

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 13-2420-EL-UNC
Authority to Transfer or Sell Its)
Generation Assets.)

June 5, 2014

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In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets.)
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)
)

I. INTRODUCTION

¹ May 30, 2014 Entry at 4.

DPL Inc.² DP&L must “produce a privilege log for any documents which it contends should remain privileged.”³

After an initial comment process regarding DP&L’s numerous undefined proposals and requests for waiver of a hearing and other requirements, the Office of the Ohio Consumers’ Counsel (“OCC”) sought information related to DP&L’s proposals. OCC served discovery on claims made in DP&L’s application and supplemental application even though those applications failed to meet legal and regulatory requirements. But DP&L refused to answer those questions and filed the above-referenced Motion for Protection, which the Attorney Examiner has denied in substantial part.

As emphasized by OCC in its Motion to Compel and concluded by the Attorney Examiner, the law affords ample rights of discovery to every party in a proceeding⁴ and the PUCO’s rules provide that the right to discovery begins with commencement of a proceeding.⁵ DP&L has failed to cite to any law or regulation that limits a party’s rights to discovery simply because a hearing has not been scheduled. Yet DP&L seeks to limit OCC – and presumably other parties – from inquiring into the basis of its claims because a hearing has not yet been scheduled.

DP&L's Memo Contra cites to two PUCO cases – 9 and 15 years old respectively – where the PUCO denied parties discovery because the PUCO found that a hearing was

² OCC has not sought, in its opinion, to compel discovery from AES or DPL Inc., despite DP&L’s characterization otherwise. As explained in OCC’s numerous pleadings, OCC seeks discovery responses from DP&L to the extent the information is known or readily available to it.

³ May 30, 2014 Entry at 3.

⁴ R.C. 4903.082.

⁵ Ohio Admin. Code 4901-1-17(A).

not necessary for its review. In the instant case, however, a hearing is required under the PUCO's rules, as the Attorney Examiner concluded.⁶ A hearing – and ample rights to discovery – are necessary to protect the customers who are being asked to pay for DP&L's proposals.

Although DP&L's claims are largely focused on denying OCC's rights to discovery in its entirety, which the Attorney Examiner has now rejected, DP&L's Memo Contra also iterates its claims of interference with DP&L's sales process, claims that OCC's discovery request are overly broad and therefore, unduly burdensome to answer, and that OCC has improperly asked for discovery of AES and DPL Inc. DP&L also contends that a privilege log would be unduly burdensome and should not be required until its objections on the merits are resolved. All of these issues were discussed in OCC's Motions to Compel and OCC's Memorandum Contra to DP&L's Motion for Protective Order. The arguments lack merit and should be rejected. DP&L should be compelled to respond.

II. ARGUMENT

A. As the Attorney Examiner Determined, Discovery Rights Are Not Limited When A Request To Waive A Mandatory Hearing Is Pending.

DP&L makes the statement that because the PUCO requested and received comments on DP&L's Application and Supplemental Application, and the PUCO has not yet scheduled a hearing, means that "there are no pending issues before the Commission for the parties to litigate."⁷ But, as the Attorney Examiner determined in connection with

⁶ Entry of May 30, 2014 at 3.

⁷ DP&L Memo Contra at 4.

DP&L's Motion for Protective Order, "this case should proceed as if it were going to hearing."⁸ Thus, all of the issues are being "litigated." The PUCO received comments on DP&L's filings. But the PUCO has not yet developed an evidentiary record in this matter. OCC's discovery is designed to elicit information related to specific statements in the Utility's initial filing and supplemental application. Such information then may be relied on for testimony or cross-examination at a hearing on DP&L's proposals.

All of the issues in this matter are currently subject to litigation and the PUCO's rules recognize that discovery commences when the proceeding commences, as the Attorney Examiner noted.⁹ A hearing is required in this matter not only because it is required by regulation¹⁰ but because of the significant impact that DP&L's proposals will likely have on customers. OCC's discovery is directed toward determining the factual underpinnings of DP&L's proposals as well as the impact of its proposals.

DP&L appears to suggest that if OCC was intending to perform discovery, it should have conducted that discovery before filing Comments to DP&L's Application and Supplemental Application.¹¹ However, the time frame for submitting Comments to both the Application and Supplemental Application allowed little time to submit discovery and receive responses prior to filing such comments -- even if DP&L would have provided substantive responses. The Application was filed on December 30, 2013 and Comments had to be filed by February 4, 2014. The Supplemental Application was filed on February 25, 2014 and Comments were due on March 25, 2014. More

⁸ Entry of May 30, 2014, at 3.

⁹ Entry of May 30, 2014 at 3, *citing* R.C. 4903.082 and Ohio Admin. Code 4901-1-17.

¹⁰ Ohio Admin. Code 4901:1-37-09(D).

¹¹ DP&L Memo Contra at 6, n. 2.

importantly, as OCC has repeatedly emphasized, DP&L's Application and Supplemental Application were completely inadequate. And OCC has urged the PUCO to reject those filings and require DP&L to submit substantially adequate filings that meet the requirements of the Commission's rules. The PUCO should do so – in addition to requiring DP&L to provide responses to OCC's discovery.

DP&L points to a PUCO decision in a merger case¹² to support its position that parties' rights to discovery may not automatically attach where a hearing has not been scheduled. In the *Cinergy* 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 before the PUCO had 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). And that rule applies to this case because the PUCO has not granted DP&L's request to waive the hearing requirement.

¹² DP&L Memo Contra at 5, citing *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”).

B. OCC's Discovery Requests Are Not Unduly Burdensome Or Overly Broad.

DP&L claims that OCC's discovery requests are unduly burdensome, pointing to the number of such requests (32 interrogatories and 40 requests for production of documents in OCC's Second Set, in addition to the 133 interrogatories and 47 requests for production in OCC's First Set).¹³ DP&L also claims that OCC's discovery requests are "overbroad" because they seek support and documentation for certain statements in DP&L's Application and Supplemental Application.¹⁴

OCC would emphasize that the Attorney Examiner found that "DP&L's motion for protective order should be granted solely" with respect to discovery sought to be compelled "as to AES or DPL Inc."¹⁵ Because DP&L, in its Motion for Protective Order, had sought protection from discovery on the basis of undue burden, one can surmise that the Attorney Examiner has rejected DP&L's arguments to prevent discovery on the basis of DP&L's claims of undue burden.¹⁶

Moreover, it is the "overbroad" statements in DP&L's Application and Supplemental Application that compel the questions that DP&L sought protection from answering. For instance, DP&L attempts to base its claims of relief in this proceeding on factors such as "current poor market conditions" without pointing to any specifics or providing further, appropriate details of what it means. Given the broad nature of the claims, OCC's requests are entirely appropriate and justified.

¹³ DP&L Memo Contra at 6-9.

¹⁴ DP&L Memo Contra at 8-9.

¹⁵ May 30, 2014 Entry at 3.

¹⁶ DP&L Memorandum in Support of Motion for Protective Order at 1.

This is a case where DP&L burdened the parties with two separate filings in three months and has now made a third filing. 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 basis 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 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 are 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 law¹⁷ 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.¹⁸ In objecting, the party must submit affidavits or offer evidence

¹⁷ 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."

¹⁸ *Trabon Engineering Corp. v. Eaton Manufacturing Co.* (N.D. Ohio 1964), 37 F.R.D. 51, 54.

revealing the nature of the burden.¹⁹ General objections without specific support can waive the objection.²⁰

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 support²¹ and the Utility has failed to do so, DP&L's arguments should be firmly rejected.

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 requested special rate treatment, it should expect discovery to be conducted. As the Attorney Examiner recognized in his May 30, 2014 Entry, ample rights of discovery are afforded parties in PUCO proceedings.²² DP&L's claim of undue burden should be rejected.

C. 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."²³ It identifies 11

¹⁹ *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297.

²⁰ *Id.*, citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264.

²¹ *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

²² May 30, 2014 Entry at 3, citing R.C. 4903.082 and Ohio Admin. Code 4901-1-17. See also, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 320.

²³ DP&L Memo Contra at 7.

interrogatories and 11 requests for production of documents that it claims will interfere with the sales process.²⁴ In support of its claim DP&L points to one specific interrogatory (INT-119) asking whether “there is a minimum price for a third party to purchase its assets that is acceptable to DP&L” and one request for documents (RPD-50) asking DP&L for “all documents that pertain to identifying a price that the generating assets must be purchased at to allow DP&L to maintain its financial integrity.”²⁵

As discussed above, the Attorney Examiner found that “DP&L’s motion for protective order should be granted solely” with respect to discovery sought to be compelled “as to AES or DPL Inc.”²⁶ Accordingly, one can surmise that DP&L’s Motion for Protective Order, which had sought protection from discovery as to its ongoing sales process, has been denied in regard to preventing discovery of DP&L’s ongoing sales process.²⁷

Additionally, DP&L’s argument that information regarding purchase price and preliminary discussions with prospective buyers 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. Under such an agreement the information would be protected from public disclosure (subject to OCC’s rights under the protective agreement). In this

²⁴ *Id.*

²⁵ *Id.* (referring to OCC-INT-66 and OCC-INT-95(b)).

²⁶ May 30, 2014 Entry at 3.

²⁷ DP&L Memorandum in Support of Motion for Protective Order at 5.

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 price and 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 the terms and conditions of any sale or transfer. The sale price (and its terms and conditions) are inextricably linked to the financial integrity claims that underlie DP&L's alleged need to continue the Service Stability Rider after a sale or transfer of its generating units.

DP&L discusses only these two specific discovery requests as ones that 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 assess DP&L's Application and Supplemental Application. The information 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."²⁸

Additionally, DP&L's position that it will provide this information 75 days before the transfer date, "leaving ample opportunity for the Commission to evaluate the sale" is not reasonable.²⁹ Both the parties and the PUCO need more than 75 days to evaluate the sales price. The PUCO should not be forced into an expedited review of such an issue. It should instead allow for ample time to perform discovery – and conduct a hearing – to consider the reasonableness of any sale or transfer price, along with the terms and conditions of the sale or transfer.

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 comes into existence. Therefore, it is not grounds to deny OCC's Motion to Compel that the information is not existent or not known at this time. And the Attorney Examiner has already effectively rejected DP&L's arguments in denying DP&L's Motion for Protective Order on this basis.

²⁸ Ohio Admin. Code 4901-1-17(A).

²⁹ DP&L Memo Contra at 7-8.

D. Information Developed By AES And DPL Inc. That Supports DP&L's Claims In Its Applications Is Known or Readily Available to It and Must Be Provided.

DP&L claims in its Memo Contra that OCC seeks “information and documents that are beyond the knowledge and control of DP&L.”³⁰ The Attorney Examiner has granted DP&L’s Motion for Protection with respect to discovery sought to be compelled against AES or DPL Inc.³¹ Nonetheless, OCC’s discovery request that is the subject of this Motion to Compel does not seek to compel information that is not in DP&L’s possession or control. Nor does OCC's discovery seek information that is exclusively in the possession or control of AES or DPL Inc. Rather, DP&L only identifies one interrogatory in this set of discovery, INT-132, which it claims seeks information from AES or DPL Inc. That request asks: “Has DP&L or DPL Inc. performed an impairment analysis with respect to its generating units in 2013 or 2014? If so when was the analysis conducted and what was the result of the analysis?”

Since such an analysis of DP&L’s generating units would need to be conducted with DP&L’s cooperation, even if conducted by DPL Inc., OCC would expect that such an analysis would be known or readily available to DP&L. Under Ohio Admin Code 4901-1-19 interrogatories may seek facts or data "known or readily available" to the party from whom discovery is sought. 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 of such information. Additionally it can be

³⁰ DP&L Memo Contra at 9-10.

³¹ May 30, 2014 Entry at 3.

reasonably expected that the information, though perhaps not in DP&L's hands, is readily available to it.

Even if the PUCO were to entertain DP&L's objection, it should nonetheless be overruled. OCC's discovery request is directed to assessing the value of DP&L's generating units. Thus, one would expect that information upon which the statements were based would be known by DP&L or readily available to it. 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."

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 not claimed that the information is not known to it. Nor has DP&L claimed that the information is not readily available to it.

DP&L has a legal duty to discover and produce information known and readily available to it and to provide such information in discovery.³² In other words, if DP&L has access to the information sought, then it must produce it.³³ Clearly, the information sought is either known by DP&L or readily available to it. It would be inconsistent with the PUCO's discovery rules to allow DP&L to shield relevant information from discovery by shipping it off to an affiliate or having its affiliate(s) obtain the information from it. This would circumvent the PUCO's rules. DP&L's arguments should be rejected for the reasons stated above.

³² 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.

³³ 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).

III. CONCLUSION

DP&L's arguments to prevent discovery from occurring have been rejected by the Entry of May 30, 2014 and DP&L should be compelled to provide full and complete discovery responses. The PUCO should ensure that consumers are given ample and fair opportunity to evaluate DP&L's claims and proposals through the discovery process before consideration is given to proposals that could cost customers tens of millions, if not hundreds of millions, of dollars.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply to Dayton Power and Light Company's Memorandum Contra was provided to the persons listed below electronically this 5th day of June, 2014.

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