

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

March 17, 2021

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

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") intervened to participate in the audit investigation of coal plant charges. That includes conducting discovery regarding the potential that The Dayton Power and Light Company ("DP&L") is charging imprudent and unreasonable amounts for coal plant subsidies (for two OVEC coal plants that increase electric bills and s pollute the planet). That prospect would be contrary to the PUCO's standard for the coal plants to be run in a manner consistent with competition.<sup>1</sup> In essence, DP&L's 520,000 consumers are required to send their subsidy dollars to DP&L including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no consumer benefits.

In the case at bar, DP&L seeks to prevent a deposition, despite the ample discovery rights guaranteed under Ohio law, the Ohio Administrative Code and precedent of the Public Utilities Commission of Ohio (“PUCO”).

<sup>1</sup> *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

The PUCO ordered an audit of the OVEC charges that DP&L customers pay (as well as audits for the OVEC charges that Duke and AEP customers pay). The auditor in the AEP case confirmed that “the OVEC plants cost more than they earn.”<sup>2</sup> In fact, the PUCO auditor in the AEP case noted that OVEC continued running the plants on days when the plants earned less revenue from selling electricity than the plants’ variable operating costs.<sup>3</sup> Accordingly, the AEP Ohio auditor recommended that OVEC reconsider its must-run offer strategy that caused these losses.<sup>4</sup>

In order to explore this issue on deposition, OCC and OMAEG jointly move the PUCO for an order compelling DP&L to make witnesses available for a deposition. And, as allowed under rule, we ask that DP&L produce the documents as requested in OCC’s Notice of Depositions and Requests for Production of Documents served on January 7, 2021.

DP&L responded to OCC’s discovery with a Motion to Quash to prevent parties from taking the deposition<sup>5</sup> and to limit the methods of discovery available to parties. The PUCO has yet to rule on DP&L’s motion to quash. The PUCO should deny DP&L’s motion and the depositions should proceed.

We do ask the PUCO to grant OCC and OMAEG’s Joint Motion to Compel Deposition of DP&L and issue an order compelling DP&L’s designee to appear at

---

<sup>2</sup> *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 31 (Sept. 16, 2020).

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.*

<sup>5</sup> Motion of DP&L to Quash (Jan. 15, 2021).

deposition. But the PUCO should resolve the issue *now* by also denying DP&L's motion to quash.

For the reasons set forth in the attached Memorandum in Support, OCC and OMAEG respectfully request that the PUCO grant this Motion.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ John Finnigan  
William J. Michael (0070921)  
Counsel of Record  
Amy Botschner O'Brien (0074423)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone [Michael]: (614) 466-1291  
Telephone [Botschner O'Brien]: (614) 466-9575  
Telephone [Finnigan]: (614) 466-9585  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

/s/ Kimberly W. Bojko  
Kimberly W. Bojko (0069402)  
(Counsel of Record)  
Thomas V. Donadio (0100027)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)  
(willing to accept service by e-mail)

*Counsel for Ohio Manufacturers' Association  
Energy Group*

## **TABLE OF CONTENTS**

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. LAW AND ARGUMENT .....	2
A. Parties have a right to this discovery. ....	2
B. The information sought is reasonably calculated to lead to the discovery of admissible evidence. ....	5
C. DP&L has failed to show how the request for a deposition is unreasonable or burdensome.....	8
D. OCC undertook reasonable efforts to resolve the discovery dispute. ....	9
III. CONCLUSION.....	10

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

## I. INTRODUCTION

Also, to assist OCC, as well as OMAEG, in obtaining information reasonably calculated to lead to the discovery of admissible evidence, OCC issued a notice to take deposition, in which OMAEG intends to participate. Issues for deposition include but are not limited to: (1) the impact on DP&L's customers of the FirstEnergy Solutions bankruptcy; and (2) how and why OVEC commits its plants in the PJM day-ahead energy market and the impact on the subsidies that consumers pay. In essence, DP&L's 520,000 consumers are required to send their subsidy dollars to DP&L including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no benefits.

1

message explaining OCC's request to take a deposition on these topics and asking for dates when it would be convenient for DP&L's counsel and witness to appear at a deposition. DP&L's counsel never responded to this call.

OCC then issued a Notice of Deposition to take the deposition on January 7, 2021, or at a time that is mutually convenient.<sup>6</sup> DP&L filed a Motion to Quash. There being an impasse, OCC has exhausted all reasonable means of resolving any differences, leading to the filing of this Joint Motion to Compel.

## **II. LAW AND ARGUMENT**

### **A. Parties have a right to this discovery.**

The PUCO previously determined that "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."<sup>7</sup> The PUCO's rules on discovery "*do not create an additional field of combat to delay trials or to appropriate the Commission's time and resources*; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings."<sup>8</sup> The rules are also intended to "minimize commission intervention in the discovery process."<sup>9</sup> These rules are meant to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

---

<sup>6</sup> Notice to Take Depositions and Requests for Production of Documents (Jan. 7, 2021).

<sup>7</sup> *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

<sup>8</sup> *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

<sup>9</sup> Ohio Admin. Code 4901-1-16(A).

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”<sup>10</sup> The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases.

Despite these reforms, DP&L is impeding parties’ discovery efforts. The PUCO should not allow DP&L to use these obstructionist tactics to deny parties their ample discovery rights under Ohio law and PUCO rules. OCC and OMAEG, as parties in this proceeding, are entitled to select a deposition as a method to obtain discovery and investigate the complex issues in this case. Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules. It is both unreasonable and unlawful for DP&L to refuse to make itself available for deposition regarding the complex issues in this case.

The Ohio Administrative Code contains rules that specifically define the scope of discovery, in Ohio Admin. Code 4901-1-16(B):

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

This rule is similar to Civ. R. 26(B), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>11</sup>

---

<sup>10</sup> See also *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

<sup>11</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O’Neill* (1996), 75 Ohio St.3d 1479.



Parties' rights to discovery are assured by law, rule and Supreme Court of Ohio ("Court") precedent.<sup>12</sup> Parties are entitled to obtain a deposition from DP&L. DP&L will continue to refuse to submit to a deposition unless the PUCO compels it.

In Ohio Admin. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Admin. Code 4901-1-23(A) and (B) provide a means for the PUCO to compel a party to respond to a discovery request when the party has failed to do so. Ohio Admin. Code 4901-1-23(C) details the technical requirements for a motion to compel, all of which OCC and OMAEG meet..

The Motion to Compel is to be accompanied by a Memorandum in Support setting forth (1) the basis of the Motion and authorities relied upon; (2) a brief explanation of how the information sought is relevant; and (3) responses to objections raised by the party from whom the discovery is sought.<sup>13</sup> Finally, Ohio Admin. Code 4901-1-23(C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

OCC has detailed in the accompanying Affidavit of John Finnigan, consistent with Ohio Admin. Code 4901-1-23(C)(3), the efforts that it undertook to resolve differences between it and DP&L. At this point, there can be no resolution of this discovery dispute without PUCO intervention. Parties seek a deposition from DP&L and DP&L will not allow the deposition without the PUCO compelling such a result.

---

<sup>12</sup> *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

<sup>13</sup> Ohio Admin. Code 4901-1-23(C)(1).

**B. The information sought is reasonably calculated to lead to the discovery of admissible evidence.**

This case involves a prudency review of the OVEC costs and DP&L's charges for OVEC costs. The Auditor's Report in the AEP and Duke cases raised certain issues as to whether these costs are reasonable. The first issue involves DP&L receiving a share of FirstEnergy Solutions' OVEC entitlement after FirstEnergy Solutions filed for bankruptcy. The Auditor of AEP noted that "the FirstEnergy Solutions bankruptcy impacted OVEC and AEP Ohio charges."<sup>14</sup>

The same issue arose in the Duke OVEC case and (unlike DP&L) Duke provided a witness for deposition, as required by the PUCO's rules.<sup>15</sup> Based on information provided at deposition and in Duke's reply comments, OCC was able to determine that Duke's customers were not impacted by FirstEnergy Solutions' OVEC costs during the audit period. OCC therefore withdrew this issue from its initial comments in that case.<sup>16</sup>

Here DP&L rejected the request for deposition, and so a relevant issue still exists as to whether DP&L's customers were impacted by FirstEnergy Solutions' OVEC costs during the audit period. Parties need to depose an DP&L representative to explore this issue. DP&L's customers might have been impacted by these costs during the audit period. The FirstEnergy Solutions bankruptcy lasted from 2018 through 2020 and DP&L may have acted imprudently in its decisions regarding when and how to bill for these costs. The Auditor of AEP suggested that DP&L's customers were impacted by stating that the FirstEnergy Solutions bankruptcy impacted AEP Ohio's charges.<sup>17</sup>

---

<sup>14</sup> Audit Report of AEP at 16.

<sup>15</sup> *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Deposition of John Swez (Jan. 12, 2021).

<sup>16</sup> *Id.* Correspondence on behalf of the Office of Ohio Consumers' Counsel (Jan. 19, 2021).

<sup>17</sup> Audit Report of AEP at 16.

The second issue involves committing the plants into the PJM day-ahead energy market as must-run. The Auditor of AEP recommended that OVEC change its practice because this was resulting in “negative earnings” where the fuel cost exceeded the value of the electricity produced.<sup>18</sup>

OCC requested a deposition to question an DP&L official about these complex topics. The Auditor’s Report in the AEP case suggested the possibility of imprudent actions in each area. OCC and OMAEG intend to question DP&L to determine, inter alia, exactly what actions DP&L and OVEC took, whether DP&L’s and OVEC’s actions were reasonable and whether DP&L’s and OVEC’s actions caused customers to pay higher costs. OCC and OMAEG also intend to question the witness about, inter alia, other issues relating to prudence, such as how OVEC manages the coal purchasing, coal inventory and ancillary services for the plants.

OCC reasonably exercised its right under Ohio Admin. Code 4901-1-21 to take the testimony of DP&L by deposition on oral examination with respect to matters within the scope of discovery in this proceeding. OCC and OMAEG intend to use the discovery tool of a deposition as the best available tool for investigating the Auditor’s recommendation or lack thereof regarding OVEC’s must-run offer strategy and the other issues relating to prudence. Parties have a right under the 1983 reform law, R.C. 4903.082, to conduct discovery on these issues.

Depositions are often considered the most important and effective tool in an attorney’s toolbox. They allow for much more information to be gleaned and sooner, as compared to written discovery. Depositions, most importantly, allow for instantaneous follow-up to questions that are posed. Depositions allow attorneys to press for more information if answers are not

---

<sup>18</sup> Audit Report of AEP at 9 and 53.

detailed or forthcoming. In reality, these well-known fundamentals of the deposition as a discovery tool explain why DP&L wants the PUCO to prevent the intervenors from taking depositions.

The PUCO ordered, “that *any* conclusions, results, or recommendations formulated by the auditor may be examined by *any* participant to this proceeding.”<sup>19</sup> Accordingly, in this proceeding where DP&L bears the burden of proving its prudence, parties are lawfully exploring the prudence of using the OVEC units as must-run units and the other issues noted above. The Auditor’s Report in the AEP case indicates that these issues increased OVEC’s costs, therefore it is important to explore any detriment of this decision on DP&L customers.

These complex issues are best explored in a deposition, which may be why DP&L is objecting. In a deposition a witness can be asked to explain the intricate details involved with the daily operations of the uneconomic power plants. As to the must-run issue, the data to be considered include PJM day-ahead energy market prices and forward energy prices, as well as the following factors:

unit start-up costs, start-up times, cycling costs, risks with powering down and powering up units, such as unexpected outages that occur as a result of additional unit cycling, an operation that is required for environmental and other testing, impacts of multiple unit startups and shutdowns, as well as the loss of option values by missing the opportunity to respond to power price changes.<sup>20</sup>

Parties seek to assess how various factors contributed to the must-run decision during the 2018-2019 audit period. A deposition is appropriate for parties’ assessment of these matters that are directly related to the rates and charges that consumers pay. OCC and OMAEG also seek to

---

<sup>19</sup> Entry at ¶ 16 (March 11, 2020) (emphasis added).

<sup>20</sup> *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Reply Comments of Duke Energy Ohio, Inc. at 18 (Jan. 8, 2021).

investigate the issue as to whether the FirstEnergy Solutions bankruptcy impacted DP&L's charges and the other above-mentioned issues. DP&L does not even attempt to argue that a deposition would not provide information that is reasonably calculated to lead to the discovery of admissible evidence. The PUCO should therefore compel DP&L to appear at deposition.

**C. DP&L has failed to show how the request for a deposition is unreasonable or burdensome.**

DP&L claims that the request for a deposition is premature and unnecessary.<sup>21</sup> DP&L's objections are conclusory and does not explain why a deposition would be burdensome. Federal case law<sup>22</sup> has held that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.<sup>23</sup> In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.<sup>24</sup> General objections without specific support may result in waiver of the objection.<sup>25</sup>

DP&L argues that it was willing to respond to interrogatories and document requests in lieu of a deposition. That is an old tactic to prevent effective discovery. We intend to depose, where answers are under oath and subject to formal motions if there is a lack of responsiveness.

---

<sup>21</sup> Motion to Quash at 1.

<sup>22</sup> 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."

<sup>23</sup> *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

<sup>24</sup> *Rosenberg v. Johns-Manville*, (M.D.Pa 1980), 85 RR.D. 292, 297.

<sup>25</sup> *Id.*, citing *In re Folding Carton Anti-Trust Litigation*, (N.D. HI. 1978), 83 F.R.D. 251, 264.

And we want answers under oath that can be used for discovery purposes and evidentiary purposes.

DP&L's statement that a deposition would be premature and unnecessary is therefore a conclusory statement and it should be disregarded. As explained in OCC and OMAEG's Joint Memorandum Contra,<sup>26</sup> DP&L has offered no valid grounds for its statement that the deposition request is premature or unnecessary.

The PUCO should realize that DP&L's grounds may be that it just doesn't want its personnel answering questions about OVEC under oath and in live depositions. And the PUCO should consider the inappropriateness of DP&L thwarting our investigation of its subsidy charges when the prevailing attitude of the utility should be cooperation in deference, if not in gratitude, for the massive subsidy it is enjoying courtesy of Ohioans (our clients).

**D. OCC undertook reasonable efforts to resolve the discovery dispute.**

As detailed in the accompanying Affidavit of John Finnigan, OCC undertook efforts to resolve this discovery dispute. Mr. Finnigan called DP&L's counsel, Mr. Schuler, prior to issuing a Notice of Deposition and left a voicemail message explaining the request for a deposition and asking Mr. Schuler for dates when it would be convenient. Mr. Schuler never responded to this voicemail message. OCC had no other recourse but to issue the Notice of Deposition. DP&L offered to respond to written discovery in lieu of a deposition but this was not acceptable to OCC. OCC has exhausted all other reasonable means to resolve differences between it and DP&L. OCC and DP&L have an irreconcilable difference as to whether parties have a right to depose a DP&L official.

---

<sup>26</sup> See Joint Memorandum Contra of OCC and OMAEG at 5-6 (Feb. 1, 2021).

### III. CONCLUSION

Under Ohio law and the Ohio Administrative Code, parties have a right to discover information regarding the OVEC coal plants. That relates to the PUCO's review of the prudence and reasonableness of DP&L's charges to its 520,000 consumers for coal plant subsidies.

The PUCO, consistent with Ohio law and the Ohio Administrative Code, should grant OCC and OMAEG's Joint Motion to Compel. DP&L's 520,000 consumers are required to send their subsidy dollars to DP&L including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no benefits for DP&L's consumers. Therefore, OCC and OMAEG's Joint Motion to Compel should be granted and DP&L should be ordered to appear at deposition in the near term.

*However, the PUCO should soon rule on DP&L's motion for protection by denying it. And that should provide sufficient basis for the depositions to proceed.*

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ John Finnigan  
William J. Michael (0070921)  
Counsel of Record  
Amy Botschner O'Brien (0074423)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone [Michael]: (614) 466-1291  
Telephone [Botschner O'Brien]: (614) 466-9575  
Telephone [Finnigan]: (614) 466-9585  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402)

(Counsel of Record)

Thomas V. Donadio (0100027)

Carpenter Lipps & Leland LLP

280 North High Street, Suite 1300

Columbus, Ohio 43215

Telephone: (614) 365-4100

[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)

[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)

(willing to accept service by e-mail)

*Counsel for Ohio Manufacturers' Association  
Energy Group*



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion to Compel was served on the persons stated below via electric transmission this 17th day of March, 2021.

/s/ John Finnigan

John Finnigan (0018689)

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

### **SERVICE LIST**

[kyle.kern@ohioattorneygeneral.gov](mailto:kyle.kern@ohioattorneygeneral.gov)

[thomas.lindgren@ohioattorneygeneral.gov](mailto:thomas.lindgren@ohioattorneygeneral.gov)

Attorney Examiners:

[patricia.schabo@puco.ohio.gov](mailto:patricia.schabo@puco.ohio.gov)

[michael.williams@puco.ohio.gov](mailto:michael.williams@puco.ohio.gov)

[michael.schuler@aes.com](mailto:michael.schuler@aes.com)

[paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)

[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)

[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)

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

a) A person with knowledge and expertise regarding DP&L's decision whether to purchase a share of the FirstEnergy Solutions' ("FES") OVEC entitlement after FES declared bankruptcy and repudiated its obligation to purchase its share.

- b) A person with knowledge and expertise regarding whether DP&L received any funds or value from OVEC from the FES bankruptcy court settlement between OVEC and FES (i.e., the settlement relating to FES' attempt to repudiate its obligation to purchase power from the OVEC plants under the Amended and Restated Inter-Company Power Agreement ("OVEC Agreement")).
- c) A person with knowledge and expertise as to the obligations of DP&L under the OVEC Agreement, including any obligation to purchase another co-owner's share of the OVEC output.
- d) A person with knowledge and expertise of the decision to commit the OVEC plants in the PJM market as must-run units.

The depositions will take place through a Zoom or Microsoft Teams conference or by telephone, as mutually agreeable to OCC and DP&L. The deponents will appear at the agreed upon time and date and remain available until the deposition is completed.

The depositions will be taken of the aforementioned deponents on relevant topics within the scope of these proceedings, including: (1) whether DP&L purchased more of the output of the OVEC plants than it was obligated under the OVEC Agreement to purchase and charged its customers for such purchases; and (2) committing the OVEC plants into the PJM day-ahead energy market as must-run units. The depositions will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions.

Under Ohio Adm. Code Rules 4901-1-21(E) and 4901-1-20, each deponent is requested to produce prior to the deposition and to bring copies to the telephonic deposition, the following documents:

- 1. A copy of the deponent's resume and/or C.V.
- 2. All documents related to the deponent's knowledge or expertise of the subjects identified in the sub-paragraphs above.
- 3. A copy of the current OVEC agreement.

4. A copy of the Audit Report.
5. A copy of DP&L's responses to data requests in this case.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ John Finnigan  
William J. Michael (0070921)  
Counsel of Record  
Amy Botschner O'Brien (0074423)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone [Michael]: (614) 466-1291  
Telephone [Botschner O'Brien]: (614) 466-9575  
Telephone [Finnigan]: (614) 466-9585  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Notice to Take Deposition and Request for Production of Documents were served on the persons stated below via electric transmission this 7th day of January 2021.

/s/ John Finnigan  
John Finnigan (0018689)  
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

### **SERVICE LIST**

[kyle.kern@ohioattorneygeneral.gov](mailto:kyle.kern@ohioattorneygeneral.gov)  
[thomas.lindgren@ohioattorneygeneral.gov](mailto:thomas.lindgren@ohioattorneygeneral.gov)

[michael.schuler@aes.com](mailto:michael.schuler@aes.com)  
[paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)

Attorney Examiners:  
[patricia.schabo@puco.ohio.gov](mailto:patricia.schabo@puco.ohio.gov)  
[michael.williams@puco.ohio.gov](mailto:michael.williams@puco.ohio.gov)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/7/2021 2:48:02 PM**

**in**

**Case No(s). 20-0165-EL-RDR**

Summary: Notice of Deposition Notice to Take Depositions and Requests for Production of Documents by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Finnigan, John

In the Matter of the Review of the )  
Reconciliation Rider of The Dayton )  
Power and Light Company )

Case No. 20-165-EL-RDR

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

The Dayton Power and Light Company (“DP&L”), pursuant to Ohio Administrative Code (“OAC”) 4901-1-12, hereby moves to quash the Notice of Deposition served by the Ohio Office of the Consumers’ Counsel (“OCC”) on January 7, 2021. DP&L submits that OCC’s Notice of Deposition is premature and unnecessary. It should be quashed at this time, subject to renewal only if this proceeding is set for evidentiary proceedings and other, less intrusive, means of discovery prove to be insufficient for OCC to obtain the information it seeks for such evidentiary proceedings.

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH**

OCC's notice of deposition is premature and unnecessary. DP&L has already offered to respond in writing to the specific questions that OCC set forth in its Notice of Deposition. DP&L, in fact, will commit here that, subject to normal privileges and normal objections on grounds of relevance or other valid grounds for objection, it will respond in writing to any and all reasonable document requests and interrogatories that OCC may wish to propound with respect to the issues raised in this proceeding.

DP&L has already provided OCC with responses to 19 interrogatories and eight document requests. To the extent, OCC seeks additional information with respect to those interrogatories and document requests, DP&L remains willing to respond to reasonable follow-up interrogatories and document requests. To the extent that OCC is unsatisfied with one or



more of DP&L's prior responses, the appropriate remedy is a motion to compel. There is no need to schedule a deposition to obtain the information that OCC seeks.

Moreover, 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.<sup>1</sup> That has occurred. An Entry by the Attorney Examiner has permitted comments to be filed, which has also occurred.<sup>2</sup> But this case has not 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.

DP&L recognizes that the Public Utilities Commission of Ohio ("PUCO" or "Commission") has promulgated no specific rules defining the exact circumstances under which depositions are necessary or appropriate. But DP&L also notes that the general practice before both the Commission and Ohio courts is that other, less intrusive means of discovery are preferred at least as the initial steps in a litigated matter.

### **Conclusion.**

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 through DP&L's voluntary willingness to provide responses in writing to reasonable interrogatories and documents requests.

---

<sup>1</sup> *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.

<sup>2</sup> *Id.*, Entry at ¶ 16, Nov. 30, 2020.



Respectfully submitted,

/s/ *Randall V. Griffin*

Randall V. Griffin (0080499)  
Chief Regulatory Counsel  
The Dayton Power and Light Company  
1065 Woodman Drive  
Dayton, Ohio 45432  
937-479-8983 (cell)  
[randall.griffin@aes.com](mailto:randall.griffin@aes.com)

(willing to accept service by e-mail)

January 15, 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 15<sup>th</sup> day of January 2021.

/s/ *Randall V. Griffin*

Randall V. Griffin (0080499)

Chief Regulatory Counsel

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, Ohio 45432

937-479-8983 (cell)

[randall.griffin@aes.com](mailto:randall.griffin@aes.com)

## SERVICE LIST

[kimberly.naeder@ohioattorneygeneral.gov](mailto:kimberly.naeder@ohioattorneygeneral.gov)

[michael.schuler@aes.com](mailto:michael.schuler@aes.com)

[tracy.greene@occ.ohio.gov](mailto:tracy.greene@occ.ohio.gov)

[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)

[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)

[heather.chilcote@puco.ohio.gov](mailto:heather.chilcote@puco.ohio.gov)

[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)

[paul@carpenterlipps.com](mailto:paul@carpenterlipps.com) (intervention pending)

[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com) (intervention pending)

[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com) (intervention pending)

Attorney Examiners:

[patricia.schabo@puco.ohio.gov](mailto:patricia.schabo@puco.ohio.gov)

[michael.williams@puco.ohio.gov](mailto:michael.williams@puco.ohio.gov)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/15/2021 1:24:41 PM**

**in**

**Case No(s). 20-0165-EL-RDR**

Summary: Motion to Quash Notice of Deposition electronically filed by Mr. Randall V Griffin on behalf of The Dayton Power and Light Company

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

I, John Finnigan, Assistant Counsel for the Ohio Consumers' Counsel ("OCC") in the above-captioned case, submit this affidavit in support of the Joint Motion to Compel DP&L to Respond to Discovery Regarding Charges to Consumers for Subsidized Coal Power Plants by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group.

- 1

message, I asked Mr. Schuler to call me to discuss a date for the deposition. Mr. Schuler never returned my phone call.

3. The deposition notice proposed to take the deposition of DP&L witnesses on January 14, 2021 or such other date as mutually agreed upon by OCC and DP&L.
4. Mr. Schuler contacted me by email on January 11, 2021 and notified me that he was scheduled to be in a hearing on the week of January 11<sup>th</sup>.
5. As a result of Mr. Schuler being in a hearing during the week of January 11, 2021, I had an email notice sent to the parties that the deposition scheduled for January 14, 2021 would be re-scheduled for a later date.
6. I notified Mr. Schuler by email on January 12, 2021 that OCC would like to proceed with the deposition before reply comments were due (scheduled for January 20, 2021). In my email, I proposed a new date of January 19, 2021 for the deposition.
7. Mr. Schuler replied by email that it was likely he would also be out of the office during the weeks of January 18, 2021 and January 25, 2021. On January 15, 2021, DP&L filed a motion to quash the deposition.

STATE OF OHIO                    )  
  )  
COUNTY OF FRANKLIN        )                    ss

The undersigned, being of lawful age and duly sworn by oath, hereby certifies,  
deposes and states the following:

I have caused to be prepared the attached written affidavit for OCC in the above-  
referenced docket. This affidavit is true and correct to the best of my knowledge,  
information and belief.

/s/ John Finnigan  
John Finnigan, Affiant

Sworn to and subscribed by affiant via Microsoft Teams meeting this 17th day of March,  
2021.

Debra Jo Bingham  
Notary Public



DEBRA JO BINGHAM  
Notary Public  
State of Ohio  
My Comm. Expires  
June 13, 2025

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/17/2021 11:06:25 AM**

**in**

**Case No(s). 20-0165-EL-RDR**

Summary: Motion Joint Motion to Compel Deposition of DP&L by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Deb J. Bingham on behalf of Finnigan, John