

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 12-426-EL-SSO
Approval of Its Electric Security Plan	)	
In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 12-427-EL-ATA
Approval of Revised Tariffs	)	
In the Matter of the Application of	)	
The Dayton Power and Light Company for	)	Case No. 12-428-EL-AAM
Approval of Certain Accounting Authority	)	
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	)	
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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**INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO  
THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO  
IEU'S MOTION FOR PROTECTIVE ORDER**

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**Attorneys for Industrial Energy Users-Ohio**

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In accordance with Rule 4901-1-12(B)(2), Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby files its Reply to The Dayton Power and Light Company’s (“DP&L”) Memorandum in Opposition<sup>1</sup> (“Memo Contra”) to IEU-Ohio’s Motion for a Protective Order (“Motion”). IEU-Ohio’s Motion seeks a

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<sup>1</sup> The Dayton Power and Light Company’s Reply in Support of its Motion to Compel Industrial Energy Users-Ohio to Answer its Interrogatories and Produce Documents; The Dayton Power and Light Company’s Memorandum in Opposition to IEU’s Motion for Protective Order (Jan. 22, 2013) (hereinafter, “Memo Contra”). Although DP&L filed its reply on its motion to compel and its memorandum contra IEU-Ohio’s Motion as a single document, this pleading is limited to responding to DP&L’s opposition to IEU-Ohio’s Motion that seeks a protective order from the Commission.

protective order from the Public Utilities Commission of Ohio (“Commission”) regarding several improper discovery requests that DP&L served upon IEU-Ohio.<sup>2</sup> In its Motion, IEU-Ohio demonstrated that DP&L’s Interrogatories 4 through 7 are overbroad and that the responsive information was not currently known. IEU-Ohio also showed that several of DP&L’s discovery requests sought information outside the scope of discovery. On January 22, 2013, DP&L filed its Memo Contra to IEU-Ohio’s Motion. DP&L’s Memo Contra generally ignores the arguments raised by IEU-Ohio and fails to support its conclusions with any analysis. As discussed in additional detail below, the Commission should grant IEU-Ohio’s Motion for a Protective Order.

#### **I. INTERROGATORIES 4 THROUGH 7**

DP&L’s Interrogatories 4 through 7 request IEU-Ohio to identify all legal and mathematical errors associated with DP&L’s Revised ESP Application<sup>3</sup> and supporting documents. In its responses, IEU-Ohio explained that it did not currently possess responsive information,<sup>4</sup> and the request was overly burdensome. However, IEU-Ohio indicated that it would supplement its responses and identify areas of concern raised by IEU-Ohio’s review that IEU-Ohio intended to pursue.

Much of the information necessary for IEU-Ohio to conduct its review of DP&L’s Revised ESP Application arrived in December. In early December, DP&L filed its Revised ESP Application and in late December DP&L responded to various outstanding

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<sup>2</sup> DP&L has filed a motion to compel responses to the same discovery requests.

<sup>3</sup> Second Revised Application of The Dayton Power and Light Company for Approval of an Electric Security Plan (December 12, 2012).

<sup>4</sup> Motion at 6-8.

discovery requests of IEU-Ohio.<sup>5</sup> Throughout January 2013, IEU-Ohio has submitted additional discovery requests to clarify its understanding of DP&L's Revised ESP Application and DP&L's recent discovery responses. Over the past month, IEU-Ohio has reviewed the information provided by DP&L and IEU-Ohio is currently in the process of identifying areas of concern that it plans to pursue at hearing. As IEU-Ohio indicated to DP&L, IEU-Ohio will supplement its discovery responses to identify these issues.

IEU-Ohio maintains, however, that DP&L's Interrogatories 4 through 7 are overly broad and would cause IEU-Ohio an undue burden or expense. Specifically, DP&L cannot require IEU-Ohio to identify each and every legal or mathematical error associated with its Revised ESP Application and supporting documents, provide DP&L with an explanation for why IEU-Ohio believes DP&L's proposal is in error, regardless of how minor any error might be and regardless of whether IEU-Ohio intends to raise or pursue such issues during the hearing. DP&L has not offered any analysis on why it believes its requests are proper and not unduly burdensome; DP&L's Memo Contra merely asserts that IEU-Ohio "must be required" to respond.<sup>6</sup> That assertion is not correct because these interrogatories are overly broad and unduly burdensome.

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<sup>5</sup> DP&L provided IEU-Ohio with initial responses to IEU-Ohio's first set of discovery on November 8, 2012, and supplemental responses on November 16, 2012, December 18, 2012, and December 27, 2012. DP&L provided initial responses to IEU-Ohio's second set of discovery requests on November 20, 2012, and supplemental responses on December 18, 2012. DP&L responded to IEU-Ohio's third set of discovery on December 18, 2012 (which were incomplete and the subject of IEU-Ohio's second motion to compel). DP&L responded to IEU-Ohio's fourth set of discovery requests on December 21, 2012. DP&L responded to IEU-Ohio's fifth set of discovery requests on December 31, 2012. DP&L responded to IEU-Ohio's sixth set of discovery on January 15, 2013. It supplemented the sixth set of discovery on January 24 and 25, 2013. DP&L responded to IEU-Ohio's seventh and eighth sets of discovery requests on January 22, 2013.

<sup>6</sup> DP&L's Memo Contra at 6.

Accordingly, the Commission should grant IEU-Ohio's Motion and hold that DP&L's Interrogatories 4 through 7 are overly broad and would cause IEU-Ohio an undue burden or expense. IEU-Ohio is currently in the process of compiling supplemental discovery responses to identify issues with the Revised ESP Application that IEU-Ohio plans to address and pursue in this case.<sup>7</sup> But, as discussed above, IEU-Ohio should not be required to analyze each and every fact and facet contained in DP&L's Revised ESP Application and then provide DP&L with an explanation for why it believes DP&L's application is in error.

## **II. DP&L'S MARKET RATE OFFER ("MRO") APPLICATION**

DP&L's Requests for Production of Documents ("RPD") 6 and 7 seek information from IEU-Ohio related to DP&L's withdrawn MRO application. IEU-Ohio's Motion seeks a determination that any information that might be in IEU-Ohio's possession related to DP&L's MRO application is outside the scope of discovery because it is not reasonably calculated to lead to the discovery of admissible evidence.

In response, DP&L's Memo Contra lists five items to support its claim that information related to its withdrawn MRO application is within the scope of discovery: (1) the MRO application and ESP applications were filed under the same case number; (2) many witnesses who were scheduled to testify regarding the MRO application are scheduled to testify regarding DP&L's ESP applications; (3) both the MRO and ESP applications had similar proposed rate blending plans; (4) both the MRO and ESP

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<sup>7</sup> Given that information is still slowly trickling in, IEU-Ohio's review is still ongoing and therefore IEU-Ohio's supplemental discovery responses identifying areas of concern will be based upon its preliminary review. For example, IEU-Ohio requested information regarding the contribution to gross margin of DP&L's distribution function in October. DP&L initially provided information specific to 2009 and 2010, supplemented its response to include information related to 2011 and 2012 on December 18, 2012, and on January 24, 2013, in response to a Staff Data Request, DP&L provided IEU-Ohio with gross margin information for the years 2013-2017.

applications proposed non-bypassable charges; and (5) both the MRO and ESP applications proposed nearly identical rate structures. These items, however, do not demonstrate that everything related to DP&L's MRO application is reasonably calculated to lead to the discovery of admissible evidence.

For information to be within the scope of discovery, it must either be relevant or reasonably calculated to lead to the discovery of admissible evidence.<sup>8</sup> "Relevant evidence' means 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."<sup>9</sup> DP&L fails to explain how the areas discussed above will make any fact of consequence under consideration as part of its Revised ESP Application more or less probable. DP&L's lack of analysis is telling.

The first two categories, the case number and DP&L's proposed witnesses, are clearly not related to making a fact of consequence more or less probable. DP&L's suggestion that the case number and the identity of witnesses somehow makes the MRO filing relevant is meritless on its face.

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<sup>8</sup> Rule 4901-1-16(B), O.A.C.

<sup>9</sup> Ohio R. Evid. 401; Ohio R. Evid 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.") Ohio Jurisprudence also contains the following discussion of admissible evidence:

The rights of litigants are determined according to evidence tending to prove the issues and not upon evidence that merely raises suggestions. Matters offered in evidence must tend to prove or disprove the issues involved in the case. Matter that should be excluded as irrelevant is that which is incapable of affording any legitimate presumption or inference as to the facts in issue, such as evidence that does not relate to the issues raised by the pleadings. Facts that, in connection with other facts, may in some degree tend to render more or less probable the existence of facts in issue may also be rejected where in the opinion of the trial court, they are too remote. Immaterial evidence, or evidence that has no bearing upon the issues of the case, should be excluded although the admission in evidence of matter that is irrelevant and immaterial is not necessarily prejudicial error.

42 Ohio Jur.3d § 153 (internal citations omitted).

The attempt to demonstrate that the MRO is relevant based on a link between the proposed non-bypassable riders in the MRO and Revised ESP Application is also groundless. DP&L's MRO application contained different riders than those proposed in the Revised ESP Application. DP&L's MRO application requested a non-bypassable charge of \$73 million [the Electric Service Stability Charge ("ESSC") based upon a continuation of the Rate Stability Charge ("RSC")], and DP&L's initial ESP application sought a non-bypassable charge in the amount of \$120 million for the Service Stability Rider ("SSR"), and revised its request to \$137.5 million for the SSR. The proposed MRO rates are not "nearly identical" to DP&L's initial ESP application, and the rates proposed in DP&L's initial ESP application are not even identical to the rates proposed in DP&L's Revised ESP Application.

The rationale supporting the ESSC and the SSR also are different. The ESSC was merely a continuation of DP&L's RSC, which was authorized by the Commission in DP&L's initial ESP proceeding. DP&L has stated that the RSC was a provider of last resort ("POLR") charge.<sup>10</sup> The SSR, on the other hand, is based upon DP&L's claim that it needs the non-bypassable rider to support its financial integrity.

Moreover, the ESSC and SSR would have been evaluated under completely different statutory criteria (Section 4928.142, Revised Code vs. Section 4928.143, Revised Code). DP&L has failed to demonstrate how information that may be relevant to an analysis under Section 4928.142, Revised Code, would also lead to evidence that may be relevant to an analysis under Section 4928.143, Revised Code.

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<sup>10</sup> In response to the Office of the Ohio Consumers' Counsel ("OCC") Interrogatory 388, DP&L stated that "[s]ubject to all general objections, DP&L states that its current rates include the RSC, which is a POLR charge. DP&L collects approximately \$73 million per year through the RSC."

Although IEU-Ohio has challenged the scope of DP&L's discovery requests in IEU-Ohio's discovery responses, Motion, and Memorandum in Opposition to DP&L's Motion to Compel, DP&L has not offered any analysis on why the information it seeks is within the scope of discovery. Instead, DP&L has come up with a list of items it considers similar, but as discussed above, the list does not demonstrate that every document that IEU-Ohio might possess related to DP&L's withdrawn MRO application will make any fact of consequence more or less probable. Because DP&L has failed to demonstrate what facts of consequence will become more or less probable if it obtains the discovery it seeks, the Commission should grant IEU-Ohio's Motion and hold that any information in IEU-Ohio's possession related to DP&L's withdrawn MRO application is not within the scope of discovery.

### **III. AEP-OHIO'S ESP PROCEEDING**

DP&L's Requests for Production of Documents 4 and 8 seek all documents in IEU-Ohio's possession or control related to AEP-Ohio's ESP proceeding and all communications with third parties.<sup>11</sup> DP&L has not limited the scope of its requests to any specific aspect of AEP-Ohio's proceeding and has moved to compel IEU-Ohio to provide all communications between IEU-Ohio and other intervenors in that case on any subject matter related to that case.

DP&L does not provide any analysis of why it believes everything related to AEP-Ohio's ESP proceeding is within the scope of discovery, nor does DP&L even list items

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<sup>11</sup> IEU-Ohio's discovery responses, Motion, and Memorandum Contra DP&L's Motion to Compel all identified other issues raised by DP&L's overly broad discovery requests. For instance, DP&L's Requests for Production of Documents 4 and 8 seek information which could include legal advice given from IEU-Ohio's counsel to IEU-Ohio, and seek information subject to the Commission's protective orders. These issues are addressed in detail in IEU-Ohio's Memorandum Contra DP&L's Motion to Compel that are incorporated herein by reference.



it believes are similar (as it did regarding its MRO application). Instead, DP&L claims that IEU-Ohio's claim that the information is not within the scope of discovery is "not [a] valid objection[.]"<sup>12</sup> DP&L then continues that IEU-Ohio is free to argue on brief about the precedential weight of AEP-Ohio's ESP proceeding.

IEU-Ohio's Motion demonstrated that the Commission had crafted a unique result for AEP-Ohio (which IEU-Ohio has contested is unlawful and unreasonable) and therefore any information in IEU-Ohio's possession related to that case would not make any fact of consequence regarding DP&L's ESP applications more or less probable.<sup>13</sup> Further, IEU-Ohio's position about AEP-Ohio's ESP proceeding is contained in the various pleadings IEU-Ohio filed with the Commission. These public filings contain hundreds of pages of briefs, hundreds of pages of applications for rehearing, and hundreds of pages of testimony. Thus, DP&L already has access to IEU-Ohio's legal position in the AEP-Ohio ESP case.<sup>14</sup>

Accordingly, the Commission should grant IEU-Ohio's Motion with respect to DP&L's Requests for Production of Documents 4 and 8. DP&L has failed to offer the Commission a single reason to justify the scope of its Requests for Production of Documents 4 and 8. Finally, DP&L has access to hundreds, if not thousands, of pages

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<sup>12</sup> DP&L's Memo Contra at 11.

<sup>13</sup> AEP-Ohio's ESP proceeding contained three different ESP proposals: AEP-Ohio's initial application, the ESP proposal contained in the stipulation, and the modified ESP proposal that was ultimately approved by the Commission in August 2012. These various ESP proposals contained numerous provisions that are absent in DP&L's ESP application, e.g. the distribution investment rider. It is obvious that DP&L's Requests for Production of Documents 4 and 8 are overly broad and seek information that will not make any fact of consequence more or less probable.

<sup>14</sup> Rules 4901-1-16(G), 4901-1-29(C), and 4901-1-20(D), O.A.C., provide limitations on the discovery of publicly available information for the obvious reason that the party requesting the information can easily access the information that it seeks.

of documents IEU-Ohio has publicly filed in AEP-Ohio's proceeding; the need for any further information from IEU-Ohio is not apparent (nor has DP&L offered any rationale).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Reply to The Dayton Power and Light Company's Memorandum in Opposition to IEU's Motion for Protective Order* was served upon the following parties of record this 25<sup>th</sup> day of January 2013, via electronic transmission.

/s/ Matthew R. Pritchard

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