

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	:	Case No. 12-426-EL-SSO
The Dayton Power and Light Company for	:	
Approval of Its Market Rate Offer.	:	
	:	
In the Matter of the Application of	:	Case No. 12-427-EL-ATA
The Dayton Power and Light Company for	:	
Approval of Revised Tariffs.	:	
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In the Matter of the Application of	:	Case No. 12-428-EL-AAM
The Dayton Power and Light Company for	:	
Approval of Certain Accounting Authority.	:	
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In the Matter of the Application of	:	
The Dayton Power and Light Company for	:	Case No. 12-429-EL-WVR
the Waiver of Certain Commission Rules.	:	
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In the Matter of the Application of	:	
The Dayton Power and Light Company	:	Case No. 12-672-EL-RDR
to Establish Tariff Riders.	:	

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**JOINT MOTION<sup>1</sup> TO VACATE PROCEDURAL SCHEDULE OR IN THE  
ALTERNATIVE TO MODIFY PROCEDURAL SCHEDULE,  
SCHEDULE A PREHEARING CONFERENCE,  
REQUEST FOR EXPEDITED TREATMENT, AND  
MEMORANDUM IN SUPPORT**

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<sup>1</sup> This Motion is supported by Industrial Energy Users-Ohio ("IEU-Ohio"), the Office of the Ohio Consumers' Counsel ("OCC"), Honda of America Manufacturing, Inc., Wal-Mart Stores East, LP and Sam's East, Inc., Ohio Partners for Affordable Energy, The Kroger Company, Interstate Gas Supply, Inc., Federal Executive Agencies, Ohio Energy Group, Edgemont Neighborhood Coalition, Ohio Hospital Association, City of Dayton, Retail Energy Supply Association, Attorneys for the Retail Energy Supply Association, Exelon Generation Company, LLC, Energy Company, Inc.; Constellation Energy Commodities Group, Inc.; and Constellation NewEnergy, Inc., Ohio Environmental Council, SolarVision, LLC, and The Ohio Manufacturers' Association Energy Group (collectively, "Joint Movants").

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REQUEST FOR EXPEDITED TREATMENT**

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Joint Movants hereby move the Public Utilities Commission of Ohio (“Commission” or “PUCO”) for an order vacating the deadline for testimony and the hearing date established by the Attorney Examiner’s November 14, 2012 Entry. Due to the unilateral actions of The Dayton Power and Light Company (“DP&L”), the procedural schedule is not just and reasonable; thus, the Commission should issue an order granting the relief requested in this Joint Motion.

The following dates are relevant to this Motion:

- March 30, 2012: DP&L files Application for a market rate offer (“MRO”) (“First Application”);
- September 7, 2012: DP&L withdraws First Application;
- October 5, 2012: DP&L files Application for an electric security plan (“ESP”) (“Second Application”);
- November 14, 2012: Attorney Examiner issues an Entry setting the Second Application for hearing on February 11, 2013; Intervenor testimony due January 28, 2013;
- November 29, 2012: DP&L cancels settlement meeting and ceases to respond to discovery;
- December 5, 2012: DP&L notifies Intervenors that it has identified a mathematical error in the Second Application. DP&L claims that it must refile its testimony and cannot respond to discovery until after it refiles its testimony;
- December 12, 2012: DP&L files an Amended Application for an ESP (“Third Application” or “Amended Application”);
- December 18, 2012: IEU-Ohio files Motion to Compel Discovery Responses to obtain complete responses to requests initially served on October 23, 2012;
- December 20, 2012: DP&L holds informational session to explain errors requiring Third Application; and
- January 3, 2013: IEU-Ohio files Second Motion to Compel Discovery Responses.

As an initial matter, the Attorney Examiner should clarify that the procedural schedule established by the November 14, 2012 Entry has no legal effect because it pertained to the Second Application, which is no longer the subject of this proceeding. Regardless, the procedural schedule has been rendered unjust and unreasonable by DP&L’s unilateral decisions: DP&L has frustrated the ability of Joint Movants to prepare

to litigate this proceeding by filing an Amended Application and by refusing to participate in meaningful and timely discovery with various parties.<sup>3</sup>

Therefore, the Joint Movants request that the Commission vacate<sup>4</sup> the current procedural schedule and set a prehearing conference through which the parties may convene in the presence of the Attorney Examiners to discuss the status of discovery and to establish just and reasonable dates for testimony and hearing. If the Commission deems that vacating the procedural schedule is not possible, Joint Movants request that the Commission extend the deadline for testimony and continue the hearing and local public hearing dates as follows:

- On or about April 16, 2013: Local Public Hearings;
- April 23, 2013: Intervenor testimony due;
- April 30, 2013: Staff testimony due;
- May 7, 2013: Hearing commences<sup>5</sup>.

For reasons stated more fully in the Memorandum in Support, the Joint Motion should be granted. Because the deadline for testimony is quickly approaching, Joint Movants request expedited treatment.<sup>6</sup>

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<sup>3</sup> See, e.g., Section 4903.082, Revised Code (parties “shall be granted ample rights of discovery.”)

<sup>4</sup> Joint Movants request that the Commission continue to require discovery responses to be provided within ten days.

<sup>5</sup> In the event that DP&L continues to refuse to participate in meaningful discovery, Joint Movants reserve the right to request that the Commission further modify the deadline for testimony and the hearing date.

<sup>6</sup> Joint Movants are not in a position to certify that no party objects to this request.

Respectfully submitted:

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**MEMORANDUM IN SUPPORT**

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On November 14, 2012, the Attorney Examiner issued an Entry establishing the deadline for testimony and the hearing date<sup>7</sup> for DP&L's ESP Application (the Second Application). DP&L's unilateral actions have since rendered the procedural schedule unjust and unreasonable and unfair to Intervenor. More specifically, DP&L's decision to file an Amended Application, as well as DP&L's failure to participate in meaningful discovery has frustrated the ability of Intervenor and Staff to prepare for the hearing and to file testimony. In addition to frustrating Intervenor's ability to prepare to litigate

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<sup>7</sup> A December 6, 2012 Entry scheduled two local public hearings for January 29, 2013.

this proceeding, DP&L's actions have rendered it impossible for Intervenors to consider settlement discussions under the current schedule.

As an initial matter, the Commission may determine that this Joint Motion is unnecessary because the November 14, 2012 Entry established a deadline for testimony and a hearing date related to the October 5, 2012 ESP Application, and not the Amended Application filed on December 12, 2012. That October 5, 2012 Application, however, has been superseded by the Amended Application and it is the Amended Application that the Company now seeks approval of.<sup>8</sup> So the Commission may appropriately find that the November 14, 2012 Entry no longer has any legal effect. Accordingly, the Attorney Examiner should issue a new or amended procedural schedule related to the Amended Application filed on December 12, 2012.

In the event that the Amended Application did not void the procedural schedule per se, DP&L's unilateral actions have rendered the procedural schedule unworkable. DP&L's Amended ESP Application contained significant changes, asked for nearly an additional \$100 million, changed the identity of key witnesses, and, while DP&L was in the process of drafting the Amended Application, DP&L refused to participate in settlement discussions and discovery.

Not that DP&L needed much of an excuse to avoid the discovery process. From the start, DP&L has slow-walked the discovery process. Although the Attorney Examiner issued an Entry requiring discovery responses to be answered in 10 days, DP&L has missed deadline after deadline, and, when DP&L has responded, its responses have been inadequate. Additionally, when DP&L has not flatly missed

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<sup>8</sup> See Second Revised Application of Dayton Power and Light Company for Approval of an Electric Security Plan at 16 (December 12, 2012).

deadlines, it has requested (and received) extensions. Rather than using the extra time to craft meaningful answers to discovery requests, DP&L has provided meritless objections. Typically, DP&L provides partially meaningful responses only after a deficiency letter is served with a deadline upon which a motion to compel will be filed. Moreover, it appears that DP&L has not been serving its responses to discovery upon all parties, as is required by Rule 4901-1-19, Ohio Administrative Code (“OAC”).<sup>9</sup> Still, as is evident by IEU-Ohio’s Motion to Compel (related to discovery initially served on October 23, 2012) and Second Motion to Compel (related to discovery requests initially served on November 28, 2012), even DP&L’s supplemental responses are not completely forthcoming.

Joint Movants’ requested prehearing is allowed by the PUCO’s rules. Rule 4901-1-26(A)(1), OAC, allows the PUCO to hold a prehearing to resolve discovery matters. Rule 4901-1-26(A)(1)(a), OAC, allows the PUCO to hold a prehearing to rule on motions to compel and protective orders. Rule 4901-1-26(A)(7), OAC, allows the PUCO to hold a prehearing to rule on other procedural matters. The PUCO may consider that the prehearing will be a forum for oral motions to compel (that otherwise would be written) under Rule 4901-1-23, OAC.

Furthermore, there is precedent for resolving discovery disputes through the hearing of oral arguments. For example, a group of parties sought oral argument in a case where a utility had failed to respond to certain discovery requests.<sup>10</sup> The PUCO

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<sup>9</sup> Rule 4901-1-19, OAC, states: The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories *and all other parties within twenty days after the service thereof, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an attorney examiner may allow* (emphasis added).

<sup>10</sup> *In the matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for authority to continue and modify certain regulatory accounting*

granted the motion, scheduling a conference for the PUCO to hear and resolve the discovery issues.<sup>11</sup>

Given the unjust and unreasonable date for the hearing, the Commission should choose from two courses of action: (1) vacate the deadline for testimony and the hearing date and hold a prehearing conference on January 31, 2013 to determine whether DP&L has completely participated in discovery; or (2) require testimony to be filed on April 23, 2013 (Staff on April 30, 2013) and set the matter for hearing on May 7, 2013, subject to the Commission's calendar.<sup>12</sup> Although Joint Movants support both options, the Commission should elect the first option because it is more likely to curb DP&L's abusive discovery practices, and afford an opportunity for the parties to explore settlement with regard to the latest Amended Application.

For the reasons stated herein, Joint Movants request that the Commission grant the relief requested in the Joint Motion.

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*practices and procedures, for tariff approval and to establish rates and other charges including regulatory transition charges following the Market Development Period, Case Nos. 03-2144-EL-ATA et al., Entry at para. 9 (November 25, 2003).*

<sup>11</sup> *Id.*

<sup>12</sup> Counsel for DP&L has indicated that he cannot litigate this proceeding in March due to a conflicting trial. Many of the Joint Movants, however, have a conflicting trial scheduled for April (Case Nos. 12-2400-EL-UNC, *et al.*). In fairness to all parties, May is the only suitable alternative.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Joint Motion to Vacate Procedural Schedule or in the Alternative to Modify Procedural Schedule, Schedule a Prehearing Conference, Request for Expedited Treatment, and Memorandum in Support* was served upon the following parties of record this 4th day of January, 2012, *via* electronic transmission.

/s/ Joseph E. Olier

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**Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0672-EL-RDR, 12-0429-EL-WVR**

Summary: Motion - "Joint Motion to Vacate Procedural Schedule or in the Alternative to Modify Procedural Schedule, Schedule a Prehearing Conference, and Request for Expedited Treatment" electronically filed by Mr. Joseph E. Olikier on behalf of Industrial Energy Users-Ohio