohio Civ. R. 26(B)(3). [↑](#footnote-ref-52)
53. Moreover, even if DP&L had initially met its burden of establishing the work-product doctrine applies to specific information OCC has requested, the inquiry does not end. If a party can show good cause—a demonstrated “need for the materials -ie., a showing that the materials or the information they contain, are relevant and otherwise unavailable”--discovery of the requested materials may be granted. Here there is good cause because the information requested is relevant and otherwise unavailable. Under Ohio Civil Rules of Evidence, Rule 403, relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The facts of consequence to this proceeding include determining whether DP&L’s application is reasonable. The information sough is relevant under the test set forth in Rule 403. Good cause can be shown. [↑](#footnote-ref-53)
54. *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010). [↑](#footnote-ref-54)
55. See Exhibit 1. [↑](#footnote-ref-55)
56. 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). [↑](#footnote-ref-56)
57. Id. at ¶18. [↑](#footnote-ref-57)
58. See, e.g., *In the Matter of the Complaint of AT&T v. Global NAPs Ohio, Inc*., Case No. 08-960-TP-CSS, Entry at 4 (Mar. 17, 2008). [↑](#footnote-ref-58)