

**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 Market Rate Offer.	)	
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	)	Case No. 12-429-EL-WVR
Dayton Power and Light Company for	)	
Waiver of Certain Commission Rules.	)	
In the Matter of the Application of The	)	Case No. 12-672-EL-RDR
Dayton Power and Light Company to	)	
Establish Tariff Riders.	)	

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**MEMORANDUM CONTRA TO  
MOTION TO COMPEL OF THE DAYTON POWER AND LIGHT COMPANY  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On January 25, 2013, Dayton Power & Light Company ("DP&L") filed a Motion with the Public Utilities Commission of Ohio ("PUCO") to compel the Office of the Ohio Consumers' Counsel ("OCC") to submit additional responses to DP&L's discovery requests served on OCC on December 20, 2012. Five days later, on January 30, 2012, a discovery conference was held before the Attorney Examiners. At that time, the parties

presented their positions on unresolved discovery issues. Certain outstanding discovery disputes were resolved between DP&L and OCC.

As to the unresolved discovery disputes the Attorney Examiners gave OCC until February 6, 2013, to file a Memorandum Contra to DP&L's Motion to Compel. DP&L was given until February 13, 2013 to reply to OCC's Memorandum. On February 5, 2013, DP&L and OCC agreed to a one-day extension of the time frame for OCC to file a Memorandum Contra, until February 7, 2013. DP&L's Reply is due on February 14, 2013. OCC now files this Memorandum Contra on the unresolved issues that are the subject of DP&L's Motion to Compel. In sum, DP&L has inappropriately requested that OCC produce communications that are clearly covered by the attorney-client privilege and or the trial preparation/work product doctrine.

## **II. SUMMARY OF ISSUES AND OCC POSITION**

DP&L continues to assert that OCC is required to produce (1) communications between OCC counsel and other parties' counsel discussing joint pleadings (including drafts of joint pleadings), and (2) communications between OCC (including counsel) and its third-party experts. As discussed below, the attorney-client privilege applies to OCC's preparation of pleadings. It is a statutory privilege codified under R.C. 2317.02. This statutory attorney-client privilege is not waived by disclosure of information to an expert hired for the purposes of providing testimony or by disclosure of information to a third party in pursuit of filing of joint pleadings. As explained later, the Supreme Court in *Jackson v. Greger*<sup>2</sup> has specifically stated that the attorney-client privilege is a statutory

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<sup>2</sup> *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 11.

privilege and can only be waived if the client expressly consents or voluntarily testifies to the communications. Neither of those conditions exists in this case.

Moreover, even if the attorney-client privilege were found to be waived—though it has not been waived by OCC—the trial preparation doctrine also protects discovery of this information. Under the trial preparation/work product doctrine, discovery of documents prepared in anticipation of litigation, such as these materials, will be compelled for disclosure only upon a showing of “good cause therefore.” The Supreme Court of Ohio has held that “good cause” under Civ. R. 26(B)(3) requires a demonstration of a need for the materials—i.e., a showing that the materials, or information they contain are relevant or otherwise unavailable.<sup>3</sup> Civ. R. 26(B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials. DP&L has not demonstrated such good cause.

OCC would emphasize that it has provided DP&L with appropriate responses to discovery and has negotiated resolutions of disputes where appropriate. Consequently, the PUCO should find that OCC has properly responded to DP&L’s discovery requests. OCC addresses below the two remaining disputes between DP&L and OCC.

### **III. ARGUMENT**

#### **A. PUCO’s Rules On Applicable Discovery Rules And Statutory Provision.**

Ohio Admin. Code 4901-1-16(B) states that, “[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding . . . if the information sought appears reasonably

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<sup>3</sup> Jackson v. Greger, 2006 Ohio 4968 at ¶16.

calculated to lead to the discovery of admissible evidence.”<sup>4</sup> The most common judicial privilege, the attorney-client privilege, is recognized under Ohio law.

In Ohio, the attorney-client privilege is primarily governed by R.C. 2317.02(A), and in circumstances not addressed by R.C. 2317.02(A), the attorney-client privilege is filled in by common law.<sup>5</sup> The attorney-client privilege is recognized in R.C. 2317.02(A), which states that an attorney or its representatives shall not testify, “concerning a communication made to the attorney by a client in that relation or the attorney’s advice to a client, except that the attorney may testify by express consent of the client.”<sup>6</sup> R.C. 2317.02(A) is the sole method by which the attorney-client privilege can be waived.<sup>7</sup> The Ohio Supreme Court’s recent holding in *Jackson v. Greger* provides the cornerstone analysis of the privilege.

*Jackson v. Greger* initially arose from an altercation between Maudy Jackson and the New Kettering Police Department, which led to her subsequently being arrested and charged with disorderly conduct.<sup>8</sup> Jackson entered a guilty plea upon the advice of her lawyer, Lawrence Greger.<sup>9</sup> Jackson then tried to pursue a § 1983 civil rights violation against the police officers but was estopped because of the fact she had previously entered the previous guilty plea.<sup>10</sup>

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<sup>4</sup> O.A.C. 4901-1-16(B).

<sup>5</sup> *State ex rel. Leslie v. Ohio House Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18.

<sup>6</sup> R.C. 2317.02(A).

<sup>7</sup> *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 11.

<sup>8</sup> *Id.* at ¶ 2.

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

<sup>10</sup> *Id.* at ¶ 3.

As a result, Jackson sued Greger for malpractice, claiming she had received negligent advice.<sup>11</sup> The action eventually reached the Ohio Court of Appeals, Second District, on the issue of whether Greger could use the attorney-client communications between him and Jackson he asserted had been waived.<sup>12</sup> The Court of Appeals had applied the *Hearn* test,<sup>13</sup> but the Ohio Supreme Court ruled that, “R.C. 2317.02(A) clearly enumerates the means by which a client may waive the statutory attorney-client privilege: by express consent or by voluntarily testifying on the same subject.”<sup>14</sup> In reaching this disposition, the Ohio Supreme Court reasoned that the client is the exclusive holder of the attorney-client privilege and, as such, the only party that can waive the immunity.<sup>15</sup> The Ohio Supreme Court subsequently held that Jackson had not waived the attorney-client privilege by either means.<sup>16</sup> In reaching this conclusion, the Ohio Supreme Court effectively overruled use of the *Hearn* test and eliminated the notion of implied waiver.<sup>17</sup>

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<sup>11</sup> *Id.* at ¶ 4.

<sup>12</sup> *See id.* at ¶¶ 3–4.

<sup>13</sup> *See Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975) (holding that a client impliedly waived the attorney-client privilege when, “(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.”).

<sup>14</sup> *Jackson*, *supra* note 3 at ¶ 12–13 (“We are . . . guided by the significant body of law from this court that has consistently rejected the adoption of judicially created waivers, exceptions, and limitations for testimonial privilege statutes.”).

<sup>15</sup> *See id.* at ¶ 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 31 (Lanzinger, J., concurring) (“Without expressly repudiating the use of *Hearn* in Ohio, the majority does so implicitly by holding that R.C. 2317.02(A) provides the sole means of waiving the attorney-client privilege.”).



**B. Request For Production Of Documents No. 11.**

DP&L moves to compel OCC's response to Request for Document No. 11, seeking "[a]ll writings constituting or relating to communications among OCC and any other person (including, but not limited to, intervenors) relating to DP&L's ESP Application or MRO Application."<sup>18</sup> OCC objected, for a number of reasons, to this discovery request, on the basis that (1) OCC has exchanged e-mails with other parties relating to discussion of settlement,<sup>19</sup> (2) in light of the attorney-client privilege, which is not waived simply by communications with third persons, and (3) in light of the trial preparation doctrine which requires of a showing of "good cause" to obtain any documents "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)."

With respect to the claim that DP&L is entitled to communications between parties regarding the joint preparation of pleadings, OCC submits that, based on Ohio Supreme Court precedent, such communications are subject to the attorney-client privilege. A privilege that no party has indicated (to OCC) that they are waiving. And OCC has not waived its privilege.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications."<sup>20</sup> An attorney-client privilege is created where: (1) legal

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<sup>18</sup> *In the Matter of the Application of The Dayton Power and Light Company*, Case No. 12-426-EL-SSO, Memorandum in Support of The Dayton Power and Light Company's Motion to Compel the OCC at 5 (January 25, 2013).

<sup>19</sup> At argument on January 30, 2012, DP&L stated that it was not pursuing communications regarding settlement.

<sup>20</sup> *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403; *see also Upjohn v. United States* (1981), 449 U.S. 383, 389.

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.<sup>21</sup>

The Ohio Revised Code provides a statutory testimonial privilege for attorney-client communications preventing an attorney from testifying to communications made “to the attorney by a client or the attorney’s advice to a client.”<sup>22</sup> Under R.C. 2317.02(A), an attorney may not testify as to privileged communications with a client unless the client has waived the statutory attorney-client privilege by either express consent or by voluntarily testifying to the communications, at which point the attorney may be compelled to testify on the same subject. The Ohio Supreme Court has held that the testimonial privilege of R.C. 2317.02(A) applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process.<sup>23</sup>

Where R.C. 2317.02(A) applies, the statute provides the only means by which the privilege may be waived.<sup>24</sup> In *Jackson v. Greger, supra*, the Ohio Supreme Court explicitly held that R.C. 2317.02(A) provides the exclusive means by which a client may waive the statutory attorney-client privilege.<sup>25</sup> In *Jackson*, the Court emphasized its consistent rejection of judicially

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<sup>21</sup> *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, 105 Ohio St.3d 261, ¶ 21 (citation omitted).

<sup>22</sup> *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St.3d 488 at FN 1.

<sup>23</sup> *Jackson* at FN 1; see also *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 2010-Ohio-4469, reconsideration denied, 2010-Ohio-5762.

<sup>24</sup> *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St. 3d 488, syllabus.

<sup>25</sup> *Jackson* at ¶13.

created “waivers, exceptions, and limitations for testimonial privilege statutes.”<sup>26</sup> Thus, where the attorney-client privilege is governed by R.C. 2317.02(A), the statute provides the only means by which the privilege may be waived. Thus, under the statutory attorney-client privilege, a client’s disclosure to a third party of communications made pursuant to the attorney-client privilege, does not constitute a waiver.<sup>27</sup>

In this case, the drafts and edits to pleadings constitute attorney-client communications. The drafts and edits prepared by OCC’s counsel, and counsel for other parties, reflect attorney client communications. They reflect the legal analysis and positions and are not waived by the sharing of such drafts and edits with third parties as part of the preparation of a joint pleading. This is consistent with the Supreme Court of Ohio’s determination in *Jackson*<sup>28</sup> (discussed above) where the Supreme Court of Ohio clearly stated that disclosure of attorney-client communications to a third party did not constitute a waiver of attorney-client privilege and were not subject to discovery. Commenting on *State v. McDermott*, 72 Ohio St.3d 570, 651 N.E.2d 985 (1995), the Supreme Court of Ohio stated:

In that case, the prosecution argued that McDermott had impliedly waived the attorney-client privilege by disclosing the substance of attorney-client communications to a third party. In rejecting the **third-party-disclosure** exception to the statutory attorney-client privilege, we held that “R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived.” [cites]

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<sup>26</sup> *Id.* at ¶ 13 (citing numerous cases).

<sup>27</sup> See *State v. McDermott*, 72 Ohio St.3d 570, 1995 Ohio 80 (modifying the waiver proposition of the *State v. Post syllabus*, (1987), 32 Ohio St.3d 380).

<sup>28</sup> 100 Ohio St. 3d 488, 854 N.E. 2d 487 (2006).

In this case, no waiver was made pursuant to R.C. 2317.02(A) and, therefore, there can be no waiver of the attorney-client privilege with respect to the preparation of joint pleadings. Disclosure of drafts or edits to joint pleadings would improperly disclose attorney-client communications and should not be required to be divulged.

Even if the attorney-client privilege were held not to apply, the trial preparation doctrine prevents the discovery of “documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent” except “upon a showing of good cause therefore.” Ohio Civ. R 26(B)(3). The trial preparation doctrine ensures that clients and their agents are not required to divulge materials prepared for litigation absent a showing of good cause. Here, DP&L has not produced any showing of good cause with respect to writings relating to communications between parties with whom OCC has prepared joint pleadings. It has only stated that they are “relevant and not privileged”. *Motion to Compel at 4-5*. DP&L has not provided any justification for their production.

**C. Request For Production Of Documents No. 13.**

DP&L’s Motion to Compel Request for Production No. 13 relates to communications between OCC’s third-party experts and OCC relating to DP&L’s Application.<sup>29</sup> DP&L claims that OCC is shielding communications between and OCC and its third-party experts.<sup>30</sup> First, OCC submits that any discussions between OCC counsel and its third-party experts are protected by the attorney-client privilege and trial

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<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 9.

preparation doctrine and such privileges have not been waived. R.C. 2317.02; *see Section C infra*. To the extent that DP&L is seeking communications with OCC's outside experts, the attorney-client privilege protects not only communications between the attorney and client, but also between the attorney and consultants hired by the attorney to enable the attorney to render legal advice. In *In re Copper Market Antitrust Litigation*<sup>31</sup> the Federal Rules Court in New York stated that "the attorney-client privilege 'exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.'"<sup>32</sup> The court took this to mean that the privilege "protects communications between lawyers and agents of a client where such communications are for the purpose of rendering legal advice."<sup>33</sup> The court saw RLM, a public relations media firm, as essentially being incorporated into Sumitomo for duties in preparation of anticipated litigation, and held that "confidential communications between RLM and Sumitomo's counsel . . . that were made for the purpose of facilitating the rendition of legal services to Sumitomo can be protected from disclosure by the attorney-client privilege."<sup>34</sup> Based on this ruling, communications between counsel and a hired third party would be protected by privilege, as long as the communications relate to the legal issue for which the third party was hired.

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<sup>31</sup> 200 F.R.D. 213 (S.D. N.Y. 2001), citing *Upjohn v. United States*, 449 U.S. 383 (1981).

<sup>32</sup> *Id.* at 218 (quoting *Upjohn* at 390).

<sup>33</sup> *Id.* at 217.

<sup>34</sup> *Id.* at 218.

The Federal Court for the Southern District of Ohio made a similar ruling in *Baxter Travenol Laboratories v. Lemay*.<sup>35</sup> In that case an employee was hired as a “litigation consultant” to assist in an investigation which resulted in litigation. The defendants in the case attempted to compel disclosure by the consultant of conversations he had with the plaintiffs’ counsel. The court held that conversations made pursuant to the consultation agreement were protected by the attorney-client privilege.<sup>36</sup> OCC would further emphasize the cases of *In re Copper Market Antitrust Litigation* and *Baxter Travenol Laboratories v. Lemay* which make clear that the attorney-client privilege extends to agents of the attorney engaged to render legal advice.

OCC would further emphasize that the scope of the trial preparation doctrine is specifically stated to extend to expert witnesses. Ohio Civ. R. 26(B)(5)(d) states: “Communications between a party’s attorney and any witness identified as an expert witness under division (B)(5)(b) of this rule regardless of the form of the communications are protected by division (B)(3) of this rule . . .” Although exceptions apply to this provision, the trial preparation doctrine clearly protects communications between attorneys and third-party expert witnesses.<sup>37</sup>

DP&L cites to no case which would indicate that communications between OCC and its third-party experts are not privileged communications. And OCC submits that they are clearly protected communications. Except to the extent that such communications relate to the expert’s compensation, facts or data provided by counsel to

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<sup>35</sup> 89 F.R.D. 410 (S.D. Ohio 1981).

<sup>36</sup> *Id.* at 413-414.

<sup>37</sup> OCC notes that DP&L has indicated in e-mail that it is only seeking communications with third-party experts expected to be called as expert witnesses. It is widely recognized that a party may not obtain any discovery of experts not expected to be called as an expert witness at trial. Ohio Civ. R. 26(B)(5)(b).

the expert and utilized by the expert in forming their opinion, or assumptions provided by the attorney and relied upon by the expert, such communications are protected by the trial preparation doctrine in Ohio.

With respect to written communications between OCC's third-party experts and communications between OCC's third-party experts and non-OCC persons, there have been no such communications regarding this matter. But, in any event, these communications would be subject to the trial preparation doctrine as they would have been made in anticipation of litigation. DP&L should not be permitted to obtain any such communications.

#### **IV. CONCLUSION**

OCC respectfully submits that the attorney-client privilege applies to communications between the agency and its counsel, that this privilege is not waived by communications with third parties in the preparation of joint pleadings, and that OCC's communications with its third-party experts are likewise protected attorney-client communications and protected attorney work-product under Ohio Civ. R 26(b)(5)(d).<sup>38</sup>

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<sup>38</sup> SolarVision and Industrial Energy Users-Ohio have authorized OCC to represent that they support OCC's position that the attorney-client privilege is not waived by the preparation and filing of joint pleadings, and that they do not waive such privilege here.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was provided to the persons listed below electronically this 7<sup>th</sup> day of February 2013.

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Summary: Memorandum Memorandum Contra to Motion to Compel of the Dayton Power and Light Company by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Mr. Tad Berger