**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**

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

*/s/ Maureen R. Grady*

Melissa R. Yost, Counsel of Record

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January 29, 2013

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**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 Requests for Production of Documents (RPD) 89 which is attached hereto as OCC Exhibits 1 and 2.

As demonstrated in the attached Memorandum in Support, DP&L objected to this discovery based on a litany of objections, including “privileged” and “work product.” The privilege DP&L is asserting is the work product doctrine. With respect to RPD 89, DP&L has withheld all unnamed, responsive documents on the ground that the communications are work product and reveal DP&L’s expectations as to the results of this case.

Yet DP&L failed to identify the responsive documents, and did not explain exactly how the documents fall within the work product doctrine. DP&L has never identified on a document-by-document basis the justification for the alleged “privilege.” OCC requested a privilege log to enable it to determine the validity of the work product claim, and to enable an in camera inspection of the documents at the upcoming January 30, 2013 discovery conference. Nonetheless, DP&L has not produced a privilege log, nor provided any further information to back up its work product claim.

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. OCC’s Motion to compel should be granted, for the reasons set forth below. If the Attorney Examiner does not outright grant this motion, the Attorney Examiner should conduct an in camera inspection of the documents subject to this motion to compel at the January 30, 2013 discovery conference.

Respectfully submitted,

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EXH 3 – Executed Protective Agreement

**ATTACHMENTS**

ATTACHMENT 1 – OCC to DP&L – 1/22/13 e-mail

ATTACHMENT 2 – OCC to DP&L – 1/23/13 e-mail

ATTACHMENT 3 – DP&L TO OCC – 1/23/13 e-mail

ATTACHMENT 4 – OCC TO DP&L – 1/24/13 e-mail

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

OCC has sought (several times) to obtain documents that DP&L provided to the three credit rating agencies during 2012 and 2013 related to its creditworthiness, it future business conditions, and its ability to repay interest and capital.[[4]](#footnote-4) DP&L did not produce any documents, but instead relies upon a litany of rote objections and upon an unsubstantiated claim of work product as a reason to not respond.[[5]](#footnote-5) At the same time DP&L has not produced a discovery log, nor identified responsive documents that are being withheld. Additionally, while DP&L claims that RPD 89 is “unduly burdensome” to respond to, it does not explain what efforts would be necessary to respond. DP&L also maintains objections that the information sought is “proprietary” 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. Further DP&L objects to the information sought on grounds of relevance. But, DP&L’s own witness, Mr. Chambers, devotes 59 pages and countless exhibits to defining financial integrity in the context of the company’s overall creditworthiness, as measured by credit rating agencies. It is the very same “financial integrity” that customers are being asked to ensure through the payment of a $687 million SSR charge.

The Company’s “responses” are evasive, incomplete, and insufficient. Such responses are contrary to the Commission’s rules.[[6]](#footnote-6) The Attorney Examiner should overrule the objections to the discovery, and order DP&L to immediately provide complete responses to OCC’s RPD 89. In the event that the Attorney Examiner does not grant this motion outright, it should conduct an in camera inspection of the documents being withheld, to test the applicability of the Company’s work product claim.

# 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.”[[7]](#footnote-7) 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.”[[8]](#footnote-8) 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.[[9]](#footnote-9)

This scope of discovery is applicable to written requests for production of documents. Written requests may seek to inspect and copy any designated documents which are in the possession, custody, or control of a party, under Ohio Adm. Code 4901-1-20. Requests for production may also request a party to produce for inspection and copying any tangible things which are in the possession, custody or control of a party. And requests for production may seek to permit entry for the purposes of inspecting the property or any designated object or operation thereon. Each request must be responded to and shall state that inspection or related activities will be permitted as requested unless the request is objected to. In such a case the reason for the objection must be stated.

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.[[10]](#footnote-10) Copies of the discovery requests and the responses are to be attached.[[11]](#footnote-11) 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 it undertook to resolve differences between it and the Company. At this point it is clear that there is no resolution. OCC seeks responses to RPD 89 and is unable to obtain the response without the Commission compelling such a result.

# III. ARGUMENT

## A. Documents That DP&L Provided To The Credit Rating Agencies In 2012 And 2013 Are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

RPD 89seeks documents that DP&L provided or that were provided on behalf of DP&L to the three credit rating agencies during 2012 and 2013 pertaining to three categories: (a) the utility’s creditworthiness; (b) the utility’s future business conditions; and (c) the utility’s ability to repay interest and capital.[[12]](#footnote-12)

The creditworthiness of a company, including a utility, is assessed by independent credit rating agencies. These credit rating agencies assign a credit rating as an indication of a company’s overall creditworthiness. This credit rating then becomes information available to investors, who factor such ratings into their investment decisions.

DP&L Witness Chambers testifies that credit ratings are important and crucial to maintaining the financial integrity of DP&L. Indeed, Mr. Chambers opines that one way of defining “financial integrity” is to relate it to a company’s overall creditworthiness—with the creditworthiness being measured by credit rating agencies.[[13]](#footnote-13) It is the same “financial integrity” that DP&L is asking customers to pay $687 million for through the SSR.

Mr. Chambers testifies that if the Company’s proposed SSR is not approved, DP&L’s financial integrity will not be maintained and DP&L would “probably” lose its investment grade credit rating from all the rating agencies.[[14]](#footnote-14) This in turn will cause DP&L’s cost of capital to increase and access to capital may be restricted. [[15]](#footnote-15) According to Mr. Chambers, these effects would harm both DP&L and its customers through higher costs and diminished quality of service.[[16]](#footnote-16) Thus, DP&L’s justification for customers paying $687 million, is attributable, in part, to the need for DP&L to maintain an investment grade credit rating.

As Mr. Chambers testified, the debt rating process by credit agencies “involves a great deal of interaction between the rated entity (the debt issuer) and the rating agency.”[[17]](#footnote-17) Mr. Chambers testifies to DP&L’s current long-term credit rating and discusses recent actions in November 2012 by all three agencies that have changed DP&L’s ratings in some respect.[[18]](#footnote-18) Yet, at the same time, DP&L seeks to preclude OCC from discovering information DP&L provided to those agencies that were the basis of DP&L’s current long-term credit rating as well as the November 2012 ratings changes.

DP&L objects to the discovery on grounds of relevance but, as explained above, the discovery is appropriate as it is reasonably calculated to lead to the discovery of admissible evidence. It is directed to exploring the justification for the $687 million SSR charge. And it is directed specifically to Mr. Chambers’ testimony where he discusses the current debt ratings of DP&L and the recent changes to the debt ratings. Mr. Chambers testifies that such ratings are developed with a great deal of interaction between the debt issuer and the rating agency. Mr. Chambers most likely considered, if not relied upon, the information OCC is seeking discovery of. That discovery--documents pertaining to interaction between the credit rating agencies and the Company—is reasonably calculated to lead to the discovery of admissible evidence. OCC is seeking to obtain documents that constitute underlying facts or data pertaining to Mr. Chamber’s expert opinion. The Company’s objections to this discovery on grounds of relevance should be overruled.

## B. The Company’s Numerous Objections Should Be Overruled.

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

While DP&L relies upon “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.[[19]](#footnote-19)

DP&L advised that the “privilege” it claimed is not attorney-client privilege, but the work product doctrine.[[20]](#footnote-20) DP&L claims that all of the information provided to the credit rating agencies over the past two years is work product because the information conveyed pertains to DP&L’s expectations as to the results of this case.

But a blanket assertion of privilege[[21]](#footnote-21) is insufficient to meet the burden of establishing that the work product doctrine applies. DP&L needs to provide information to enable OCC and the PUCO to determine whether the work product doctrine applies, and if it is applicable, whether it has been waived[[22]](#footnote-22) or there is an exception to the doctrine.[[23]](#footnote-23)

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.[[24]](#footnote-24) Under Ohio Civ. R. 26(B)(6)(a) “[w]hen information 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 has the burden of proving that the materials should not be discoverable.[[25]](#footnote-25) 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.[[26]](#footnote-26)

Upon a showing of all of these requirements, the burden shifts to the opposing party to show “good cause” for obtaining such documents.[[27]](#footnote-27) 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.[[28]](#footnote-28)

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 based on privilege, it must show sufficient facts as to bring the identified and described discovery within the “narrow

confines” of the privilege.[[29]](#footnote-29) And it must show that it has not waived the privilege and that there are no exceptions to the privilege. DP&L however, failed to do either. All it has done is claim that all documents provided to credit rating agencies from 2011 forward are work product.[[30]](#footnote-30) To date, it has not produced a discovery log.

By failing to produce a privilege log in a timely manner, the Company has failed to demonstrate that 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.[[31]](#footnote-31) 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 the work product doctrine applies. Nor can the OCC (or the Commission) determine whether the work product doctrine has been waived or some exception to the doctrine applies.

Apart from the general statements that all communications that are responsive to OCC’s discovery are privileged, the Company failed to show how the work product document applies to any particular document. On this basis, the Commission should compel answers to the discovery, finding that doctrine does not apply. This would be appropriate because the Company has failed to establish that the responsive documents fall under the work product doctrine.

Such a ruling would be in keeping with Attorney Examiner Price’s ruling in the FirstEnergy all electric case.[[32]](#footnote-32) 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.[[33]](#footnote-33)

Moreover, at the heart of this request is an attempt to discover facts or data that Mr. Chambers considered or relied upon in forming his opinions expressed in testimony.

Disclosure of the information requested will permit OCC to effectively cross-examine Mr. Chambers on all bases for opinions expressed, including information that might have been provided to him by his attorney. There is no sufficient reason that an unsubstantiated claim of work product should be accepted to shield facts, data, and assumptions that underlie Mr. Chambers testimony, even if these were provided by DP&L’s attorneys. This is especially true when the facts, data, and assumptions were provided to a third party—a credit rating agency. If Mr. Chambers considered facts, or data that was supplied by DP&L’s attorney(s), DP&L should produce such facts or data when asked. If Mr. Chambers relied upon assumptions provided by DP&L’s attorney(s), then DP&L should produce such assumptions.

### 2. The Company’s objections 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 RPD 89. 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 its 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 OCC RPD 89 would be unduly burdensome. Federal case law[[34]](#footnote-34) 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.[[35]](#footnote-35) In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.[[36]](#footnote-36) General objections without specific support may result in waiver of the objection.[[37]](#footnote-37)

Here, the utility has failed to specifically show how the request for production is unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support[[38]](#footnote-38) and DP&L 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). Such a filing requires the party to present specific and detailed reasons why providing a response to matters will be unduly burdensome.[[39]](#footnote-39) DP&L did not seek a protective order.

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.[[40]](#footnote-40) Additionally, it must prove that the provisions of the ESP are consistent with state policy enunciated in R.C. 4928.02.[[41]](#footnote-41) 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[[42]](#footnote-42) and by rule[[43]](#footnote-43) and precedent.[[44]](#footnote-44) The Company’s objection should be overruled.

### 3. DP&L’s objections that the request seeks “proprietary” documents and is vague or undefined should be overruled.

DP&L also objects on grounds that the information sought is “proprietary” and “vague or undefined.” OCC will address these seriatim.

If the information is objectionable because it is “proprietary” then it may be treated as protected information under the current protective agreement that OCC and DP&L executed.[[45]](#footnote-45) That protective agreement provides specific safeguards to ensure that alleged proprietary information is not disclosed to third parties. This objection should be overruled.

DP&L’s objection that OCC’s request is vague or undefined is hard to understand. OCC requested discrete materials that were provided to the credit rating agencies. If there is an issue about the meaning of the terms “creditworthiness” “future business conditions” or “ability to repay interest and principal” OCC would be willing to accept a broader base of documents that covers all documents provided by DP&L or on its behalf to the credit rating agencies. Moreover, these terms should be familiar to DP&L as they come from the testimony of their own witness, Mr. Chambers. DP&L’s objection should be overruled.

## 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.[[46]](#footnote-46) Once OCC received the responses and objections, OCC communicated to Company Counsel its concerns. OCC offered legal authority to back up its view of the Company’s responsibilities under the discovery provisions of the Ohio Admin. Code. OCC offered to further discuss the issues with Company Counsel. 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 this one request for production. And the Company relies upon a blanket claim of work product to shield it from discovery, without making a document by document showing. Such a claim is inconsistent with PUCO practice.[[47]](#footnote-47)

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

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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 29th day of January 2013.

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

Maureen R. Grady

Assistant Consumers’ Counsel

**SERVICE LIST**

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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 OCC RFP 89, which is a reiteration of an earlier request, OCC RFP 41. [↑](#footnote-ref-4)
5. See DP&L response to OCCRPD 89. (Exhibit 1, 2). [↑](#footnote-ref-5)
6. Ohio Adm. 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-6)
7. *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-7)
8. Id., citing *Penn Central Transportation Co. v. Armco Steel Corp*. (C.P. 1971), 27 Ohio Misc. 76. [↑](#footnote-ref-8)
9. *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-9)
10. See Ohio Adm. Code 4901-1-23(C)(1). [↑](#footnote-ref-10)
11. Ohio Adm. Code 4901-1-23(C)(2). [↑](#footnote-ref-11)
12. See Exhibit 1, 2. [↑](#footnote-ref-12)
13. Second Revised Testimony of DP&L Witness Chambers at 9. [↑](#footnote-ref-13)
14. Id. at 4. [↑](#footnote-ref-14)
15. Id. at 1. [↑](#footnote-ref-15)
16. Id. at 8. [↑](#footnote-ref-16)
17. Id. at 14. [↑](#footnote-ref-17)
18. See Second Revised Testimony of Witness Chambers at 12. [↑](#footnote-ref-18)
19. *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-19)
20. See Attachment 3. [↑](#footnote-ref-20)
21. *Hitachi Medical Systems America, Inc. v. Branch*, 2010 U.S. District, Lexis 1597 at 7 (N.D. Ohio) (Sept. 24, 2010). [↑](#footnote-ref-21)
22. See *U.S. v. Nobles*, 422 U.S. 225, 239 (1975) (holding that work product protection could be waived with regard to matters raised in testimony). [↑](#footnote-ref-22)
23. See Ohio R. Civ. P. 26(B)(5)(d)(ii), (iii). Under 2012 amendments to Ohio R. Civ. P. 26(B) (and federal rules of civil procedure) there are exceptions to the attorney work product doctrine that permit discovery of work product where a testifying expert considers or relies onfacts, data, and assumptions that the party’s attorney provided. [↑](#footnote-ref-23)
24. [*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-24)
25. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166. [↑](#footnote-ref-25)
26. See Ohio Civ. R. 26(B)(3). [↑](#footnote-ref-26)
27. Id. [↑](#footnote-ref-27)
28. 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 -i.e., 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. The information that OCC seeks goes to the information that the Company provided to the credit rating agencies. This information will test the Company’s claimed need for a $687 million SSR. It is relevant under the test set forth in Rule 403. Good cause can be shown. [↑](#footnote-ref-28)
29. 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-29)
30. OCC inquired as to whether all such documents were tied to the attorney’s assessment of the results of the case. See Exhibit 4. DP&L’s Attorney did not respond to OCC’s inquiry in this regard. [↑](#footnote-ref-30)
31. 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-31)
32. Id., Tr. 112 (Jan. 7, 2011). [↑](#footnote-ref-32)
33. *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-33)
34. 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-34)
35. *Trabon Engineering Corp. v. Eaton Manufacturing Co*.( N.D. Ohio 1964), 37 F.R.D. 51, 54. [↑](#footnote-ref-35)
36. *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297. [↑](#footnote-ref-36)
37. Id., citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264. [↑](#footnote-ref-37)
38. *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917. [↑](#footnote-ref-38)
39. 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-39)
40. See R.C. 4928.143(C)(1). [↑](#footnote-ref-40)
41. [*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-41)
42. R.C. 4903.082. [↑](#footnote-ref-42)
43. Ohio Admin. Code 4901 -1-16 (scope of discovery is wide—reasonably calculated to lead to the discovery of admissible evidence). [↑](#footnote-ref-43)
44. See, e.g., *Ohio Consumers’ Counsel v. Pub. Util. Comm.*(2006), 111 Ohio St.3d 300, 320. [↑](#footnote-ref-44)
45. See Exhibit 3. [↑](#footnote-ref-45)
46. See also Attachments 1-4. [↑](#footnote-ref-46)
47. 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-47)
48. Mr. Berger is representing OCC in PUCO Case No. 12-426-EL-SSO. [↑](#footnote-ref-48)