**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| In the Matter of the Application of The  Dayton Power and Light Company for  Approval of its Market Rate Offer.  In the Matter of the Application of The  Dayton Power and Light Company for  Approval of Revised Tariffs.  In the Matter of the Application of The  Dayton Power and Light Company for  Approval of Certain Accounting  Authority.  In the Matter of the Application of The  Dayton Power and Light Company for  Waiver of Certain Commission Rules.  In the Matter of the Application of The  Dayton Power and Light Company to  Establish Tariff Riders. | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | Case No. 12-426-EL-SSO  Case No. 12-427-EL-ATA  Case No. 12-428-EL-AAM  Case No. 12-429-EL-WVR  Case No. 12-672-EL-RDR |

**MOTION TO COMPEL RESPONSES TO DISCOVERY**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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January 23, 2013

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**MOTION TO COMPEL RESPONSES TO DISCOVERY**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

In this case where just one of the utility’s many proposals would cost customers more than $600 million, the Office of the Ohio Consumers’ Counsel (“OCC”) must seek enforcement of discovery law and rules to obtain the information needed for presenting the consumer perspective on the issues. OCC, on behalf of the residential utility consumers of the Dayton Power & Light Company (“DP&L” or “Company”), moves[[2]](#footnote-2) the Public Utilities Commission of Ohio (“PUCO” or “Commission”), the legal director, the deputy legal director, or an attorney examiner for an order compelling the Company to fully and specifically respond to OCC Interrogatories 227, 239, 255, 260, 261, 268, 333, and 334, and requests for production of documents RPD 37, 39, 69, 71, and 73 which are attached hereto as OCC Exhibits 1-13.

As demonstrated in the attached Memorandum in Support, DP&L objected to this discovery based on a litany of objections, including privilege. Yet DP&L failed to do any more than assert a blanket claim of privilege. DP&L has never identified on a document-by-document basis the justification for any alleged privilege. To date, even when asked for a privilege log, DP&L has not produced one. DP&L initially offered to produce a privilege log to justify its numerous privilege claims only if OCC would pay $180 per hour for one of its legal firm’s attorneys to conduct a computer search. Although later (late December, 2012) DP&L agreed to do a computer search of the law firm files, using search terms provided by OCC, there has been no privilege log provided to OCC to date.

With the upcoming discovery conference set for January 30, 2013, and Attorney Examiner Price’s indicated preference that discovery matters be addressed by written motion, OCC files this Motion to Compel, with the reasons supporting this motion set forth in the attached Memorandum in Support.

Respectfully submitted,

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**TABLE OF CONTENTS**

**Page**

[I. INTRODUCTION 1](#_Toc346698916)

[II. STANDARD OF REVIEW 2](#_Toc346698917)

[III. ARGUMENT 5](#_Toc346698918)

[A. The Discovery Sought Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence. 5](#_Toc346698919)

[1. Information reported about distributions to DPL by AES and   
other DP&L specific information contained in presentations to shareholders. (Interrogatory 255, 260, 261) (Exhibits 3-5). 5](#_Toc346698920)

[2. Information supplied by DP&L to AES pertaining to estimates   
of revenues, expenditures, customer switching and aggregation trends, capacity and energy price curves, etc. which was   
ultimately the basis of a $2.4 billion good will impairment. (Interrogatories 333, 334, RFP 69, 71, and 73) (Exhibits 7, 8,   
11, 12, 13). 6](#_Toc346698921)

[3. Discovery directed at alternative scenarios where the value of the SSR and the move to market differs from the values incorporated into the pro forma financials (Interrogatory 239, Request for Production 39; Interrogatory 227, 268, RPD 37) (Exhibits 2, 10,   
1, 6, 9). 8](#_Toc346698922)

[B. The Company’s Numerous Objections Should Be Overruled And The Company Should Be Required To Provide A Complete Response To   
The Questions Posed. 9](#_Toc346698923)

[1. The Company’s objections to discovery of information based on privilege and work product must fail because the Company has failed to establish privilege. 9](#_Toc346698924)

[2. The Company’s objections to OCC discovery based on undue burden should be overruled because the Company has failed to establish undue burden and should have moved for protection   
if the discovery was truly burdensome. 14](#_Toc346698925)

[3. The Company’s objections to OCC discovery based on affiliates not being subject to discovery should be overruled because the discovery being sought is DP&L-specific and is known by   
DP&L or readily available to it. 17](#_Toc346698926)

[4. The Company’s objections that the discovery calls for a narrative answer should be overruled because the Company has failed to provide authority for such an objection. 19](#_Toc346698927)

[C. OCC Undertook Reasonable Efforts To Resolve The Discovery   
Dispute. 19](#_Toc346698928)

[IV. CONCLUSION 20](#_Toc346698929)

**Exhibits**

EXH 1 - INT-227 – OCC Set 13

EXH 2 - INT-239 – OCC Set 14

EXH 3 - INT-255 – OCC Set 14

EXH 4 - int-260 – occ set 14

EXH 5 - int-261 – occ set 14

EXH 6 - int-268 – occ set 14

EXH 7 - int-333 – occ set 19

EXH 8 - int-334 – occ set 19

EXH 9 - RPD-37 – OCC SET 13

EXH 10 - RPD-39 – OCC SET 14

EXH 11 - RPD-69 – OCC SET 19

EXH 12 - RPD-71 – OCC SET 19

EXH 13 - RPD-73 – OCC SET 19

**ATTACHMENTS**

ATTACHMENT 1 – December 7, 2012 e-mail

ATTACHMENT 2 – December 11, 2012 e-mail

ATTACHMENT 3 – December 14, 2012 e-mail

ATTACHMENT 4 – December 17, 2012 e-mail

ATTACHMENT 5 – December 18, 2012 e-mail

ATTACHMENT 6 – December 19, 2012 e-mail

ATTACHMENT 7 – December 19, 2012 e-mail

ATTACHMENT 8 – December 19, 2012 e-mail

ATTACHMENT 9 – December 20, 2012 e-mail

ATTACHMENT 10 - December 31, 2012 e-mail

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

DP&L has failed to provide complete responses to discovery requests propounded by the OCC. Instead, DP&L repeatedly asserts a litany of rote objections and relies in some instances upon blanket claims of privilege as a shield.[[4]](#footnote-4) At the same time DP&L has been unwilling and unable to produce a discovery log, when asked to do so by OCC.[[5]](#footnote-5) Additionally, while DP&L claims that some of the discovery requests are “unduly burdensome” to respond to,[[6]](#footnote-6) it does not explain what efforts would be necessary to respond. DP&L also tries to hide behind its affiliates by claiming that the information requested is in the affiliates’ possession, and the affiliates are not subject to discovery.[[7]](#footnote-7) DP&L also maintains objections that the information is “proprietary”[[8]](#footnote-8) even though OCC and DP&L have executed a protective agreement setting forth agreed upon terms to treat proprietary information and protect it from disclosure.

These responses are evasive, incomplete, and insufficient. Such responses are contrary to the Commission’s rules.[[9]](#footnote-9) The Attorney Examiner should overrule the objections to the discovery, and order DP&L to immediately provide complete responses to OCC’s discovery.

# II. STANDARD OF REVIEW

According to the Commission, “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.”[[10]](#footnote-10) The Commission’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.”[[11]](#footnote-11) These rules are intended to assure full and reasonable discovery, consistent with the statutory discovery rights of parties under R.C. 4903.082.

Specifically, R.C. 4903.082 states that the OCC and “[a]ll parties and intervenors shall be granted ample rights of discovery.” Therefore the OCC, a party and intervenor, is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the Commission to ensure that parties are allowed “full and reasonable discovery” under its rules.

Accordingly, the Commission has adopted Ohio Adm. Code 4901-1-16(B) that provides:

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.

The PUCO’s discovery rule is similar to Ohio Civ. R.26 (B)(1), 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.[[12]](#footnote-12)

This scope of discovery is applicable to written interrogatories. Written interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the discovery is served, under Ohio Adm. Code 4901-1-19. Each interrogatory must be answered “separately and fully, in writing and under oath, unless objected to, in which case the reasons for the objection shall be stated in lieu of an answer. The answer shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them.”

In Ohio Adm. 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 Adm. Code 4901-1-23(A) and (B) provide for the PUCO to compel a party to answer discovery when the party has failed to do so, including when answers are evasive or incomplete. Ohio Adm. Code Rule 23(C) details the technical requirements for a motion to compel, all of which are met in this OCC pleading.

The motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon; a brief explanation of how the information sought is relevant; and responses to objections raised by the party from whom the discovery is sought.[[13]](#footnote-13) Copies of the discovery requests and the responses are to be attached.[[14]](#footnote-14) Finally, Rule 4901-1-23, subsection (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.

The OCC has detailed in the attached affidavit, consistent with Rule 4901-1-23(C)(3), the efforts which have been undertaken to resolve differences between it and the Company. At this point it is clear that there can be no resolution worked out. OCC seeks responses to its discovery requests and is unable to obtain the responses without the Commission compelling such a result.

# III. ARGUMENT

## A. The Discovery Sought Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

### 1. Information reported about distributions to DPL by AES and other DP&L specific information contained in presentations to shareholders. (Interrogatory 255, 260, 261) (Exhibits 3-5).

Interrogatory 255 seeks DP&L specific information reported by AES Corporation in its Third Quarter 2012 Financial Review.[[15]](#footnote-15) The information was presented by AES as an “Update on DP&L” at a presentation to the investment community. OCC seeks to understand the effect on DP&L’s cash flow of AES’ plans to “de-lever ‘the business’ with cash generated at DPL.” Interrogatories 260 and 261 pertain to information reported by AES that relates to distributions that AES has made and will make to DP&L, another factor impacting DP&L’s cash flow.[[16]](#footnote-16)

DP&L objects to the discovery on grounds of relevance, that it is “unduly burdensome,” “calls for a narrative answer,” is in the “possession of DP&L’s unregulated affiliate, and “further objects because AES is not subject to discovery in this matter.”

This information is sought in the context of DP&L’s claims that it needs revenues from its Ohio customers over the term of the ESP in order to maintain its financial integrity. Distributions by AES to DP&L may affect DP&L’s cash flow, and may diminish the need for customers to pay a $687 million SSR (not that the SSR is needed in any event). The discovery is appropriate as it is reasonably calculated to lead to the discovery of admissible evidence. The Company’s objections to this discovery on grounds of relevance should be overruled.

### 2. Information supplied by DP&L to AES pertaining to estimates of revenues, expenditures, customer switching and aggregation trends, capacity and energy price curves, etc. which was ultimately the basis of a $2.4 billion good will impairment. (Interrogatories 333, 334, RFP 69, 71, and 73) (Exhibits 7, 8, 11, 12, 13).

Interrogatory 333 asked the Company to identify the estimates and assumptions used in the testing for good will impairment, as reported in the DP&L Form 10Q, for the third quarter of 2012.[[17]](#footnote-17) Interrogatory 334 asked for the assumptions that were described in the Form 10Q as “material” to the impairment analysis.[[18]](#footnote-18) Requests for production of documents 69, 71, and 73 seek documents identified in the description of the impairment analysis, a copy of the values assigned to the factors, and a copy of the report which reflected the results of the impairment analysis.[[19]](#footnote-19)

DP&L objected to this discovery on the basis of “relevance,” “unduly burdensome,” “proprietary,” “calls for a narrative answer,” “possession of DP&L’s unregulated affiliate,” and “DPL Inc. is not subject to discovery in this matter and because the requested information is irrelevant.”

After some communication between counsel, OCC proposed to limit its discovery to information supplied by DP&L to AES and DPL Inc. for use in the good will impairment study. In this way, the DP&L supplied information would be segregated from AES’ conclusions on that information.[[20]](#footnote-20) DP&L did not respond to OCC’s proposal.

As explained to the Company, as part of the impairment analysis a "fair value" of DP&L was determined using a discounted cash flow valuation model.  In order to conduct that analysis, assumptions were made as to various factors--factors that pertain to

and are related to the financial integrity of DP&L.  As  reported in the 10Q, values were assigned for factors of:  customer switching and aggregation trends, capacity and energy price curves, the amount of the standard service offer charge, the transition period for converting to wholesale competitive bidding, and dispatching.

In the pro forma financials presented by Mr. Jackson, many of these same factors are assigned values, and underlie the financial projections. And the financial projections are the basis for the $687 million SSR requested by DP&L. While the "good will" impairment pertains to AES, it is based on projections that are DP&L-specific. It can be reasonably assumed that information on the assumptions was provided by DP&L to AES.[[21]](#footnote-21)

Because the Company has put its financial integrity into issue as a reason why customers should have to pay hugely expensive charges, parties can challenge the data and assumptions made pertaining to the Company's financial projections. These challenges provide information to the PUCO for its decision-making under R.C. 4903.09.  One way of doing this is by discovering how the financial projections made in the ESP compare to other financial projections (such as those presented in the good will impairment analysis) that are being made about DP&L to the investment community. Thus, the discovery is reasonably calculated to lead to the discovery of admissible evidence and is proper. The Company’s objections to this discovery on grounds of relevance should be overruled.

### 3. Discovery directed at alternative scenarios where the value of the SSR and the move to market differs from the values incorporated into the pro forma financials (Interrogatory 239, Request for Production 39; Interrogatory 227, 268, RPD 37) (Exhibits 2, 10, 1, 6, 9).

Interrogatory 239 asks the Company whether it has developed ROE projections based on a quicker move to 100% competitive bid-based rates, and asks the Company to identify such scenarios and the resulting ROE projections.[[22]](#footnote-22) It is very appropriate to be considering a quicker move to market since the market is producing very good generation prices for customers now (and considering that Ohio utilities were supposed to be on an arc for market pricing dating back to Senate Bill 3 in 1999).

Request for Production 39 asks the Company to produce a copy of the return on equity projections associated with Interrogatory 239.[[23]](#footnote-23) Interrogatories 227 and 268 ask the Company whether it undertook any analysis of its financial position if the amount of the SSR approved varies from the amount DP&L requests.[[24]](#footnote-24) RPD 37 asks for the documents associated with financial analysis of alternate SSR scenarios.[[25]](#footnote-25)

The Company objects to these discovery requests claiming that it is privileged and work product, and proprietary.[[26]](#footnote-26) The Company also states that it “objects to providing this information since it is privileged and work product.”

The information sought by OCC pertains to whether the Company has made financial projections that reflect a quicker move to 100% competitive bid. As stated, the transition to market –how fast customers will be able to access 100% competitive bids—is an important issue in this proceeding for reducing consumers’ rates.

This discovery also seeks to explore the financial effect of approving a lower SSR charge than that proposed by the Company. The value of the SSR and its impact on the Company’s financial stability is an issue in this proceeding. One of the outcomes the Commission must consider is whether the Company’s SSR should be rejected altogether (or reduced from the amount requested). So the information is reasonably calculated to lead to the discovery of admissible evidence.

## B. The Company’s Numerous Objections Should Be Overruled And The Company Should Be Required To Provide A Complete Response To The Questions Posed.

### 1. The Company’s objections to discovery of information based on privilege and work product must fail because the Company has failed to establish privilege.

While DP&L relies upon attorney client privilege and work product doctrine to shield it from answering discovery, it fails to meet the burden which it uniquely bears: to establish that a privilege exists. It is uncontroverted that the burden of establishing the applicability of privilege rest upon the party asserting the privilege.[[27]](#footnote-27)

For instance, when claiming attorney client privilege, the party raising the privilege must establish that the privilege applies to a particular communication that is sought to be disclosed.[[28]](#footnote-28) The mere existence of a lawyer-client relationship does not create, without the privilege being asserted with specificity, a “cloak of protection…draped around all occurrences and conversations which have any bearing, direct, or indirect upon the relationship of the attorney with his client.”[[29]](#footnote-29) The privilege must be proven document by document, with the demonstration typically being made with a privilege log.[[30]](#footnote-30) Thus, a separate claim must be raised in response to each request for disclosure.[[31]](#footnote-31)

In order to meet the burden of establishing an attorney client privilege, each element of the privilege must be demonstrated with specificity.[[32]](#footnote-32) The basic criteria required to establish the privilege are (1) a communication (2) made in confidence (3) to an attorney (4) by a client (5) for the purpose of seeking or obtaining legal advice (6) and the privilege has been affirmatively asserted (7) and not waived (8) or covered by any of the exceptions to the privilege.[[33]](#footnote-33)

But DP&L failed to establish any of these elements. Rather it relied upon an unexplained blanket attorney client privilege claim that was presented with no attempt to identify specific documents that it applies to. DP&L merely claims that any document that is responsive would be protected by attorney-client privilege.[[34]](#footnote-34)

A blanket assertion of privilege is insufficient to meet this burden.[[35]](#footnote-35) A representation by an attorney that there are no documents that are not covered by attorney client privilege, with no specific identification of documents is insufficient. DP&L needs to provide information to enable OCC and the PUCO to determine whether privilege exists, and if it exists, whether it has been waived or is covered by an exception to privilege.

The Ohio Rules of Civil Procedure are instructive in this regard, and the PUCO may apply those rules as appropriate, under its broad discretion in the conduct of its hearings.[[36]](#footnote-36) Under that rule, “When information is privileged or subject to discovery is withheld on a claim that it is privileged or is subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest that claim.”

A party wishing to protect a document from disclosure under the work product doctrine also has the burden of proving that the materials should not be discoverable.[[37]](#footnote-37) The burden is fulfilled only if the party can show 1) the material is a document, electronically stored information or tangible thing; 2) prepared in anticipation of litigation and 3) prepared by a party or its representative.[[38]](#footnote-38) Upon a showing of all of these requirements, the burden shifts to the opposing party to show “good cause” for obtaining such documents.[[39]](#footnote-39) But here, even though work product is claimed, the Company has failed to identify specifically what tangible information exists, and how it meets the definition of work product. So the burden has not shifted to OCC.[[40]](#footnote-40)

A proper claim of privilege, whether attorney-client or trial preparation/work product doctrine, requires a specific designation and description of documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the description is precise there is no basis on which to weigh the applicability of the claim of privilege. Hence, if a party is resisting disclosure on the privilege, it must show sufficient facts as to bring the identified and described discovery within the “narrow confines” of the privilege.[[41]](#footnote-41) DP&L did not.

On December 7, 2012, OCC requested that DP&L produce a privilege log.[[42]](#footnote-42) DP&L’s response, one week later, was that it would not because it would be “unduly burdensome.”[[43]](#footnote-43) DP&L offered to do so only if OCC would pay an attorney at Counsel’s law firm to create a privilege log. When pressed into defining how burdensome it would be, DP&L responded that it would take 50-70 hours and the billing rate would be $180/hour.[[44]](#footnote-44) In other words, DP&L would create a privilege log but only with charging OCC $9,000-$13,500--in this case where just one of DP&L’s proposals tops $600 million for customers to pay. OCC declined that offer.[[45]](#footnote-45) Subsequently, DP&L agreed to conduct a search of the law firm’s e-mail with targeted search terms that OCC would provide. On December 20, 2012, OCC provided proposed terms. To date, a discovery log has not been produced.

By failing to produce a privilege log in a timely manner, the Company has failed to demonstrate that either the attorney client privilege or the work product/trial preparation doctrine applies to some unnamed and unidentified documents. As the Commission has recognized, the purpose of a privilege log is to assist the parties contesting the privilege claim as well as the attorney examiner in evaluating the merits of the privilege claim to understand both the parameters of the claim and its legal sufficiency.[[46]](#footnote-46) Because DP&L has not produced a privilege log, and has not otherwise provided a document-by-document description of the information responsive to discovery, OCC (and the Commission) have been precluded from determining whether privilege actually exists. Nor can the OCC (or the Commission) determine whether the alleged privilege has been waived or whether there is an exception to privilege for the discovery in question.

Apart from the general statements that all communications that are responsive to OCC’s discovery are privileged, the Company failed to show how the privilege (attorney-client or trial preparation) applies to any particular document. On this basis, the Commission should compel answers to the discovery, finding that privilege does not apply. This would be appropriate because the Company has failed to establish that a privilege or doctrine exists and applies to any particular documents.

Such a ruling would be in keeping with Attorney Examiner Price’s ruling in the FirstEnergy all electric case.[[47]](#footnote-47) There parties were ordered to produce responsive documents because they failed to establish, on a document by document basis, that an attorney-client privilege or trial preparation privilege applies. Attorney Examiner Price’s ruling was subsequently confirmed by the Commission when it denied an interlocutory appeal that was taken of Examiner Price’s ruling.[[48]](#footnote-48)

### 2. The Company’s objections to OCC discovery based on undue burden should be overruled because the Company has failed to establish undue burden and should have moved for protection if the discovery was truly burdensome.

DP&L claimed there was an undue burden to respond to OCC discovery requests.[[49]](#footnote-49) In a case where DP&L has burdened the parties with three filings in succession and where DP&L would burden Ohio customers with paying for proposals totaling hundreds of millions of dollars, DP&L should be extremely limited in what it would describe to this Commission as DP&L’s burden in answering questions. Unfortunately, DP&L has not been so circumspect in its efforts to avoid sharing meaningful information about its case.

DP&L has failed to explain how responding to these discovery requests would be unduly burdensome. Federal case law[[50]](#footnote-50) 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.[[51]](#footnote-51) In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.[[52]](#footnote-52) General objections without specific support may result in waiver of the objection.[[53]](#footnote-53) Perhaps the objection was designed to test whether OCC would move to compel answers to the inadequate responses.

Here, the Company has failed to specifically show how the interrogatories and requests for production are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support[[54]](#footnote-54) and the Company has failed to do so, the Commission should overrule this objection.

Moreover, if the discovery requests were truly burdensome, DP&L has a remedy. Where a party finds that compliance with a discovery request would be burdensome or costly, the party may seek a protective order under Ohio Admin. Code 4901-1-24(B), O.A.C. Such a filing requires the party to present specific and detailed reasons why providing a response to matters will be unduly burdensome.[[55]](#footnote-55) DP&L did not seek a protective order and its failure to do so speaks volumes.

Additionally, courts have recognized that it is not a valid objection that compilation of data through discovery will necessitate large expenditures of time and money. *Adelman v. Nordberg Manufacturing Co.* (1947 DC Wis), 6 F.R.D. 383; *Burns v. Imagine Films Entertainment* (1996, WD NY), 164 F.R.D. 589. Rather, parties are expected to bear expenses incident to litigation. *Life Music, Inc. v. Broadcast Music, Inc.* (1996, SD NY), 41 F.R.D. 16.

DP&L should expect that detailed discovery will be “incident” to seeking hundreds of millions of dollars from Ohio customers. Here the Company is requesting the authority to collect $687 million from customers for one charge in the ESP plan—the SSR rider. DP&L bears the burden of proving its ESP provisions, including the SSR, are permitted under R.C. 4928.143(B)(2), and that the ESP is more favorable in the aggregate than the MRO.[[56]](#footnote-56) Additionally, it must prove that the provisions of the ESP are consistent with state policy enunciated in R.C. 4928.02.[[57]](#footnote-57) Given the magnitude of its requested increase, DP&L should expect vigorous discovery to be conducted. Ample rights of

discovery are afforded parties in Commission proceedings, by law[[58]](#footnote-58) and by rule[[59]](#footnote-59) and precedent.[[60]](#footnote-60) The Company’s objection should be overruled.

### 3. The Company’s objections to OCC discovery based on affiliates not being subject to discovery should be overruled because the discovery being sought is DP&L-specific and is known by DP&L or readily available to it.

The Company objects to providing certain discovery[[61]](#footnote-61) alleging that OCC is seeking to do discovery on its affiliates. A close review of the discovery in question reveals that the information sought is limited to DP&L-specific information. OCC’s discovery at issue does not seek information pertaining to the affiliate or the affiliates’ business. For instance, Interrogatories 255, 260, and 261 seek to discover DP&L-specific information that was reported by AES Corporation in a public presentation to investors. Interrogatories 333 and 334 seek DP&L specific information that was used in AES’ impairment analysis.

While DP&L at times proclaims that the information sought to be discovered is in the possession of it unregulated affiliate,[[62]](#footnote-62) this does not insulate DP&L from its obligation to provide sufficient responses to appropriate discovery requests. 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.” Certainly, the discovery OCC seeks is known by DP&L or readily available to it. Just because the information may be in the possession of an affiliate does not mean it is not known by DP&L or readily available to it. Indeed, DP&L has made no such claim that the information is not known or not readily available to it.

DP&L has a legal duty to discover and produce readily available evidence pertaining to its case.[[63]](#footnote-63) In other words if DP&L has access to the information sought, then it must produce it.[[64]](#footnote-64) Clearly, the information sought was supplied by DP&L to its affiliate, is known by DP&L, and would be readily available to it. It would be inconsistent with the Commission’s discovery rules to allow DP&L to shield the information from discovery by shipping it off to its affiliate.

Moreover, the shielding of affiliate information from discovery runs counter to provisions under S.B. 221[[65]](#footnote-65) and the Ohio Admin. Code [[66]](#footnote-66) which requires disclosure of affiliate information,[[67]](#footnote-67) provided an appropriate discovery request is made. In particular, the Commission rules require utilities to provide information with respect to corporate separation (Ohio Admin. Code 4901-35-11, Appendix B, subsection (D), and permit the PUCO Staff to investigate the operations of the electric utility affiliate, with the affiliates employees, officers, books, and records being made available to them.[[68]](#footnote-68)

For these reasons the Company’s objections to discovery on these grounds should be overruled.

### 4. The Company’s objections that the discovery calls for a narrative answer should be overruled because the Company has failed to provide authority for such an objection.

The Company objects to certain of the discovery requests on grounds that the discovery calls for a narrative answer.[[69]](#footnote-69) However, there is nothing in the Commission’s rules that suggest that such discovery is objectionable. And when asked for authority for this objection, the response from the Company was merely that the objection came from one of the Company’s senior counsel. With no authority to attest to the legitimacy of the objection, the Commission should overrule it.

## C. OCC Undertook Reasonable Efforts To Resolve The Discovery Dispute.

As detailed in the attached affidavit OCC took reasonable efforts to resolve the discovery dispute.[[70]](#footnote-70) Once OCC received the responses and objections, OCC communicated to Company Counsel its concerns. OCC explained why the information needed was relevant. OCC offered legal authority to back up its view of the Company’s responsibilities under the discovery provisions of the Ohio Admin. Code. In some instances OCC offered to narrow its discovery. In other instances, OCC offered search terms for a more targeted search of records to occur. Reasonable efforts to resolve this discovery dispute were undertaken. Those efforts failed, necessitating this motion to compel.

# IV. CONCLUSION

When utilities file applications (and DP&L has by now essentially filed three in one case) for massive collections of money from their customers, they should expect under law, rule and reason that there will be thorough discovery. The PUCO allows for that discovery, pursuant to R.C. 4903.082 and Ohio Adm. Code 4901-1-16 and other authority.

Ohio Adm. Code 4901-1-16(B) provides the recipient of discovery the opportunity to prove that the discovery in question will not lead to the discovery of admissible evidence. DP&L did not supply that proof. Nor has the Company provided anything but conclusory statements as to the “burden” that will be imposed upon it to answer these interrogatories. And the Company relies upon blanket claims of privilege to shield it from discovery, without making a document by document showing. Such claims are inconsistent with PUCO practice.[[71]](#footnote-71)

It is appropriate and fitting that the PUCO, consistent with its rules and the statutes discussed herein, grant OCC’s Motion to Compel. Granting OCC’s motion to compel will further the interests of consumers by requiring information to be produced by DP&L that will enable OCC to further evaluate the Company’s claims for a $687 million charge.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

*/s/ Maureen R. Grady*

Melissa R. Yost, Counsel of Record

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Tad Berger[[72]](#footnote-72)

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Motion to Compel Responses to Discovery by the Office of the Ohio Consumers’ Counsel was provided to the persons listed below electronically this 23rd day of January 2013.

*/s/ Maureen R. Grady*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Maureen R. Grady

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1. Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-1)
2. See Ohio Adm. Code 4901-1-12 and 4901-1-23. [↑](#footnote-ref-2)
3. Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-3)
4. See DP&L response to OCCInterrogatories 227, 239, 268 (Exhibits 1, 2, 6); Request for Production 37 and 39 (Exhibits 9, 10). [↑](#footnote-ref-4)
5. See attached Affidavit of Counsel. [↑](#footnote-ref-5)
6. See DP&L Response to OCC Interrogatories 255, 260, 261, 333, 334 (Exhibits 3, 4, 5, 7, 8) ; RFP 69, 71, and 73 (Exhibits 11,12, 13). [↑](#footnote-ref-6)
7. See DP&L Response to OCC Interrogatories 255, 260, 261, 333,334 (Exhibits 3, 4, 5, 7, 8); RFP 69, 71, and 73 (Exhibits 11, 12, 13). [↑](#footnote-ref-7)
8. See DP&L Response to OCC Interrogatories 227, 239, 268, 333, 334 (Exhibits 1, 2, 6, 7, 8), RFP 37, 39, 69, 71, and 73 (Exhibits 9-13). [↑](#footnote-ref-8)
9. Ohio Admin. Code 4901-1-19 requires that interrogatories “shall be answered separately and fully” in writing and under oath. See also Ohio Civil Rule 33 (A)(3). [↑](#footnote-ref-9)
10. *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar.17, 1987). [↑](#footnote-ref-10)
11. Id., citing *Penn Central Transportation Co. v. Armco Steel Corp*. (C.P. 1971), 27 Ohio Misc. 76. [↑](#footnote-ref-11)
12. *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, 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. [↑](#footnote-ref-12)
13. See Ohio Adm. Code 4901-1-23(C)(1). [↑](#footnote-ref-13)
14. Ohio Adm. Code 4901-1-23(C)(2). [↑](#footnote-ref-14)
15. See Exhibit 3. [↑](#footnote-ref-15)
16. Exhibits 4, 5. [↑](#footnote-ref-16)
17. Exhibit 7. [↑](#footnote-ref-17)
18. Exhibit 8. [↑](#footnote-ref-18)
19. Exhibits 11, 12, 13. [↑](#footnote-ref-19)
20. See Attachment 10. [↑](#footnote-ref-20)
21. The Company has not refuted this. [↑](#footnote-ref-21)
22. Exhibit 2. [↑](#footnote-ref-22)
23. Exhibit 10. [↑](#footnote-ref-23)
24. Exhibits 1, 6. [↑](#footnote-ref-24)
25. Exhibit 9. [↑](#footnote-ref-25)
26. With respect to Interrogatory 239, the Company also claims the discovery is “unduly burdensome.” [↑](#footnote-ref-26)
27. *Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648; *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997), cert. denied, 522 U.S. 1047 (1998). [↑](#footnote-ref-27)
28. *In re: Guardianship of Marcia S. Clark*, 2009-Ohio-6577 at ¶8. [↑](#footnote-ref-28)
29. Sec. 5.02[8], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege (Matthew Bender 2d ed.). [↑](#footnote-ref-29)
30. *United States v. Rockwell,* 897 F.2d 1255 (3rd Cir. 1990). [↑](#footnote-ref-30)
31. Sec. 5.02[11a], 4 Weinstein’s Federal Evidence, Chapter 503, Lawyer-Client Privilege. [↑](#footnote-ref-31)
32. *State ex rel Dann v. Taft,* (2006), 109 Ohio St.3d 364. [↑](#footnote-ref-32)
33. See *United States v. United Shoe Machinery Corp.*.(D.Mass. 1950), 89 F. Supp. 357, 359. [↑](#footnote-ref-33)
34. DP&L offered to provide OCC a declaration that it was not aware of documents that are responsive to OCC’s request that fall outside of four categories: (1) communication between DP&L and the firm; (2) communications between DP&L employees and DP&L’s in-house counsel; (3) communications between DP&L or its counsel and non-testifying experts or (4) work done by DP&L on the SSO filings at the direction of legal counsel. See Attachment 4. [↑](#footnote-ref-34)
35. *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010). [↑](#footnote-ref-35)
36. [*Greater Cleveland Welfare Rights Organization, Inc. et al., v. Public Utilities Commission of Ohio et al.,* 2 Ohio St.3d 62 at 68 (1982)*,*](https://advance.lexis.com/GoToContentView?requestid=6169267f-f605-4459-92e1-a67e1778fb1a##) citation omitted. See also R.C. 4903.22 and 4901.13. [↑](#footnote-ref-36)
37. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166. [↑](#footnote-ref-37)
38. See Ohio Civ. R. 26(B)(3) (2008). [↑](#footnote-ref-38)
39. Ohio Civ. R. 26(B)(3). [↑](#footnote-ref-39)
40. Moreover, even if DP&L had initially met its burden of establishing the work product doctrine applies to specific information OCC has requested, the inquiry does not end. If a party can show good cause—a demonstrated “need for the materials -ie., a showing that the materials or the information they contain, are relevant and otherwise unavailable”--discovery of the requested materials may be granted. Here there is good cause because the information requested is relevant and otherwise unavailable. Under Ohio Civil Rules of Evidence, Rule 403, relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The facts of consequence to this proceeding include determining the appropriate amount, if any, to be established to ensure the financial integrity of the utility; and the blending period for the transition to 100% competitive bid. The information that OCC seeks is the Company’s analysis of alternate scenarios which vary the level of the SSR or the blending period for 100% CBP. This information will test the Company’s claimed need for a $687 million SSR, and a specific transition to 100% CBP. It is relevant under the test set forth in Rule 403. Good cause can be shown. [↑](#footnote-ref-40)
41. The lawyer-client privilege is inconsistent with the common law rule of evidence that any witness with knowledge of the facts at issue may be called to testify about what he knows. This is because the privilege “impedes full and free discovery of the truth” and is “in derogation of the public’s ‘right to every man’s evidence.’” The privilege is not favored by the federal courts and should be “strictly confined within the narrowest possible limits consistent with the logic of its principle.” Bender’s Forms of Discovery Treatise Sec. 5.02[2][b] (citations omitted). [↑](#footnote-ref-41)
42. See Attachment 1. [↑](#footnote-ref-42)
43. See Attachment 4. [↑](#footnote-ref-43)
44. See Attachment 4. [↑](#footnote-ref-44)
45. See Attachment 8. [↑](#footnote-ref-45)
46. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶19 (Jan. 27, 2011). [↑](#footnote-ref-46)
47. Id., Tr. 112 (Jan. 7, 2011). [↑](#footnote-ref-47)
48. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶21 (Jan. 27, 2011). [↑](#footnote-ref-48)
49. See DP&L response to OCC Interrogatories 239, 255, 260, 261, 268, 333, 334, RFP 69, 71, 73 (Exhibits 2-13). [↑](#footnote-ref-49)
50. 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.” [↑](#footnote-ref-50)
51. *Trabon Engineering Corp. v. Eaton Manufacturing Co*.( N.D. Ohio 1964), 37 F.R.D. 51, 54. [↑](#footnote-ref-51)
52. *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297. [↑](#footnote-ref-52)
53. Id., citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264. [↑](#footnote-ref-53)
54. *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917. [↑](#footnote-ref-54)
55. See, e.g., *In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 16 (Mar. 17, 1987). [↑](#footnote-ref-55)
56. See R.C. 4928.143(C)(1). [↑](#footnote-ref-56)
57. [*Elyria Foundry Co. v. Pub Util. Comm.*](https://advance.lexis.com/GoToContentView?requestid=6169267f-f605-4459-92e1-a67e1778fb1a##) (2007),114 Ohio St.3d 305*.*  [↑](#footnote-ref-57)
58. R.C. 4903.082. [↑](#footnote-ref-58)
59. Ohio Admin. Code 4901 -1-16 (scope of discovery is wide—reasonably calculated to lead to the discovery of admissible evidence). [↑](#footnote-ref-59)
60. See, e.g., *Ohio Consumers’ Counsel v. Pub. Util. Comm.*(2006), 111 Ohio St.3d 300, 320. [↑](#footnote-ref-60)
61. See DP&L Response to OCC Interrogatories 255, 260, 261. 333, 334, Requests for Production 69, 71 (Exhibits 3, 4, 5, 7, 8, 11, 12). [↑](#footnote-ref-61)
62. See DP&L Response to OCC Interrogatories 255, 260, 261, 333, 334, RFP 69, 71 (Exhibits 3, 4, 5, 7, 8, 11, 12). [↑](#footnote-ref-62)
63. 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. [↑](#footnote-ref-63)
64. 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). [↑](#footnote-ref-64)
65. See R.C. 4928.145. [↑](#footnote-ref-65)
66. Ohio Adm. Code 4901:1-35-07. [↑](#footnote-ref-66)
67. See also *Ohio Consumers’ Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789 (holding that side agreements between utilities and third parties are discoverable). [↑](#footnote-ref-67)
68. See Ohio Adm. Code 4901:1-37-07. [↑](#footnote-ref-68)
69. DP&L response to OCC Interrogatories 255, 260,261, 333,334, Request for production 69, 71, 73 (Exhibits 3-5, 7-8, 11-13). [↑](#footnote-ref-69)
70. See also Attachments 1-9. [↑](#footnote-ref-70)
71. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶21 (Jan. 27, 2011) (Commission found that attorney-client privilege or work product must be shown to apply to particular documents, and that general statements claiming that all communications between certain individuals are privileged fails to establish privilege.) [↑](#footnote-ref-71)
72. Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-72)