

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 13-2442-EL-UNC
The Dayton Power and Light Company	:	
for Authority to Amend Its Corporate	:	
Separation Plan.	:	

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**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN  
OPPOSITION TO THE MOTION TO COMPEL RESPONSES TO DISCOVERY BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Dayton Power and Light Company ("DP&L") is under no obligation to answer the irrelevant and unnecessary Interrogatories and Request for Production of Documents Propounded upon The Dayton Power and Light Company by The Office of the Ohio Consumers' Counsel – First Set (April 9, 2014) ("April 9, 2014 Discovery Requests") (attached as Exhibit 1 to the May 21, 2014 Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel ("Motion to Compel")).

The time for comments and objections to the December 30, 2013 Application of The Dayton Power and Light Company to Amend Its Corporate Separation Plan ("Application") has passed, and the issue of whether a hearing will even be held in this matter is currently pending before the Commission. Jan. 3, 2014 Entry, ¶ 4-5. Unless and until a hearing is set in this matter, DP&L should not be required to respond to the April 9, 2014 Discovery Requests because they are not relevant to any pending issue.

Moreover, even if The Office of the Ohio Consumers' Counsel ("OCC") were entitled to conduct discovery, many of the April 9, 2014 Discovery Requests are objectionable for multiple independent reasons. Specifically,

1. Many of OCC's individual discovery requests are overbroad, and responding to them would be unduly burdensome; and
2. OCC is not entitled to conduct discovery as to AES or DPL Inc.

Finally, given these objections, assembling privileged documents and creating a privilege log would be unduly burdensome, and DP&L should not be required to do so until the objections outlined above are resolved.

OCC now seeks to compel DP&L to respond to the April 9, 2014 Discovery Requests. As demonstrated below, the Commission should deny the Motion to Compel. In addition, for the same reasons, the Commission should issue a protective order that (1) discovery not be had unless and until the Commission decides to hold a hearing, (2) even if OCC is entitled to conduct discovery, then DP&L need not respond to many of the April 9, 2014 Discovery Requests for the reasons demonstrated below, and (3) DP&L need not assemble its privileged documents and create a privilege log unless and until the Commission requires DP&L to respond to the April 9, 2014 Discovery Requests. Ohio Admin. Code § 4901-1-23(D) ("If the motion [to compel] is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may issue such protective order as would be appropriate under rule 4901-1-24 of the Administrative Code.") .

## **I. BACKGROUND**

This proceeding was commenced on December 30, 2013 when DP&L filed the Application of The Dayton Power and Light Company to Amend Its Corporate Separation Plan

("Application"). Shortly thereafter, the Attorney Examiner set a deadline for comments and objections on February 4, 2014, and a deadline for reply comments on February 19, 2014.

Jan. 3, 2014 Entry, ¶ 4. The Attorney Examiner further stated that "[a]fter comments and reply comments are received and the issues raised therein considered, a decision will be made whether a hearing is warranted in this matter." *Id.* at ¶ 5. Since then, the Attorney Examiner has suspended this proceeding for further review by the Commission. Feb. 25, 2014 Entry, ¶ 4.

Although the Commission has not decided whether to hold a hearing, OCC served the extensive April 9, 2014 Discovery Requests. DP&L objected to each of those discovery requests on various independent grounds. Apr. 29, 2014 The Dayton Power and Light Company's Objections and Responses to Interrogatories and Request for Production of Documents by The Office of the Ohio Consumers' Counsel (First Set April 9, 2014) (attached as Exhibit 2 to the Motion to Compel). OCC filed the Motion to Compel on May 21, 2014.

**II. THE COMMISSION SHOULD DENY THE MOTION TO COMPEL BECAUSE (1) THE COMMISSION HAS NOT DECIDED WHETHER TO HOLD A HEARING, AND (2) EVEN IF DISCOVERY IS ALLOWED, MANY OF OCC'S REQUESTS ARE OBJECTIONABLE**

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DP&L should not be compelled to respond to OCC's April 9, 2014 Discovery Requests. Indeed, the Ohio Administrative Code protects parties from discovery requests that cause "annoyance, embarrassment, oppression, or undue burden or expense." Ohio Admin. Code § 4901-1-24(A). This rule "provides a remedy where a response to discovery requests would be unduly burdensome or costly." In the Matter of the Petition of OHIOTELNET.COM, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with ALLTEL Ohio, Inc., Case No. 00-1601-TP-ARB, 2001 Ohio PUC LEXIS 1012, \*16 (Jan. 11, 2001).

As demonstrated below, the Commission should conclude that DP&L is not required to respond to OCC's discovery requests because (1) the Commission has not decided whether to hold a hearing, and (2) the discovery requests are objectionable for multiple independent reasons. Moreover, DP&L should not be forced to create a privilege log at this time.

**A. OCC IS NOT ENTITLED TO DISCOVERY BECAUSE NO HEARING HAS BEEN SCHEDULED**

The Commission has previously decided that discovery was not proper while the Commission was deciding the scope of its review. 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 Nos. 05-732-EL-MER, et al., 2005 Ohio PUC LEXIS 633, \*5-6 (Dec. 7, 2005) ("Cinergy Case"). In the Cinergy Case, Cinergy Corp. and Duke Energy Holding Corp. jointly filed an application for the Commission's consent and approval to change the control of the Cincinnati Gas & Electric Company. Id. at \*1. The Commission issued an entry that provided an opportunity for interested persons to file comments to "identify the issues which the Commission should consider," and that stayed discovery until the Commission "determine[d] the scope and nature of its review." Id. at \*1-2. The Commission later rejected OCC's argument that the Commission should lift the stay on discovery, stating that because "we have not yet determined whether a hearing will be held, we find that it is not appropriate to lift the stay on discovery." Id. at \*7. Accord: In the Matter of the Commission's Investigation into the Adequacy of Electricity Generation of Ohio's Investor-Owned Electric Utility Companies, et al., Case Nos. 99-190-EL-COI, et al., 1999 Ohio PUC LEXIS 104, \*1-2 (June 1, 1999) ("Inasmuch

as the Commission does not intend at this time to hold hearings in either of these proceedings, IEU-OH's motion to compel discovery filed on May 14, 1999 should be denied.").

The same reasoning applies here. The comment period adopted by the Attorney Examiner has ended, and the Commission has not decided whether to hold a hearing. In proceedings for approval of corporate separation plans, a hearing shall be afforded only "upon those aspects of the plan that the commission determines reasonably require a hearing." Ohio Rev. Code § 4928.17(B). In the Motion to Compel, OCC concedes that the Commission "has not yet made this determination." Motion to Compel, p. 3. The April 9, 2014 Discovery Requests are thus not relevant to any issue pending before the Commission. Moreover, it would be particularly inappropriate to compel DP&L to respond to OCC's extensive discovery requests given how unduly burdensome they are. DP&L should not be subject to unduly burdensome discovery requests, particularly when it remains uncertain whether there will even be a hearing.<sup>1</sup>

The April 9, 2014 Discovery Requests are extensive. They contain 16 interrogatories and 14 requests for production of documents. Given their scope, it would be

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<sup>1</sup> OCC erroneously relies on In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program, et al., Case Nos. 11-5351-GA-UNC, et al., 2012 Ohio PUC LEXIS 97 (Jan. 27, 2012) for the proposition that discovery may be necessary before a hearing is scheduled. That case is distinguishable. Columbia Gas of Ohio, Inc. moved to stay discovery because the Commission had not yet determined the nature or scope of any future proceedings. The Commission allowed discovery, but explained that "[t]he discovery process [would] aid the parties in the preparation of their comments and reply comments in these cases and, ultimately, better inform the Commission's review of the application." Discovery was, therefore, relevant to an issue pending before the Commission, namely a comment period. In this case, however, OCC's discovery requests are not relevant to any issue pending before the Commission.

OCC also relies on In the Matter of the Complaint of the Office of Consumers' Counsel v. Ohio Bell Telephone Co., No. 93-576-TP-CSS, 1993 Ohio PUC LEXIS 671 (July 27, 1993). Motion to Compel, p. 23, n. 73. In that case, the Commission rejected a utility's argument that discovery should not proceed while the Commission was considering whether there were reasonable grounds for a complaint. Id. at \*2. However, in allowing discovery, the Commission expressly relied on the fact that 12 days earlier, in a separate proceeding, the same utility had served a notice of deposition while the Commission was considering a motion to dismiss. Id. ("Ohio Bell cannot engage in discovery when it sues Ohio Bell, but, under the same circumstances, refuse to respond to other discovery when it does not suit Ohio Bell."). Similar facts are not present here.

unduly burdensome for DP&L to answer those discovery requests when there are no issues before the Commission that would make use of such discovery. Indeed, OCC has maintained that discovery is needed only "for whatever comes next," not any pending matter before the Commission. Motion to Compel, p. 9. This weak rationale does not justify the substantial burden that OCC's discovery requests would impose. The Commission should, therefore, deny OCC's Motion to Compel.

**B. EVEN IF DISCOVERY IS ALLOWABLE, MANY OF OCC'S DISCOVERY REQUESTS ARE OBJECTIONABLE**

Even if OCC is entitled to responses in this proceeding, many of the April 9, 2014 Discovery Requests are objectionable.

**1. Many of OCC's Discovery Requests Are Overbroad**

Many of OCC's discovery requests are overbroad, and it would be unduly burdensome for DP&L to respond to them. As but one example -- RPD-4 requests "any documents relating to corrective actions that DP&L has taken in the past five years," without any context or limitation to those actions being related to the corporate separation plan at issue in this proceeding. April 9, 2014 Discovery Requests. OCC's unduly burdensome requests include INT-5, 6, 7, 8, 9, 10, 11, 13, 14, and 15, and RPD-1, 2, 4, and 7. *Id.*

**2. OCC Is Not Entitled to Compel Discovery as to AES or DPL Inc.**

Moreover, OCC seeks information and documents that are beyond the knowledge and control of DP&L. As the Commission has repeatedly held, affiliates of a utility are not subject to discovery. In the Matter of Duke Energy Ohio, Inc., No. 10-2586-EL-SSO, 2010 Ohio PUC LEXIS 1336, at \*8-9 (PUCO Dec. 13, 2010) (granting IEU's motion to compel but limiting

IEU's original request for "any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM" to "require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates") (emphasis added); In the Matter of Manchester Group, LLC, No. 08-360-GA-CSS, 2009 Ohio PUC LEXIS 988, at \*1-3 (Nov. 13, 2009) (denying complainant's motion to compel Columbia Gas to produce 'all documents and correspondence of Columbia and Columbia's affiliates, subsidiaries, and parent companies that relate to the sale of Columbia Service Partners (CSP) to the CSP Acquisition Company" as to the "document not in possession of Columbia 'because such request is overbroad, but granting the motion to compel as to the documents in the possession of Columbia) (emphasis added); Feb. 13, 2013 Transcript of Proceedings, p. 145 (Case No. 12-0426-EL-SSO) (denying motion to compel production of documents in possession of DP&L's affiliates at discovery conference). DP&L, therefore, has no duty to obtain access to information and documents that are known and controlled only by AES and DPL, Inc.

OCC seeks information from AES or DPL Inc. in INT-8, 9, 10, and 11 and RPD-10 and 11. Apr. 9, 2014 Discovery Requests. AES and DPL Inc. are not subject to discovery in this matter, and the Commission should not require DP&L to respond to discovery requests.

**C. DP&L SHOULD NOT BE COMPELLED TO ASSEMBLE PRIVILEGED DOCUMENTS AND PREPARE A PRIVILEGE LOG UNTIL THE OTHER ISSUES IN THIS MOTION ARE RESOLVED**

Finally, many of OCC's discovery requests seek documents that are privileged. Those privileged documents are in the custody of many different custodians, and assembling those privileged documents and creating a privilege log would require many hours of work by many different persons.

In light of the objections to OCC's discovery requests identified above, it would be unduly burdensome to require DP&L to assemble privileged documents and prepare a privilege log. Indeed, it would be unduly burdensome for DP&L even to determine which discovery requests seek privileged materials, because DP&L would need to identify which documents were responsive to each OCC request before DP&L could determine whether those documents are privileged. DP&L asks that it not be required to assemble privileged documents and prepare a privilege log, unless and until the Commission concludes that OCC is entitled to conduct discovery in this proceeding. The Commission should, therefore, reject OCC's demand for a privilege log.

For the foregoing reasons, the Commission should deny OCC's Motion to Compel and, pursuant to Ohio Admin. Code § 4901-1-23(D), and grant DP&L the protections as would be appropriate under Ohio Admin. Code § 4901-1-24.



Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 5th day of June, 2014:

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