

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION OF INDUSTRIAL ENERGY USERS-OHIO TO COMPEL DISCOVERY
RESPONSES FROM THE DAYTON POWER AND LIGHT COMPANY
AND MEMORANDUM IN SUPPORT**

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**MOTION OF INDUSTRIAL ENERGY USERS-OHIO TO COMPEL DISCOVERY
RESPONSES FROM THE DAYTON POWER AND LIGHT COMPANY**

On March 30, 2012, Industrial Energy Users-Ohio ("IEU-Ohio") moved to intervene in the above-captioned matter. On October 5, 2012, The Dayton Power and Light Company ("DP&L") filed its application to establish a standard service offer ("SSO") in the form of an electric security plan ("ESP"). IEU-Ohio has served five sets of discovery upon DP&L relevant to its ESP application ("Application") and testimony. Relevant to this motion, are IEU-Ohio's discovery requests in its Interrogatories and Requests for Production of Documents Upon Dayton Power and Light Company ESP Third Set ("IEU-Ohio's Third Set"); specifically Interrogatory Nos. ESP INT 3-1(A)-(F), ESP INT 3-2(A)-(F), and ESP INT 3-3(A)-(F), and IEU-Ohio's Request for Production

No. ESP RPD 1-4 in conjunction with FirstEnergy Solutions Corp.'s ("FES") Request for Production No. 8-13.¹

These requests seek information about DP&L's finances, specifically its attempts to reduce its expenses and/or increase its revenue to address its financial integrity. In past cases dealing with utilities' claims of financial emergency, the Public Utilities Commission of Ohio ("Commission") has held this type of information is the most important to consider.²

Additionally, IEU-Ohio seeks a copy of DP&L's CAM. The CAM details how it allocates costs to its transmission, generation and distribution business functions. The CAM is materially important to this proceeding for two reasons. First, it will provide some transparency into DP&L's finances and into the specific finances of its business units (as discussed herein, this issue is critically important because DP&L's generation business is on its own in the competitive market and the Commission lacks authority to address any financial issues relative to DP&L's transmission business which is subject to the exclusive regulation of the Federal Energy Regulatory Commission ("FERC")). The CAM is also important to this proceeding because Ohio law and Commission rules require DP&L to be in compliance with the corporate separation requirements. The CAM is perhaps the single most important document regarding corporate separation.

To date, DP&L has failed to comply with Commission discovery rules, including the applicable response times established by Commission rule and later shortened by a

¹ Pursuant to IEU-Ohio Request for Production No. ESP RPD 1-4, IEU-Ohio sought all discovery requested by other parties. FES requested that DP&L produce its Cost Allocation Manual ("CAM") in its Request for Production No. 8-13 (Attachment C).

² *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Fixed Schedules Fixing Rates and Charges for Electric Service*, Case Nos. 88-170-EL-AIR, *et al.*, Opinion and Order at 15 (Aug. 23, 1988).

Commission Entry. As detailed in the attached memorandum in support and attached affidavit, IEU-Ohio has attempted in good faith to resolve its discovery disputes with DP&L but those efforts have failed. It is clear that DP&L will not participate in meaningful discovery unless the Commission intervenes and grants this motion. Accordingly, IEU-Ohio moves the Commission for an order compelling DP&L to respond to IEU-Ohio's discovery requests identified herein.

Respectfully submitted,

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 In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 672-EL-RDR
to Establish Tariff Riders)	

MEMORANDUM IN SUPPORT

This is now the second motion to compel IEU-Ohio has been forced to file in this proceeding. Despite IEU-Ohio's continued efforts³ to resolve its discovery disputes with DP&L, DP&L has made it more than clear that it will not engage in meaningful discovery and comply with proper discovery requests without Commission intervention. The Commission must compel DP&L to comply with IEU-Ohio's proper discovery requests. As procedural deadlines approach, the need for immediate Commission intervention is

³ In attempts to resolve DP&L's incomplete responses to IEU-Ohio's first and second sets of discovery requests, IEU-Ohio followed up with DP&L on November 9, 2012, November 27, 2012, November 29, 2012, December 6, 2012, December 11, 2012, December 14, 2012, and again on December 17, 2012. On December 20, 2012 and December 25, 2012, IEU-Ohio contacted DP&L in attempts to resolve outstanding discovery issues with the requests that are the subject of this motion to compel.

even more heightened. For the reasons below, IEU-Ohio requests the Commission to compel DP&L to timely and completely respond to the discovery requests identified herein.

I. INTRODUCTION

On March 30, 2012, DP&L initiated this proceeding and filed an application to establish an SSO in the form of a market rate offer (“MRO”). After months of settlement discussions, on September 7, 2012, DP&L unilaterally decided to withdraw its MRO application and indicated that it would file an application to establish an SSO in the form of an ESP. On October 5, 2012, DP&L filed its Application and supporting testimony. However, sometime in mid to late November 2012, DP&L claimed to have found significant errors with its Application, prompting DP&L to file a second application to establish an SSO in the form of an ESP (the third overall SSO application in six months).

On November 28, 2012, IEU-Ohio served DP&L with IEU-Ohio’s Third Set. On the day the discovery responses were due, Monday, December 10, 2012, counsel for DP&L contacted counsel for IEU-Ohio and indicated that DP&L had inadvertently deleted IEU-Ohio’s Third Set and would not be able to respond to discovery in the allowable timeframe. Despite DP&L’s failure to provide IEU-Ohio complete or timely responses to IEU-Ohio’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (“IEU-Ohio’s First Set”) and Second Set of Interrogatories and Requests for Production of Documents (“IEU-Ohio’s Second Set”), IEU-Ohio agreed to provide DP&L another week to provide discovery responses to IEU-Ohio’s Third Set. On December 18, 2012, DP&L served IEU-Ohio with responses to IEU-Ohio’s Third Set. DP&L’s responses to IEU-Ohio’s Third Set were incomplete

and are the subject of this motion to compel. IEU-Ohio has attempted to work out its discovery dispute with DP&L, but DP&L has indicated it does not intend to supplement its responses.

Despite unilaterally withdrawing its MRO application, and unilaterally withdrawing and supplementing its ESP Application and supporting testimony, DP&L has opposed intervenors' attempts to set a reasonable procedural schedule that would allow the Commission's Staff ("Staff") and intervenors a meaningful opportunity to review DP&L's claims. And along the way, DP&L has refused to provide substantive discovery responses, or has only provided substantive responses after IEU-Ohio threatened to file a motion to compel and then was in fact forced to file such a motion. As discussed below, the information IEU-Ohio seeks in this motion to compel is at the heart of DP&L's financial integrity claim. By granting this motion to compel, the Commission can bring additional clarity that is necessary to completely review DP&L's financial integrity claim.

II. DISCOVERY STANDARDS

Rule 4901-1-16(B), Ohio Administrative Code ("O.A.C.") (General provisions and scope of discovery), states:

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. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission.

Rule 4901-1-19(B), O.A.C. (Interrogatories and response time), provides:

Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is

not objectionable merely because it calls for an opinion, contention, or legal conclusion

Additionally, Rule 4901-1-20(A)(2), O.A.C. (Production of documents and things; entry upon land or other property), provides that, subject to the scope of discovery in Rule 4901-1-16, O.A.C., a party may request another party to “[p]roduce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.” (emphasis added).

Finally, Rule 4901-1-23, O.A.C., governs motions to compel and provides that any party may file a motion to compel with respect to:

- (1) Any failure of a party to answer an interrogatory served under rule 4901-1-19 of the Administrative Code.
- (2) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under rule 4901-1-20 of the Administrative Code.
- (3) Any failure of a deponent to appear or to answer a question propounded under rule 4901-1-21 of the Administrative Code.
- (4) Any other failure to answer or respond to a discovery request made under rules 4901-1-19 to 4901-1-22 of the Administrative Code.

This Rule also treats evasive answers as a failure to answer.⁴ Finally, before the Commission allows a motion to compel to be filed, the party seeking discovery must exhaust all other reasonable means of obtaining discovery.

III. ARGUMENT

DP&L has objected to IEU-Ohio’s Third Set on grounds that the information regarding its ability to increase revenue or decrease expenses: is irrelevant, is proprietary information, is in an affiliates’ possession, production would be an undue

⁴ Rule 4901-1-23(B), O.A.C.

burden, and the information sought is privileged or work product. The information IEU-Ohio seeks goes to the core of DP&L's ability to manage its finances and whether it is and to what extent DP&L is struggling financially. Additionally, DP&L has objected to providing its CAM⁵ on grounds that it is proprietary, privileged and work-product (and after attempting to obtain a copy of the CAM, DP&L responded to IEU-Ohio with an additional objection on grounds of relevance).

IEU-Ohio has contacted DP&L numerous times in attempts to amicably resolve its discovery dispute.⁶ But DP&L has refused to properly supplement its responses or provide the requested documents. In regards to the CAM, DP&L allowed IEU-Ohio to view the document, which IEU-Ohio then determined was entirely relevant. However, after requesting a complete copy of the CAM, DP&L refused, claiming that IEU-Ohio would have to review the CAM again and would have to choose which select pages IEU-Ohio wanted copies of, which then DP&L would review to determine if it would produce copies of those pages. IEU-Ohio indicated this approach was unacceptable and that the entire CAM was desired and relevant. DP&L again refused to produce the CAM, now claiming the entire document was irrelevant; however, DP&L's initial objections were limited to claims of propriety and privilege. DP&L only objected on grounds of relevance after IEU-Ohio requested a copy of the CAM.

⁵ In response to FES' Request for Production No. 8-13, DP&L indicated it would allow FES to view unprivileged portions of the CAM. IEU-Ohio also requested to view a copy of the CAM. After viewing an incomplete copy of the CAM, IEU-Ohio indicated that it believed the entire CAM was relevant and requested a complete copy. Although IEU-Ohio was allowed to view the CAM, the board of directors minutes, which are required by Commission rule to be maintained in the CAM, were not included. Rule 4901:1-37-08(D), O.A.C., states that the "CAM will include ... (9) [a] copy of the minutes of each board of directors meeting, where it shall be maintained for a minimum of three years." IEU-Ohio requested copies of the minutes as well; however, DP&L also indicated that it would not copy of any portion of the CAM or the board of directors minutes.

⁶ See Attachment D (affidavit of Matthew R. Pritchard).

As demonstrated below, IEU-Ohio's requests are within the scope of discovery, and DP&L's objections are without merit. Because DP&L's objections are meritless, the Commission should grant this motion and compel DP&L to provide complete and accurate responses to IEU-Ohio's discovery.

A. IEU-Ohio's discovery requests are within the scope of discovery because they are reasonably calculated to lead to discovery of admissible evidence.

IEU-Ohio's discovery requests that are the subject of this motion to compel seek two types of information: (1)⁷ information related to efforts by DP&L to enhance its revenue or reduce its expenses; and (2)⁸ DP&L's CAM. As explained below, these items are within the proper scope of discovery because they are reasonably calculated to lead to the discovery of admissible evidence.

Information related to DP&L's efforts to improve its financial integrity by reducing its expenses or increasing its revenue goes to the heart of DP&L's financial integrity claim: a claim that DP&L voluntarily put in front of the Commission. Accordingly, to the extent DP&L's Application and testimony regarding financial integrity is admissible as relevant in an ESP proceeding, IEU-Ohio's discovery requests that seek information related to DP&L's finances are reasonably calculated to lead to the discovery of admissible evidence. Moreover, the Commission has held that a utility's efforts to enhance its revenue and reduce its expenses are critically important in addressing a utility's financial integrity claim.

⁷ The first category of information was sought in IEU-Ohio's Interrogatory Nos. ESP INT 3-1(A)-(F), ESP INT 3-2(A)-(F), and ESP INT 3-3(A)-(F)

⁸ The second category of information was sought in IEU-Ohio's Request for Production Nos. ESP RPD 1-4 and FES Request for Production No. 8-13. Pursuant to IEU-Ohio Request for Production No. ESP RPD 1-4, IEU-Ohio sought all discovery requested by other parties. FES requested that DP&L produce the CAM in its Request for Production No. 8-13 (Attachment C).

In Case Nos. 88-170-EL-AIR, *et al.*, the Commission was presented with a financial integrity claim by The Cleveland Electric Illuminating Company and The Toledo Edison Company. Both companies filed applications for an increase in rates under Section 4909.18, Revised Code, and also filed motions seeking interim rate relief. In addressing the interim rate relief based upon a financial integrity claim the Commission held, “[f]ifth, and perhaps most importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency.”⁹

IEU-Ohio’s Interrogatory Nos. ESP INT 3-1(A)-(F), ESP INT 3-2(A)-(F), and ESP INT 3-3(A)-(F) ask whether DP&L, DPL Inc. (“DPL”), or AES Corporation (“AES”) have “performed any analysis, study, and/or made any recommendation of potential cost savings measures or revenue enhancements for DP&L.”¹⁰ IEU-Ohio’s requests seek information that the Commission held was “perhaps most important[]” when considering a utility’s financial integrity claim. Accordingly, IEU-Ohio’s Interrogatory Nos. ESP INT 3-1(A)-(F), ESP INT 3-2(A)-(F), and ESP INT 3-3(A)-(F) are not only within the scope of discovery, they are perhaps the most important information the Commission could have when reviewing DP&L’s financial integrity claim.

IEU-Ohio’s request for a complete copy of the CAM is also within the proper scope of discovery. The CAM is relied upon and cited to in DP&L’s own testimony for

⁹ *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Fixed Schedules Fixing Rates and Charges for Electric Service*, Case Nos. 88-170-EL-AIR, *et al.*, Opinion and Order at 15 (Aug. 23, 1988) (emphasis added).

¹⁰ Attachment A at 5 (ESP INT 3-1). Interrogatory Nos. 3-2(A)-(F) and 3-3(A)-(F) ask the same question from ESP INT 3-1, but focus on what analysis, study, and/or recommendation were taken or considered in the event that DP&L’s request for the Service Stability Rider (“SSR”) or switching tracker is denied.

support that DP&L is in compliance with its amended corporate separation plan.¹¹ Because this document is cited to and relied upon in DP&L's own testimony, the document must clearly contain relevant information. As the name of the CAM suggests, the document describes how DP&L allocates costs between its business functions. This information is relevant to issues of potential cross-subsidization between business functions, which is prohibited under Section 4928.02(H), Revised Code.

The Commission has also confirmed that cross-subsidization issues are relevant in an SSO proceeding, stating that an SSO application must be consistent with the state policies contained in Section 4928.02, Revised Code:

The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated."

...

The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code. See *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.¹²

Thus, discovery requests that seek information related to DP&L's compliance with the state policies in Section 4928.02, Revised Code, are proper in an SSO proceeding. Section 4928.02(H), Revised Code, prohibits cross-subsidies between

¹¹ Testimony of Timothy G. Rice at 2 (Dec. 12, 2012).

¹² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (Nov. 25, 2008); see also *Elyria Foundry v. Public Util. Comm.*, 114 Ohio St.3d 305 (2007).

non-competitive business functions and competitive business functions. The CAM is likely the single most important document relevant to whether there are any cross-subsidies between competitive and non-competitive business functions. Accordingly, IEU-Ohio's request for the CAM is proper because the information contained in the CAM is reasonably calculated to lead to the discovery of admissible information.

Further, the Commission's standard filing requirements require DP&L to demonstrate it is currently in compliance with its corporate separation plan.¹³ Thus, any discovery requests by IEU-Ohio related to corporate separation, e.g., the CAM, are relevant or are reasonably calculated to lead to the discovery of admissible evidence.

For these reasons, IEU-Ohio's discovery requests that are the subject of this motion to compel are properly within the scope of discovery.

B. DP&L's General Objections

1. Proprietary

DP&L objects to multiple discovery requests on grounds that the information is "proprietary, competitively sensitive or valuable, or constitutes trade secrets."¹⁴ For support, DP&L cites Rule 4901-1-24(A), O.A.C., which governs motions for protective orders. Division (A) allows a movant to seek a protective order that limits discovery in various manners. DP&L, however, did not seek to invoke Division (A) when it filed its motion for protective order along with its Application, instead filing its motion pursuant to Division (D) of that rule. Moreover, in its motion, DP&L only sought to "exempt from public disclosure certain information that is confidential, and competitively sensitive and

¹³ Rule 4901:1-35-03(F), O.A.C.

¹⁴ Attachment A at 2.

trade secret information.”¹⁵ IEU-Ohio would note that it has signed a stipulated protective agreement with DP&L, and therefore any information IEU-Ohio receives would not be disclosed to the public.¹⁶ Because DP&L’s motion for protective order did not seek to limit discovery in any manner pursuant to Rule 4901-1-24(A), O.A.C., nor has the Commission imposed any restrictions under that rule, it is improper for DP&L to claim that rule as a basis for any objection.

2. Narrative Responses

DP&L objects to multiple discovery requests on grounds that the request calls for a detailed or narrative response:

DP&L objects to each and every interrogatory that can be answered more efficiently by the production of documents or by the taking of depositions. Under the comparable Ohio Civil Rules, “[a]n interrogatory seeks an admission or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidence, a function reserved by rules for depositions.” Penn. Cent. Transp. Co. v. Armco Steel Corp., 27 Ohio Misc. 76, 77, 272 N.E.2d 877, 878 (Montgomery Ctr. 1971). As Penn further noted, interrogatories that ask one to “describe in detail,” “state in detail,” or “describe in particulars” are “open end invitation[s] without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place.” Id., 272 N.E.2d at 878.¹⁷

The scope of discovery is not limited to responses that seek one word answers nor does it prohibit narrative responses, as DP&L would have it.¹⁸ The scope of discovery

¹⁵ Memorandum in Support of The Dayton Power and Light Company’s Motion for Protective Order at 1 (Oct. 5, 2012).

¹⁶ IEU-Ohio, however, reserves the right to challenge DP&L’s claim of confidentiality as to any information IEU-Ohio does not believe is appropriately categorized as confidential or proprietary.

¹⁷ Attachment A at 3.

¹⁸ Although DP&L has objected to certain requests as calling for a narrative answer, *i.e.* IEU-Ohio’s Interrogatory No. ESP INT 3-3(A), “If the answer is affirmative, what were those cost savings measures or revenue enhancements,” DP&L itself has sought discovery which calls for much more narration, *i.e.* DP&L’s Interrogatory No. 7, “Identify any and all mathematical, computational, or other errors that IEU contends exist in the Second Revised Application, the supporting testimony, workpapers, schedules, or other documents, and identify the reason for that contention.” Attachment E.

includes anything that might reasonably lead to the discovery of admissible information.¹⁹ Interrogatories may seek to “elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served.”²⁰ Nothing in the Commission’s rules limits the scope of an interrogatory to that which could be answered in one word. In fact, DP&L provided narrative responses to multiple interrogatories.²¹

DP&L claims that *Penn Central Transportation Co. v. Armco Steel Corp.*, 272 N.E.2d 877, 878 (Montgomery Cty. 1971) is controlling here, but DP&L is incorrect. The case does not control discovery in Commission proceedings. Section 4903.082, Revised Code, provides that “[w]ithout limiting the commission’s discretion the Rules of Civil Procedure should be used wherever practicable.” However, in previous cases the Commission has exercised its discretion and compelled parties to produce detailed responses to interrogatories.²² Thus, in the Commission’s discretion, it has held that parties may seek “detailed” information through discovery means outside of a deposition.

Regardless, *Penn Central* is no longer controlling in Ohio courts. Ohio courts have rejected the narrow interpretation on the applicable scope of interrogatories espoused in *Penn Central*:

¹⁹ Rule 4901-1-16(B), O.A.C.

²⁰ Rule 4901-1-19(B), O.A.C.

²¹ See, e.g., Attachment A at 7, 12, 14, 43.

²² See, e.g., *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry at 4 (May 17, 2012). In this case, Direct Energy Services, LLC and Direct Energy Business, LLC (“Direct”) moved Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) to produce “detailed information relating to [FirstEnergy’s] handling of accounts receivable.” Direct’s request that the Commission compel FirstEnergy to produce detailed information was granted. *Id.*

Penn Cent. was written by Judge Robert L. McBride of the Montgomery County Court of Common Pleas, who decided the case under the new Rules of Civil Procedure that he had helped draft as a member of the Rules Advisory Committee. McBride gave a very narrow construction of what was proper in an interrogatory. He believed that questions that called for more than brief answers ought to be made in depositions, not interrogatories. After being elevated to the Second District Court of Appeals, Judge McBride had cause to comment on his own decision when he said that an interrogatory that asked a party to identify certain things was perfectly proper. Likewise, other Ohio courts have rejected the narrow use of interrogatories Judge McBride felt was proper.

The court declines to follow the narrow construction of *Penn Cent.* urged by plaintiff.²³

Additionally, the District Court for the Southern District of Ohio also rejected the narrow scope of interrogatories espoused in *Penn Central*:

With all respect to Judge McBride's opinion, this Court does not believe that the *Penn Central* decision accurately reflects federal discovery law. Moreover, its adoption by this Court would unwisely constrict available discovery methods.²⁴

Accordingly, DP&L's objections under its claim that the request calls for a detailed or narrative response is meritless and should be rejected.

3. The Information is Not in DP&L's Possession

DP&L objected to various discovery requests on grounds that the information was not in DP&L's possession.²⁵ DP&L claimed that DPL, AES, and DPLER (its affiliate) are not parties to this proceeding and are in possession of the relevant information or documents. The fact that these three entities are not parties to this proceeding or might have access to or possess certain information or documents does

²³ *Hudson v. United Servs. Auto. Assn. Ins. Co.*, 902 N.E.2d 101, 2008-Ohio-7084 at ¶¶ 34-35 (Greene Cty.).

²⁴ *Babcock Swine, Inc. v. Shelbco, Inc.*, 126 F.R.D. 43, 45 (S.D. Ohio 1989) (emphasis added).

²⁵ Attachment A at 4, 6.

not insulate DP&L from its responsibility for responding to appropriate discovery requests.

Section 4928.145, Revised Code, for example, requires DP&L to “make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.” (emphasis added). Further, the Commission in the past has required parties to produce information and documents in the possession of an affiliate that the party had access to.²⁶ Thus, it is clear that the General Assembly and the Commission allow parties in a Commission proceeding to seek discovery from a party’s affiliates.

4. Privileged or Work-Product

DP&L objects to various requests on grounds that the requests seek information that is privileged or work-product. DP&L bears the burden of demonstrating that the information sought by IEU-Ohio is protected under the attorney-client privilege or the work-product doctrine: a demonstration that DP&L cannot meet.²⁷ However, even if DP&L could demonstrate that the information was covered by the attorney-client privilege or work-product doctrine, DP&L waived those claims by voluntarily disclosing

²⁶ *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).

²⁷ *MA Equipment Leasing I, LLC v. Tilton*, 2012-Ohio-4668, ¶ 20 (Ohio App. 10th Dist.) (citing *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178 (1976)); see also *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 2, 7-8 (Jan. 27, 2011) (“Apart from general statements claiming that [the responses at issue] are privileged, appellants failed to show how the attorney-client and/or work product privilege applies to any particular document, and therefore the Commission finds that the attorney examiners did not err in finding that appellants failed to establish that either privilege applies to the documents in question.”).

information on the same subject matter, *i.e.* DP&L's financial integrity claims. Finally, if DP&L could demonstrate that the information sought is work-product and the Commission concluded DP&L had not waived that defense, IEU-Ohio can still demonstrate good cause exists to compel production of the work-product in accordance with Civ.R. 26(B)(3).

"The attorney-client privilege exempts from discovery certain communications between attorneys and their clients in the course of seeking or rendering legal advice."²⁸ The privilege "is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential"²⁹ and its purpose "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."³⁰

Under the attorney-client privilege, "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."³¹

Further, for investigative facts and documents to be covered by the attorney-client privilege, "the relevant question is ... whether [the] investigation was 'related to the rendition of legal services'"³² and requires "the client for whom the investigation was

²⁸ *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d, 68, 951 N.E.2d 91, 2011-Ohio-841 at ¶ 15 (*citing* *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210 (2001)).

²⁹ *Sutton*, 2011-Ohio-841 at ¶ 16 (*quoting* *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660 (1994)).

³⁰ *Sutton*, 2011-Ohio-841 at ¶ 16 (*quoting* *Upjohn v. U.S.*, 449 U.S. 383, 389 (1981)).

³¹ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2006-Ohio-1508, ¶ 21 (*quoting* *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998)).

³² *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, ¶ 27 (*quoting* *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)).

conducted [to] show that other *legal* advice or assistance was sought and that the investigation conducted was integral to that assistance.”³³

The work product doctrine also offers a qualified protection against the discovery of documents prepared in preparation of litigation.³⁴ Civ. R. 26(B)(3) sets forth the work product doctrine as it applies in civil cases: “a party may obtain discovery of documents, electronically stored information or tangible things prepared in anticipation of litigation of or for trial by or for another party or by or for that other party’s representative ... only upon a showing of good cause therefor.” “Through work-product jurisprudence ... two distinct categories of work product have been identified: ordinary fact work product and opinion work product.”³⁵

Ordinary fact or unprivileged fact work product, such as witness statements and underlying facts, receives lesser protection. Written or oral information transmitted to the attorney and recorded as conveyed may be compelled upon a showing of good cause by the subpoenaing party. Good cause, as set forth in Civ.R. 26(B)(3), requires a showing of substantial need, that the information is important in the preparation of the party’s case, and that there is an inability or difficulty in obtaining the information without undue hardship.

The other type of work product is opinion work product, which reflects the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.³⁶

The Commission has also distinguished between discovery seeking a lawyer’s legal advice and discovery requests seeking the underlying facts at issue in the litigation. The Commission has held that conversations between counsel and a utility’s employees and the associated “notes, correspondence, and email created in

³³ *Toledo Blade*, 2009-Ohio-1767 at ¶ 28 (emphasis in original).

³⁴ *Squire Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 55; 23 Am. Jur. 2d § 45.

³⁵ *Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 28 (7th Dist.).

³⁶ *Hohler*, 2011-Ohio-5469, ¶¶ 29-30.

anticipation of litigation ... would ordinarily be protected ... under attorney-client privilege and attorney work product doctrines.”³⁷ The Commission, however, distinguished these types of communications from those not protected under either attorney-client privilege or under the work-product doctrine.³⁸ The latter unprotected category includes documents related to the litigation produced by utility employees to, among other things, verify the accuracy of events alleged in the lawsuit.³⁹

Although certain information sought in discovery might be properly within the scope of the attorney-client privilege or the work-product doctrine, a discovery request is still proper where the attorney-client privilege doctrine or the work-product doctrine has been waived by voluntary disclosure. Additionally, discovery of work-product is allowed upon a showing of good cause.

Turning first to waiver, Ohio courts have held that “a client’s voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege,” and therefore “voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter.”⁴⁰ This rule “applies to disclosure of materials covered by an attorney-client privilege and to disclosure of materials which are protected by the work product doctrine.”⁴¹

³⁷ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the East Ohio Gas Company d.b.a Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry at 7 (July 28, 2006).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *MA Equipment*, 2012-Ohio-4668, ¶ 20; *Mid-American Natl. Bank and Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E.2d 699, 704 (6th Dist. 1991) (citing *Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

⁴¹ *Mid-American*, 599 N.E.2d at 704 (citing *Hercules Inc. v. Exxon Corp.*, 434 F.Supp 136, 156 (D. Del. 1977)).

Discovery of work product is also proper upon a showing of good cause. As explained by the Ohio Supreme Court, “a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials— *i.e.*, a showing that the materials, or the information they contain, are relevant and otherwise unavailable.”⁴² The party seeking discovery bears the burden to demonstrate good cause for discovery of work-product.⁴³

Turning now to the information IEU-Ohio has sought, it does not appear that the information falls under either the attorney-client privilege or work-product doctrine. In IEU-Ohio’s Interrogatory Nos. ESP INT 3-1 through ESP INT 3-3, IEU-Ohio seeks general investigatory information; that is information about whether DP&L has considered additional means of improving its financial integrity through reducing expenses or increasing revenue. DP&L has not indicated that any of the information IEU-Ohio seeks was given in conjunction with legal advice or assistance.

Additionally, DP&L has not demonstrated that the information IEU-Ohio seeks was prepared in preparation for litigation. It is hard to believe that there were not internal discussions about possible ways DP&L could increase its revenue and decrease its expenses prior to this proceeding (*i.e.*, before DP&L anticipated litigating its financial integrity claim). In fact, DP&L’s MRO application filed earlier this year did not assert a financial integrity claim. Thus, financial integrity information from before October 5, 2012 when DP&L filed its Application is not likely work-product. Accordingly, it does not appear that the information IEU-Ohio seeks in Interrogatory Nos. ESP INT

⁴² *Squire Sanders*, 2010-Ohio-4469, ¶ 57.

⁴³ *Id.*

3-1 through ESP INT 3-3 is subject to the attorney-client privilege or the work-product doctrine.

As part of this motion to compel, IEU-Ohio also seeks a complete copy of DP&L's CAM. Because Commission rules and orders require DP&L to maintain the CAM, it cannot be said to be prepared in anticipation of litigation and therefore cannot be work-product. This also means that the CAM was not prepared in conjunction with legal advice or services. The CAM is an ordinary company record that it is required to maintain. Accordingly, the CAM is not subject to the attorney-client privilege or work-product doctrine.

Although the information IEU-Ohio seeks is not covered by the attorney-client privilege or work-product doctrine, DP&L waived both claims by disclosing information on the same subject matter. In regards to Interrogatory Nos. ESP INT 3-1 to ESP INT 3-3, DP&L has publicly disclosed its financial information. Because DP&L has voluntarily disclosed its financial information, it waives any claim to attorney-client privilege or work-product doctrine to all information on the same subject matter. In regards to the CAM, DP&L has already allowed IEU-Ohio to view the entire document and has therefore voluntarily disclosed the CAM. Any claim to attorney-client privilege or work-product on the CAM has been waived. Accordingly, even if the information IEU-Ohio seeks was subject to the attorney-client privilege or the work product doctrine, DP&L waived those claims.

Finally, even if DP&L's work-product claim was valid and the Commission determined that claim was not waived, good cause exists for the Commission to compel DP&L to produce the information. DP&L is the only party that possesses

comprehensive information on DP&L's financial integrity and DP&L is likely the only party that is able to identify if it can increase its revenue and reduce its expenses. Moreover, DP&L is the only party that can explain how it allocates its costs to its various business functions. These claims go to the heart of DP&L's financial integrity claim, and are required to be analyzed before the Commission approves an ESP application.

In sum, DP&L's objections on grounds of privilege and work-product to providing responses to the discovery requests that are the subject of this motion to compel are meritless. The information does not appear to be covered under the attorney-client privilege or work-product doctrine (a burden that DP&L is required to prove), DP&L has waived any claim that the information is privileged or work-product by voluntarily disclosing information on the same subject matter to third parties, and good cause exists for the Commission to compel DP&L to produce the information.

5. Undue Burden

DP&L also objected to providing responses to IEU-Ohio's Interrogatory Nos. ESP INT 3-1 through ESP INT 3-3 on grounds that production would be an undue burden. DP&L has not explained how identifying and producing the sought-after information would be an undue burden. IEU-Ohio asked a narrow question regarding financial measures DP&L has considered to reduce its expenses or increase its revenue. Given DP&L's recent dedication to setting forth its financial integrity claim, it is likely DP&L is aware of any such information. DP&L has not put forth any evidence to support its burden claim. Accordingly, the Commission should reject DP&L's objection on grounds of an undue burden.

IV. CONCLUSION

For the reasons explained herein, DP&L's objections to IEU-Ohio discovery requests are without merit. Moreover, it is apparent that DP&L will not provide the information IEU-Ohio seeks without Commission intervention. Accordingly, the Commission should grant this motion to compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion of Industrial Energy Users-Ohio to Compel Discovery Responses from the Dayton Power and Light Company and Memorandum in Support* was served upon the following parties of record this 3rd day of January 2013, via hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

/s/ Matthew R. Pritchard
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	: : : : :	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	: : : : :	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	: : : : :	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	: : : : :	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	: : : : :	Case No. 12-672-EL-RDR

**OBJECTIONS AND RESPONSES OF
THE DAYTON POWER AND LIGHT COMPANY TO
INDUSTRIAL ENERGY USERS-OHIO'S
INTERROGATORIES AND REQUESTS FOR PRODUCTION
OF DOCUMENTS UPON THE DAYTON POWER AND
LIGHT COMPANY - ESP, THIRD SET, NOVEMBER 28, 2012**

The Dayton Power and Light Company ("DP&L") objects and responds to Industrial Energy Users-Ohio's ("IEU-Ohio") Interrogatories and Requests for Production of Documents Upon Dayton Power and Light Company ESP Third Set, November 28, 2012 to DP&L as follows.

GENERAL OBJECTIONS

1. DP&L objects to and declines to respond to each and every discovery request to the extent that it seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B).

2. DP&L objects to and declines to respond to each and every discovery request to the extent that it is harassing, unduly burdensome, oppressive or overbroad. Ohio Admin. Code §§ 4901-1-16(B) and 4901-1-24(A).

3. DP&L objects to each and every discovery request to the extent that it seeks information that is privileged by statute or common law, including privileged communications between attorney and client or attorney work product. Ohio Admin. Code § 4901-1-16(B). Such material or information shall not be provided, and any inadvertent disclosure of material or information protected by the attorney-client privilege, the attorney work product doctrine or any other privilege or protection from discovery is not intended and should not be construed to constitute a waiver, either generally or specifically, with respect to such information or material or the subject matter thereof.

4. DP&L objects to each and every discovery request to the extent that it seeks information that is proprietary, competitively sensitive or valuable, or constitutes trade secrets. Ohio Admin. Code § 4901-1-24(A).

5. To the extent that interrogatories seek relevant information that may be derived from the business records of DP&L or from an examination or inspection of such records and the burden of deriving the answer is the same for IEU-Ohio as it is for DP&L, DP&L may specify

the records from which the answer may be derived or ascertained and afford IEU-Ohio the opportunity to examine or inspect such records. Ohio Admin. Code § 4901-1-19(D).

6. DP&L objects to each and every interrogatory that can be answered more efficiently by the production of documents or by the taking of depositions. Under the comparable Ohio Civil Rules, "[a]n interrogatory seeks an admission or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidence, a function reserved by rules for depositions." Penn Cent. Transp. Co. v. Armco Steel Corp., 27 Ohio Misc. 76, 77, 272 N.E.2d 877, 878 (Montgomery Cty. 1971). As Penn further noted, interrogatories that ask one to "describe in detail," "state in detail," or "describe in particulars" are "open end invitation[s] without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place." Id., 272 N.E.2d at 878.

7. DP&L objects to each and every discovery request to the extent that it calls for information that is not in DP&L's current possession, custody, or control or could be more easily obtained through third parties or other sources. Ohio Admin. Code §§ 4901-1-19(C) and 4901-1-20(D). DP&L also objects to each and every discovery request that seeks information that is already on file with the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission. To the extent that each and every discovery request seeks information available in pre-filed testimony, pre-hearing data submissions and other documents that DP&L has filed with the Commission in the pending or previous proceedings, DP&L objects to it. Ohio Admin. Code § 4901-1-16(G).

8. DP&L reserves its right to redact confidential or irrelevant information from documents produced in discovery. All documents that have been redacted will be stamped as such.

9. DP&L objects to each and every discovery request to the extent that it is vague or ambiguous or contains terms or phrases that are undefined and subject to varying interpretation or meaning, and may, therefore, make responses misleading or incorrect.

10. DP&L objects to any discovery request to the extent that it calls for information not in its possession, but in the possession of DP&L's unregulated affiliates.

RESPONSES TO INTERROGATORIES

ESP INT. 3-1: Since the acquisition of DPL by AES, has DP&L, DPL, or AES performed any analysis, study, and/or made any recommendations of potential cost savings measures or revenue enhancements for DP&L?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Yes.

A. If the answer is affirmative, what were those cost savings measures or revenue enhancements?

RESPONSE: General Objection Nos. 1 (relevance), 2 (unduly burdensome), and 3 (privileged and work product). DP&L further objects because DP&L has not made any final decisions relating to reducing or eliminating expenses, and any decisions would depend on many unknown and variable factors including the results of this proceeding. DP&L's analysis of potential expense reductions constitutes protected work product, because that analysis depends upon DP&L's analysis of and expectations regarding the likely results of this proceeding; DP&L thus objects to providing the analysis that it has performed regarding potential expense reductions. DP&L has not made decisions relating to reduction or elimination of expenses and any such decisions must await the results of this case; DP&L cannot speculate as to what expense adjustments might be forced upon it. Subject to all general objections, DP&L states that its ability to reduce expenses is limited by various factors, including the requirements that DP&L comply with reliability and safety standards, and the fact that co-owners of certain of its generation assets have certain rights to operate those assets.

- B. If the answer is affirmative, identify any documents containing such analysis, study, and/or recommendation.

RESPONSE: General Objection Nos. 1 (relevance), 2 (unduly burdensome), and 3 (privileged and work product). DP&L further objects because DP&L has not made any final decisions relating to reducing or eliminating expenses, and any decisions would depend on many unknown and variable factors including the results of this proceeding. DP&L's analysis of potential expense reductions constitutes protected work product, because that analysis depends upon DP&L's analysis of and expectations regarding the likely results of this proceeding; DP&L thus objects to providing the analysis that it has performed regarding potential expense reductions. DP&L has not made decisions relating to reduction or elimination of expenses and any such decisions must await the results of this case; DP&L cannot speculate as to what expense adjustments might be forced upon it.

- C. If the answer is affirmative, identify when the analysis, study, and/or recommendation was made.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states that please see response to part A above.

- D. If the answer is affirmative, identify when the cost saving measures and/or revenue enhancements were made, or are planned to be implemented.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states that please see response to part A above.

E. If the answer is affirmative, what is the amount of the expected cost savings or revenue enhancement?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states that please see response to part A above.

F. If the answer is negative, explain why such analysis or study has not been undertaken.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states not applicable.

WITNESS RESPONSIBLE: Craig Jackson

ESP INT. 3-2: Has DP&L, DPL, or AES performed any analysis, study, and/or made any recommendations of potential cost savings measures or revenue enhancements for DP&L in the event that DP&L's request for the service stability rider ("SSR") is denied in whole or in part?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states that it has not conducted any such studies or analysis specifically linked to whether the SSR was denied.

A. If the answer is affirmative, what were those cost savings measures or revenue enhancements?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Inapplicable.

B. If the answer is affirmative, identify any documents containing such analysis, study, and/or recommendation.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Inapplicable.

- C. If the answer is affirmative, identify when the analysis, study, and/or recommendation was made.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

- D. If the answer is affirmative, identify when the cost saving measures and/or revenue enhancements were made, or are planned to be implemented.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

- E. If the answer is affirmative, what is the amount of the expected cost savings or revenue enhancement?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

F. If the answer is negative, explain why such analysis or study has not been undertaken.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Please see response to 3-1(a).

WITNESS RESPONSIBLE: Craig Jackson

ESP INT. 3-3: Has DP&L, DPL, or AES performed any analysis, study, and/or made any recommendations of potential cost savings measures or revenue enhancements for DP&L in the event that DP&L's request for the switching tracker is denied in whole or in part?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states that it has not conducted any such studies or analysis specifically linked to whether the switching tracker was denied.

A. If the answer is affirmative, what were those cost savings measures or revenue enhancements?

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Inapplicable.

B. If the answer is affirmative, identify any documents containing such analysis, study, and/or recommendation.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states: Inapplicable.

- C. If the answer is affirmative, identify when the analysis, study, and/or recommendation was made.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

- D. If the answer is affirmative, identify when the cost saving measures and/or revenue enhancements were made, or are planned to be implemented.

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

- E. If the answer is affirmative, what is the amount of the expected cost savings or revenue enhancements?

RESPONSE: General Objections Nos. 1 (relevance), 4 (proprietary), and 10 (possession of DP&L's unregulated affiliate). DP&L further objects because DPL and AES are not subject to discovery in this matter. Subject to all general objections, DP&L states:
Inapplicable.

F. If the answer is negative, explain why such analysis or study has not been undertaken.

RESPONSE: General Objections Nos. 1 (relevance), 2 (unduly burdensome), 4 (proprietary), 6 (calls for narrative answer), and 10 (possession of DP&L's unregulated affiliate). Subject to all general objections, DP&L states: Please see response to 3-1(a).

WITNESS RESPONSIBLE: Craig Jackson

ESP RPD 1-4. Produce all discovery requests received by DP&L from any other party in this proceeding, including formal and informal data requests received from Commission Staff, and answers to all discovery and data requests.

REQUESTS FOR ADMISSION

ESP RFA 1-1. Admit that DPL is a holding company and parent of DP&L and other subsidiaries.

RESPONSE:

ESP RFA 1-2. Admit that DPL's cash flow is dependent on the operating cash flows of DP&L and its other subsidiaries and their ability to pay cash to DPL.

RESPONSE:

ESP RFA 1-3. Admit that all of the outstanding common stock of DPL is owned indirectly by AES and directly by an AES wholly-owned subsidiary.

RESPONSE:

ESP RFA 1-4. Admit that DPL is not listed for trading on any stock exchange.

RESPONSE:

ESP RFA 1-5. Admit that as a result of the AES-DPL merger, including the assumption of merger-related debt, DPL and DP&L were downgraded by all three major credit rating agencies.

RESPONSE:

ESP RFA 1-6. Admit that as a result of the AES-DPL merger DPL and DPLER have represented that they expect their cost of capital to increase.

RESPONSE:

ESP RFA 1-7. Admit that DP&L's common stock is held solely by DPL.

RESPONSE:

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). DP&L further objects to this request because it seeks material that is confidential, proprietary, and trade secret information.

8-12. If Interrogatory No. 8-28 is answered in the affirmative, provide all documents showing Mr. Chambers' evaluation of DP&L's future business and financial risk after it transfers all of its generating assets to an unregulated subsidiary, including without limitation all supporting data, analysis, and workpapers.

RESPONSE: General Objections Nos. 2 (unduly burdensome), 3 (privileged and work product), and 4 (proprietary). Subject to all general objections, DP&L states that Interrogatory No. 8-28 has not been answered in the affirmative.

8-13. Provide a copy of the Cost Allocation Manual referenced by witness Judi Sobecki at Page 3, lines 57-59.

RESPONSE: General Objections Nos. 3 (privileged and work product) and 4 (proprietary). Subject to all general objections, DP&L states that it will produce responsive unprivileged documents for inspection at the offices of Faruki Ireland & Cox P.L.L., 500 Courthouse Plaza, S.W., 10 North Ludlow Street, Dayton, OH 45402, at a mutually agreed date and time.

AFFIDAVIT OF MATTHEW R. PRITCHARD

State of Ohio : S.S.

County of Franklin :

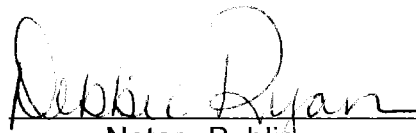
I, Matthew R. Pritchard, counsel for the Industrial Energy Users-Ohio ("IEU-Ohio"), in the above-captioned case, being first duly sworn, depose and say:

1. In attempts to resolve The Dayton Power and Light Company's ("DP&L") incomplete responses to IEU-Ohio's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission ("IEU-Ohio's First Set") and Second Set of Interrogatories and Requests for Production of Documents ("IEU-Ohio's Second Set"), myself and other counsel for IEU-Ohio followed up with DP&L on November 9, 2012, November 27, 2012, November 29, 2012, December 6, 2012, December 11, 2012, December 14, 2012, and again on December 17, 2012. These attempts to resolve discovery disputes were not successful, and IEU-Ohio was forced to file its first motion to compel in this proceeding.
2. On November 27, 2012 DP&L responded to FirstEnergy Solutions Corp.'s ("FES") eighth set of discovery requests. FES' Request for Production of Documents No. 8-13 requested that DP&L provide a copy of its Cost Allocation Manual ("CAM"). IEU-Ohio's Interrogatory No. ESP RPD 1-4 requested that DP&L provide IEU-Ohio with all responses and documents provided to other parties or Staff through discovery. DP&L responded that it would produce the CAM with privileged materials redacted.
3. On November 28, 2012, IEU-Ohio served DP&L with IEU-Ohio's Third Set of Interrogatories and Requests for Production of Documents ("IEU-Ohio's Third Set").
4. On the day the discovery responses were due, Monday, December 10, 2012, counsel for DP&L contacted counsel for IEU-Ohio and indicated that DP&L had inadvertently deleted IEU-Ohio's Third Set and would not be able to respond to discovery in the allowable timeframe. Despite DP&L's failure to provide IEU-Ohio complete or timely responses to IEU-Ohio's first two sets of discovery requests, IEU-Ohio agreed to provide DP&L another week to provide discovery responses to IEU-Ohio's Third Set.
5. On December 18, 2012, DP&L served IEU-Ohio with responses to IEU-Ohio's Third Set. DP&L's responses to IEU-Ohio's Third Set were incomplete. Also on December 18, 2012, IEU-Ohio asked to view a copy of DP&L's CAM.

6. On December 20, 2012, IEU-Ohio viewed DP&L's CAM, which had one document removed under a claim of privilege and was missing the board of directors minutes which are required to be kept in the CAM in accordance with Rule 4901:1-34-08(D)(9), Ohio Administrative Code. After viewing the CAM, counsel for IEU-Ohio requested that DP&L provide IEU-Ohio with a complete copy of the CAM. Also on December 20, 2012, I contacted DP&L in an attempt to resolve outstanding discovery issues with DP&L's responses to IEU-Ohio's Third Set.
7. On December 25, 2012, I again contacted DP&L in attempts to obtain complete supplemental responses to IEU-Ohio's Third Set as well in an attempt to obtain a complete copy of the CAM.
8. On December 26, 2012, DP&L responded to IEU-Ohio requests for additional supplements to IEU-Ohio's Third Set as well as its request for a copy of the CAM. DP&L indicated that its objections to IEU-Ohio Interrogatory Nos. ESP INT 3-1 through ESP INT 3-3 stood, and it would not be providing any substantive response to those requests. Counsel for DP&L also indicated that it believes the CAM is "confidential, and does not believe that the CAM is relevant to any issue in the case" and "thus refuses to produce copies of the CAM."
9. The procedural deadlines are quickly approaching, with intervenor testimony due on January 28, 2013, and an evidentiary hearing scheduled to begin on February 11, 2013.
10. It is my belief that without intervention from the Public Utilities Commission of Ohio, DP&L will not provide responses to the discovery requests that are the subject of this motion to compel.


Matthew R. Pritchard

Sworn before me and subscribed in my presence this 3rd day of January 2013.


Notary Public
State of Ohio

DEBBIE SUE RYAN
NOTARY PUBLIC - STATE OF OHIO
Recorded in Knox County
My commission expires 12/14, 2015

Attachment E

RESPONSE:

INTERROGATORY 7: Identify any and all mathematical, computational, or other errors that IEU contends exist in the Second Revised Application, the supporting testimony, workpapers, schedules, or other documents, and identify the reason for that contention.

RESPONSE:

INTERROGATORY 8: Identify all members of IEU-Ohio located within DP&L's service territory.

RESPONSE:

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Motion of Industrial Energy Users-Ohio To Compel Discovery Responses From The
Dayton Power And Light Company
And Memorandum In Support electronically filed by Mr. Matthew R. Pritchard on behalf of
Industrial Energy Users-Ohio