BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company	)))	Case No. 20-165-EL-RDR

REPLY OF
THE DAYTON POWER AND LIGHT COMPANY
IN SUPPORT OF ITS MOTION
TO QUASH NOTICE OF DEPOSITION WITHOUT PREJUDICE

On January 15, 2021, The Dayton Power and Light Company ("DP&L moved to quash without prejudice the Notice of Deposition that had been served by the Ohio Office of the Consumers' Counsel ("OCC") on January 7, 2021. On February 1, 2021, OCC filed a memorandum contra jointly with the Ohio Manufacturers' Association Energy Group ("OMAEG") in opposition to DP&L's motion to quash. This is DP&L's reply to the OCC/OMAEG memorandum contra.

A. DP&L Is Not Seeking a Permanent Bar to a Deposition and Therefore Chose to File a Motion to Quash Without Prejudice, Rather than a Motion for Protective Order.

DP&L's motion was predicated on two key facts. First, that DP&L has already offered to respond in writing to the specific questions that OCC set forth in its Notice of Deposition (Motion at 1-2) . Second, that the Public Utilities Commission of Ohio ("PUCO" or "Commission") has not made this proceeding an evidentiary proceeding (Motion at 2). If DP&L had been seeking a permanent bar to OCC's use of a deposition, it would have filed a Motion for Protective Order. But all DP&L has argued at this point in time is that OCC's requested deposition is premature and probably unneeded. DP&L will respond in writing to any reasonable interrogatories or document requests that OCC wishes to add to the numerous interrogatories and document requests to which DP&L has already responded.

Because DP&L's motion was not predicated on the specific requirements in the Commission's rules for a Motion for Protective Order, those portions of the OCC contra memorandum that focus on those requirements are not relevant and not responded to here. DP&L's response will briefly address other aspects of the contra memorandum.

B. OMAEG Should Not Even Be On the Pleading.

It is not clear why OMAEG is a signatory to the contra memorandum. It has not issued a notice of deposition and DP&L's motion to quash did not address any OMAEG request.

C. The PUCO Has the Authority to Determine the Proper Scope, Type, and Timing for Discovery.

OCC's contra memoranda states that it has a right to take depositions and that Parties are not limited to one form of discovery over another. (Contra Memoranda 6-9).

DP&L submits that OCC's rights in this regard are not unbounded. The PUCO has the lawful authority to determine what is and is not appropriate discovery at any particular stage of this proceeding. In proceedings in which no hearing is required, the Commission has "discretion [as to] whether to allow discovery, depositions and testimony." *In the Matter of the Joint Application of Spring Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry on Rehearing ¶ 9 (Jan. 25, 2006).

This proceeding is not currently established as an evidentiary, adversarial proceeding. The Commission established this proceeding so that an outside auditor could examine DP&L's books and records and to prepare a report.[1] That has occurred. An Entry by the Attorney Examiner has permitted comments to be filed, which has also occurred.[2] But this case has not

[1] *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Co.*, Case No. 20-165-EL-RDR, Entry, Jan. 29, 2020.
[2] *Id.*, Entry at ¶ 16, Nov. 30, 2020.

been set for evidentiary hearings. In the absence of that, a deposition is premature – it cannot produce probative relevant evidence for use in an evidentiary hearing.

The Contra Memorandum also argues that the OAC and PUCO precedent do not preclude depositions from being conducted in cases that have not been set for hearing. (Contra Memorandum at 10).

DP&L would note that such depositions are not compelled either by statute, administrative rule or PUCO precedent. As noted above, the PUCO itself has the discretionary power in such cases to establish the process by which it will consider a matter. In this matter, the PUCO has established a paper process that permits parties to submit comments on the Auditor's Report. DP&L has voluntarily provided written responses to discovery requests to facilitate this process. By scheduling a deposition, however, OCC is, in effect, making an end-run around the process that the PUCO has established which involves only paper filings of comments and reply comments. OCC's attempts at such an end-run should be rejected.

D. The Contra-Memorandum Makes a Materially Misleading Statement that Needs Context and Correction.

The Contra-Memorandum at page 9, quotes an objection in DP&L's responses to OCC's interrogatories and then makes a grossly misleading argument that DP&L "whipsaws parties" by first objecting to every interrogatory that can be answered more efficiently by the taking of depositions and then, in the Motion to Quash, by objecting to a deposition.

What the Contra Memorandum fails to disclose is that DP&L has, in fact, responded to every interrogatory that was submitted to it. There was no interrogatory in this case that DP&L failed to answer on the grounds that a deposition would be more efficient. This particular objection is a boilerplate objection that appears in the cover letter to virtually every response DP&L makes in any case, along with other boilerplate objections regarding privilege, relevance,

vagueness, or calling for a legal conclusion, etc. But this boilerplate objection was never used as an excuse in this case for not responding to an interrogatory. Even in those circumstances where DP&L believed that one or more of these boiler-plate general objections might be applicable, it followed its objection with the statement "Subject to all general objections" and then responded in full to the interrogatory.

Conclusion.

As in its original motion, DP&L respectfully moves that OCC's Notice of Deposition be quashed at this time, without prejudice. OCC may choose to renew its Notice of Deposition if this proceeding becomes set for evidentiary hearings and if OCC is unable to obtain needed information through DP&L's voluntary willingness to provide responses in writing to reasonable interrogatories and documents requests.

Respectfully submitted,

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February 4, 2021

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was served via electronic transmission upon the following parties of record this 4th day of February 2021.

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Summary: Reply of The Dayton Power and Light Company to Memorandum Contra of OCC and OMAEG electronically filed by Mr. Randall V Griffin on behalf of The Dayton Power and Light Company