

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for an Increase in Electric Distribution Rates. : Case No. 15-1830-EL-AIR
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In the Matter of the Application of The Dayton Power and Light Company for Approval to Change Accounting Methods. : Case No. 15-1831-EL-AAM
:

In the Matter of the Application of The Dayton Power and Light Company for Tariff Approval. : Case No. 15-1832-EL-ATA
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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**

I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC") seeks to invade the thought process of Blue Ridge Consulting Services, Inc. ("Blue Ridge") and, by extension, the Staff of the Commission, by demanding the production of a non-final draft of the auditor's report.¹ The Commission retained Blue Ridge to assist Staff in reviewing the application of The Dayton Power and Light Company ("DP&L"), as required by Ohio Rev. Code § 4909.19(C). Mar. 22, 2017 Entry, ¶ 1; Apr. 19, 2017 Entry, ¶ 1. The Commission should deny the Motion to Compel for two separate and independent reasons.

¹ Oct. 31, 2017 Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel ("Motion to Compel").

First, the draft report is not relevant to the subject matter of this proceeding and, therefore, is not discoverable under Ohio Rev. Code § 4903.082 or Ohio Admin. Code § 4901-1-16(B). In this proceeding, the Commission must decide whether the rates proposed in DP&L's application are just and reasonable. Ohio Rev. Code § 4909.18. Although Staff and those acting on its behalf investigate utility rate applications and report their findings pursuant to Ohio Rev. Code § 4909.19, drafts of those reports do "not make it more or less probable that" a utility's proposed rates are, in fact, just and reasonable. May 28, 2013 Opinion, Order, and Certificate, In the Matter of the Application of Champaign Wind, L.L.C., No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, at *26-28, aff'd, In the Matter of the Application of Champaign Wind, L.L.C., 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.2d 1142. Instead, it is the underlying data that is relevant. DP&L has produced that information to OCC, and OCC may conduct its own analysis.

Second, in assisting Staff, Blue Ridge is not subject to discovery in this proceeding. Staff not only is exempt from the Commission's discovery rules pursuant to Ohio Admin. Code § 4901-1-16(I), but also is prohibited from divulging information acquired as "to the transaction, property, or business of any public utility" except in its "report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission" pursuant to Ohio Rev. Code § 4901.16. In retaining Blue Ridge, the Commission expressly provided that the auditor was to "execute its duties pursuant to the Commission's statutory authority to investigate and acquire records," and was to be "subject to the Commission's statutory duty under R.C. 4901.16." Mar. 22, 2017 Entry, ¶ 9; Apr. 19, 2017 Entry, ¶ 8. Compelling DP&L to produce Blue Ridge's draft report would undercut that statutory and regulatory framework.

II. THE COMMISSION SHOULD DENY THE MOTION TO COMPEL FOR TWO SEPARATE AND INDEPENDENT REASONS

A. The Blue Ridge Draft Audit Report Is Not Relevant and, Therefore, Not Discoverable

Ohio Admin. Code 4901-1-16(B) provides that a party may obtain discovery of matters that are "relevant to the subject matter of the proceeding." Since the Blue Ridge draft audit report does not constitute the auditor's final conclusions, results, or recommendations as to DP&L's application—which the Commission retained Blue Ridge to report—it is not relevant to this proceeding. Instead, Blue Ridge's only relevant work product is the auditor's final report to the Commission.

The Power Siting Board has addressed this same issue. In the Matter of the Application of Champaign Wind, L.L.C., No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, at *26-28 (May 28, 2013). In that case, various parties sought to discover draft copies of a Staff Report believing that Staff had accepted "recommendations [by an applicant] at face value." Id. at *26. They argued that denying access to the non-final drafts violated their right to "ample rights of discovery" under Ohio Rev. Code § 4903.082. Id. at *26-27. The Power Siting Board disagreed, finding that the drafts were not relevant because "[t]he sole consideration of the Board is on the application," and that "the admission of any drafts, whether it be an application or staff report, will not make it more or less probable that [the] application meets or does not meet the requirements" of the statute pursuant to which the application was filed. Id. at *27.

The Supreme Court of Ohio affirmed. In the Matter of the Application of Champaign Wind, L.L.C., 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.Ed.3d 1142, ¶ 52. The Court rejected the parties' argument "that earlier drafts *may* have contradicted the final versions," and found that the parties "failed to establish why potential contradictions between a draft and

final version would be relevant to the board's consideration, which is based on the developer's final application." Id. (Emphasis in original.)

OCC does not cite a single case in which the Commission found that non-final reports prepared by Staff or those acting on their behalf under Ohio Rev. Code § 4909.19 are relevant to the subject matter of an application to increase rates. Moreover, OCC relied on In re Application of the Fuel Adjustment Clauses for Columbus Southern Power Co. and Ohio Power Co. and Related Matters, Case No. 11-5906-EL-FAC, in which the Commission found that the draft of an annual fuel audit was subject to release under the Ohio Public Records Act, Ohio Rev. Code § 149.43, but limited its decision "to the specific facts of these proceedings and should not be construed as precedent in any other case." Id., Feb. 3, 2016 Entry, ¶ 18. In any event, DP&L is not subject to the Public Records Act. Thus, OCC's reliance on that decision is improper.

DP&L has provided Blue Ridge's formal and informal data requests and responses to the same to OCC in response to OCC RPD 299; thus, OCC has the same information that Blue Ridge has used to prepare its report. Although OCC will have the opportunity to examine Blue Ridge as to its "conclusions, results, or recommendations," Apr. 19, 2017 Entry, ¶ 11, it is the underlying data that has been provided to OCC, not a draft report, that is relevant as to whether DP&L's proposed rates should be approved.² Allowing OCC to do obtain non-final draft reports, which are, by definition, not "conclusions, results, or recommendations," would only confuse the issues in this case and needlessly waste time.

² For this same reason, OCC's request for DP&L's communications with Blue Ridge relating to the draft report is not only overly broad, but also irrelevant.

B. Compelling the Production of the Blue Ridge Draft Audit Report Would Violate the Statutory and Regulatory Prohibitions against Subjecting Staff to Discovery

In its Motion to Compel, OCC fails to acknowledge that Blue Ridge was retained by the Commission to assist and, therefore, act as an extension of Staff in reviewing DP&L's application under Ohio Rev. Code § 4909.19(C), and that Blue Ridge is, therefore, not subject to discovery in this proceeding. As the Commission is aware, Blue Ridge was hired to assist Staff by conducting an extensive forensic accounting review of DP&L's jurisdictional rate base as presented in its application; in other words, Blue Ridge's role was to perform work that would have otherwise been completed by Staff.

The Commission's entries demonstrate that the Blue Ridge's role was to exercise the authority of Staff. The Commission ordered that, "[i]n order to complete Staff's review of the application, the Commission finds that the necessary audit should be conducted by a qualified independent auditing firm." Mar. 22, 2017 Entry, ¶ 6 (emphasis added). The Commission also ordered DP&L to cooperate with all auditor and staff document and information requests. Apr. 19, 2017 Entry, ¶ 9. The Commission further ordered that the auditor provide the audit directly to Staff. Mar. 22, 2017 Entry, Request for Proposal, p. 4. The Commission explained that Staff would "oversee the project," "be informed of all correspondence between the auditor selected and DP&L, and shall be given at least three working days' notice of all meetings and interviews with DP&L to allow Staff the opportunity to attend." Mar. 22, 2017 Entry, Request for Proposal, p. 3. The Commission mandated that "[t]he auditor shall meet with PUCO Staff no less than once a week through the duration of the audit." Mar. 22, 2017 Entry, Request for Proposal, p. 3. It stated that the auditor was to "execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under

R.C. 4903.03, 4905.06, 4905.15, and 4905.16." Mar. 22, 2017 Entry, ¶ 9; Apr. 19, 2017 Entry, ¶ 8. Finally, the Commission stated that it would "select and solely direct the work of the auditor." Apr. 19, 2017 Entry, ¶ 7.

The Commission's discovery rules, set forth in Ohio Admin. Code §§ 4901-1-16 through 4901-1-24, "do not apply to the commission staff," and therefore, in this case, Blue Ridge. Ohio Admin. Code 4901-1-16(I). Moreover, pursuant to Ohio Rev. Code § 4901.16, "[e]xcept in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent." In retaining Blue Ridge, the Commission expressly provided that the auditor was subject to that "statutory duty." Apr. 19, 2017 Entry, ¶ 8. Thus, Blue Ridge is barred from releasing information it acquired in reviewing DP&L's application other than through its final report to the Commission and in testimony. Ohio Rev. Code § 4901.16.

OCC tries to sidestep those prohibitions by seeking Blue Ridge's non-final draft report directly from DP&L. However, the Commission authorized DP&L to receive that draft report by directing DP&L to enter into a contract with Blue Ridge incorporating the terms of the auditor's response to the Commission's Request for Proposals. Apr. 19, 2017 Entry, ¶ 6. That response, in turn, called for providing a draft report to DP&L, but no other parties, "for factual verification." Blue Ridge Proposal, p. 13. The proposal further provided:

"Blue Ridge will review and incorporate comments and suggestions to the extent that they clarify information in the report or correct any factual inaccuracies. However, in order to protect the integrity of the audit process, we will scrutinize with great care

those suggestions that request that we change, remove, or otherwise modify conclusions we drew as a result of our analysis. We will identify any of these recommendations in the final report."

Id.

OCC falsely asserts (p. 2) that DP&L seeks a "new rule" that it need not "respond to discovery requests unless and until" the Commission specifically says so. That contention is belied by DP&L's responses to OCC's 714 interrogatories and 302 requests for production of documents, and its production of over 35,000 pages of documents in this proceeding over the past two years. Instead, DP&L seeks to preserve the statutory and regulatory framework that prohibits parties from obtaining non-final work product of Staff and those acting on its behalf, and thereby discovering information about DP&L that is protected by statute. Ohio Rev. Code § 4901.16. Since it would violate those prohibitions for DP&L to release Blue Ridge's draft audit report, the unfinished report is not discoverable. Id.; Ohio Admin. Code 4901-1-16(I).

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel.

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 15th day of November, 2017:

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Summary: Memorandum 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 electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company