

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Evelyn and John Keller,)	
)	
Complainants,)	
)	
v.)	
)	Case No. 12-2177-EL-CSS
Ohio Power Company,)	
)	
Respondent.)	

**OHIO POWER COMPANY’S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER**

On March 13, 2013, Respondent Ohio Power Company (“AEP Ohio” or “Company”) filed a motion for protective order and memorandum in support requesting that the Commission issue a protective order providing that no further discovery be had in this matter pending a ruling on AEP Ohio’s August 16, 2012, motion to dismiss. Because the Commission may grant AEP Ohio’s motion to dismiss, compelling the Company to produce ten individuals for depositions prior to a ruling on its motion may prove wasteful and unduly burdensome. As an alternative to suspending discovery, the Company requested that the Commission issue a protective order limiting Complainants’ February 25, 2013, notice of deposition to provide for the depositions of only two individuals at this time. If the Commission determines that discovery should continue prior to a ruling on the Company’s motion to dismiss, the Company’s alternative proposal provides a reasonable approach that protects the Company from unduly burdensome discovery and does not adversely affect the Complainants.

As discussed below, the arguments raised in Complainants' March 21, 2013, memorandum in opposition to the Company's motion for protective order are without merit and should be rejected.

ARGUMENT

1. The Commission should follow the *McLeodUSA* decision and suspend discovery in this matter pending a ruling on the Company's motion to dismiss.

Complainants argue that the Commission should not follow the *McLeodUSA*¹ decision because "the primary issues in *McLeodUSA* were issues of law," whereas the issues in this case are "inherently factual in nature." (Complainants' Memo in Opposition at 3.) However, this distinction is irrelevant for two reasons. First, when evaluating the utility's motion for protective order in *McLeodUSA*, the attorney examiner only considered how each party would be affected if the utility's motion were granted. Finding that the complainant would not be adversely affected by postponing discovery until after a ruling on the utility's motion to dismiss, and that the utility "would be put to wasteful unnecessary effort" if compelled to respond to discovery prior to a ruling on its motion, the attorney examiner granted the utility's motion for protective order.² Whether the issues raised by the complaint in that case were legal or factual was irrelevant to the attorney examiner's evaluation of the utility's motion for protective order.

Second, Rule 4901-1-24(A), O.A.C., provides that the Commission may, upon motion of any party or person from whom discovery is sought, **issue any order** which is necessary to

¹ *In the matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services*, Case No. 11-3407-TP-CSS.

² *In the matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services*, Case No. 11-3407-TP-CSS, Entry (July 13, 2011) at ¶5.

protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The rule's "issue any order" language indicates that the Commission did not intend to limit protective orders to only instances where the complaint raises questions of law. Adopting Complainants' argument that protective orders ought not to be granted when the complaint raises factual issues would unreasonably limit the Commission's ability to issue protective orders pursuant to Rule 4901-1-24(A). Such an interpretation would undermine the Commission's discretion and be inconsistent with the broad language contained in the rule.

Both the *McLeodUSA* decision and the Commission's rules support suspending discovery in this case pending a ruling on the Company's motion to dismiss. Granting the Company's motion for protective order will not adversely affect the Complainants. That Complainants have already conducted three rounds of written discovery, which demonstrates that suspending discovery pending a ruling on the Company's motion to dismiss is even more appropriate here than in *McLeodUSA*, where the protective order was granted prior to the complainant conducting any discovery. Further, because the Commission may grant AEP Ohio's motion to dismiss, compelling the Company to produce ten individuals for depositions prior to a ruling on its motion may prove wasteful and unduly burdensome. The Commission should follow the *McLeodUSA* ruling, grant the Company's motion for protective order and suspend discovery in this matter pending a ruling on the Company's motion to dismiss.

2. The Company's alternative proposal provides a reasonable approach that protects the Company from unduly burdensome discovery and does not adversely affect the Complainants.

Despite recognizing that "it is unusual to conduct much discovery" in a case like this one (*Id.* at Fn. 2.), Complainants continue to argue that all ten depositions are necessary and that they should not be limited to deposing two individuals at this time. (*Id.* at 4.) Under the Company's

alternative proposal, however, the Complainants would not be precluded from seeking to depose the other eight individuals after the depositions of Messrs. Dias and LaJeunesse. The Company's alternative approach is reasonable in that it provides Complainants an opportunity to depose two individuals who are familiar with the Company's storm restoration policies and the issues raised in the Complaint, while at the same time, protects the Company from the undue burden of conducting ten depositions prior to a ruling on the Company's motion to dismiss.

Contrary to Complainants' suggestion, Messrs. Dias and LaJeunesse were not offered by the Company because they will "say what [the Company] wants to be said." (*Id.*) Mr. Dias is the Company's Vice President of Distribution Operations and served as regulatory and governmental liaison for AEP Ohio during the Company's storm restoration efforts. Mr. LaJeunesse has been a utility forester with the Company for over fourteen years and oversaw the dispatch of tree trimming crews during the Company's storm restoration efforts. These two individuals were offered for depositions by the Company because they will fairly and thoroughly cover the issues raised in the Complaint. If the Commission determines that discovery should continue prior to a ruling on the Company's motion to dismiss, it should adopt the Company's alternative proposal and issue a protective order limiting depositions to Messrs. Dias and LaJeunesse at this time.

3. The threshold issue of the Company's motion to dismiss should be decided based upon the claims raised in the Complaint, not upon information received through discovery.

Complainants continue to suggest that they should be permitted to conduct discovery until they are "properly prepare[d] [to] respon[d] to Respondent's motion to dismiss. . . ." (*Id.* at 5.) Such an approach would turn the entire complaint process on its head. The threshold issue of the Company's motion to dismiss should not be decided based upon information received through discovery; it should be decided based on the claims raised in the Complaint—which

should have a legal and factual basis for the claim at the time it was filed. The Complainants bear the burden of proof in this case and, therefore, should not be permitted to subject the Company to unduly burdensome discovery in order to substantiate claims advanced in their Complaint.

Lastly, any concern that the Company will “resist or delay requests for additional depositions” (*Id.*) is unfounded. In addition to the remedies available to Complainants under the Commission’s rules (e.g., pursuing a motion to compel), if the Commission were to adopt the Company’s alternative proposal, the Complainants would not be precluded from revisiting whether additional depositions will be necessary.

CONCLUSION

For the foregoing reasons, the arguments raised in Complainants’ March 21, 2013, memorandum in opposition are without merit and should be rejected. AEP Ohio respectfully requests that the Commission issue a protective order providing that no further discovery be had in this matter pending a ruling on the Company’s August 16, 2012, motion to dismiss. In the alternative, if the Commission determines that discovery should continue, AEP Ohio respectfully requests that the Commission issue a protective order limiting Complainant’s February 25, 2013 notice of depositions to provide for the depositions of only two individuals as described herein.

Respectfully submitted,

/s/ Yazen Alami
Steven T. Nourse
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
(614) 716-2920
(614) 716-2950 *facsimile*
stnourse@aep.com
yalami@aep.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail upon counsel for Complainant at the address listed below on this 28th day of March, 2013.

/s Yazen Alami

Yazen Alami

John Keller
1424 Jewett Road
Powell, Ohio 43065
jkev@columbus.rr.com

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Summary: Reply Memorandum in Support of Ohio Power Company's Motion for Protective Order electronically filed by Mr. Yazen Alami on behalf of Ohio Power Company